

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1110

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142505). Claimant filed a timely request for hearing. On September 7, 2017, ALJ Amesbury conducted a hearing, and on September 11, 2017 issued Hearing Decision 17-UI-92249, affirming the Department's decision. On September 15, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) NW Traffic Control, Inc. employed claimant from October 27, 2016 until July 3, 2017 as a flagger at different work sites.

(2) The employer had a policy that required each employee who drove the employer's vehicles to have a valid driver's license for the type of vehicle the employee operated, and to keep the license with them at all times. Also, the employer required any employee whose license was revoked or suspended to immediately discontinue operating the employer's vehicles. Claimant understood these employer policies.

(3) Before June 30, 2017, claimant's Oregon driver's license was suspended, and remained suspended on June 30. The employer learned that claimant's license was suspended and told claimant he was not permitted to drive the employer's vehicles with a suspended license.

(4) The morning of June 30, 2017, claimant told the employer he had a doctor's appointment at 3:00 p.m. during his shift that day. Claimant was to be working at a job site. The employer told him it would send a replacement flagger to the work site to relieve claimant so he could attend his appointment. It was claimant's understanding that someone would arrive at 1:00 p.m. to bring him back to the employer's shop.

(5) At 2:15 p.m. on June 30, 2017, a replacement flagger went to the site where claimant was working. The employer did not have anyone drive claimant back to the shop at that time. Claimant drove one of the two employer-owned vehicles from the work site back to the employer's shop. The employer did not tell claimant he could drive the employer's vehicle back to the employer's shop.

(6) On July 3, 2017, the employer discharged claimant because he drove the employer's vehicle without a valid driver's license or permission on June 30.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he drove the employer's vehicle on June 30 without a valid driver's license or permission on June 30, 2017. Claimant did not dispute that he drove the employer's vehicle while his license was suspended, and that he knew his conduct violated the employer's policies. His conduct was, at a minimum, wantonly negligent.

Claimant's wantonly negligent behavior in violation of the employer's expectations may be excused from constituting misconduct if it was a good faith error under OAR 471-030-0038(3)(b). Claimant asserted at hearing that he called his manager, told him that he needed to get to a doctor's appointment and that he was taking one of the trucks back to the shop, and that the manager responded, "Get back the best way you can, . . . [and] do what you gotta do." Audio Record at 18:54, 25:59. The employer's manager testified that he told claimant by text message that a coworker was returning to the shop and claimant could arrange a ride back to the shop with him, and would not have authorized claimant to drive one of the employer's vehicles. Audio Record at 25:18, 25:59. Although claimant implicitly alleges that he believed he had permission to drive the truck, it is implausible the employer would have authorized claimant to drive an employer vehicle knowing that claimant did not have a valid license and that a coworker would soon be available to transport claimant, and given that it was an employee interest, and not the employer's interest, at stake. It is also implausible that claimant would have believed in good faith that the employer would condone his unlawful conduct, particularly when the claimant's actions could subject the employer to liability. For these reasons, claimant's behavior also may not be excused from constituting misconduct as a good faith error.

Claimant's wantonly negligent behavior in violation of the employer's expectations may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Although claimant's conduct was isolated, claimant's conduct in driving with a suspended license was unlawful,¹ and under OAR 471-030-0038(1)(d)(D), acts that violate the law exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-92249 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 11, 2017

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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¹ ORS 811.175(1)(a) provides that a person commits the offense of driving while suspended if the person drives a motor vehicle upon a highway during a period when the person's driving privileges have been suspended in this state by a court or by the Department of Transportation.