EO: 990
BYE: 201835

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-1360

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102013). Claimant filed a timely request for hearing. On October 30, 2017, ALJ S. Lee conducted a hearing, and on November 1, 2017 issued Hearing Decision 17-UI-95933, affirming the Department's decision. On November 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he presented information not offered during the hearing about the contents of the employer's Drivers Handbook. OAR 471-041-0090(2) (October 29, 2006) authorizes EAB to consider new information if the party offering it shows that it is relevant and material to the issues before EAB and the party was prevented by factors or circumstances beyond its reasonable control from presenting that information at the hearing. Claimant stated that the new information from the Drivers Handbook supported his position that the penalty for refusing to haul a load was limited to being placed on the bottom of the rotation list for the next load and losing layover pay, rather than the discharge that the employer imposed on him. Claimant contended he did not offer this information at the hearing because he "did not realize that [the employer's witness] would be disingenuous about the contents of the Drivers Handbook [in her hearing testimony]."

However, the excerpt from the Handbook that claimant provided merely sets out an example of a consequence for refusing to haul a load and does not guarantee that in all instances the employer would limit its sanctions to nothing more severe than a loss of layover pay and cycling to the bottom of the rotation list. Additionally, even if EAB considered claimant's new information and accepted it as accurate, that claimant might have believed the employer would not discharge him for his behavior at issue does not in and of itself preclude a finding that his behavior in refusing to haul a load constituted willful or wantonly negligent misconduct and does not immunize that behavior from being considered disqualifying misconduct, as discussed in more detail below.

FINDINGS OF FACT: (1) Blackwell Consolidation, LLC employed claimant as a truck driver from May 31, 2017 until July 11, 2017.

(2) The employer expected employees to be available to haul loads unless they were on an approved vacation or on personal or scheduled time off. After an employee was available for hauling loads for four weeks, the employer scheduled employees for four consecutive days when they were not required to haul loads or otherwise work. Employees were expected to contact the employer 24 hours before returning to work from a vacation or scheduled days off to obtain information about the first load they would haul after returning to work. The employer also expected that employees would perform the work to which they were assigned and would follow reasonable instructions from their supervisors. Claimant understood the employer's expectations.

(3) Before July 2017, claimant had on occasion declined to haul loads because he thought the hauling scheduled would interfere with his performance of non-work related errands or tasks. The employer thought it was excessively rearranging claimant's hauling schedule to accommodate his non-work related needs.

(4) Sometime before July 2, 2017, the employer approved claimant's request to have a vacation from July 2 through July 8, 2017. Claimant took that time away from work. During the time claimant was off, he requested and the employer approved extending his vacation through July 10, 2017. The employer expected claimant would begin hauling loads on July 11, 2017. However, claimant thought that his regularly scheduled four consecutive days off would occur immediately after the conclusion of his approved vacation and would extend his time away from work by an interrupted four days. Claimant had scheduled a medical appointment with a physician for pain management on July 14, 2017 because that date fell within the four days he thought he would have off immediately following the end of his approved vacation on July 10, 2017.

(5) Despite what claimant thought, the employer reset an employee's regularly scheduled four days off from work to have the four weeks from which those days were accrued begin immediately following the employee's return from any vacation. As a result, claimant would not have July 11, 2017 through July 14, 2017 off as a scheduled four days off from work or otherwise. Claimant had never asked the employer if his assumption that his regularly scheduled four days off would begin immediately after his vacation and would effectively extend his time away from work

(6) On July 10, 2017, claimant did not contact the employer about the load he would be assigned to haul on the next day. On that day, the employer's dispatcher called claimant three times and left three voicemail messages about the load he was going to be assigned to haul. Claimant did not return those messages.

(7) On July 11, 2017, the employer's dispatcher reached claimant about assigning him to haul a load. Claimant told the dispatcher that he could not haul any loads because he had a physician's appointment on July 14, 2017 in Boise, Idaho. Claimant lived in Boise and had his truck with him at his home. The dispatcher told claimant that he was assigned to pick up a load in Pendleton, Oregon and pick up or deliver a few loads elsewhere, ending up at the employer's location in Central Point, Oregon, and that he should be able to get back to Boise by July 14, 2017. Claimant still refused to haul the load, stating that

he was not assured of returning to Boise in time for the medical appointment. The dispatcher told claimant that the employer would fly claimant from his final destination in Central Point to Boise or rent a car for him so he would be able to attend the physician's appointment in Boise on July 14, 2017. Claimant again refused to haul the load. The dispatcher then told claimant to drive the truck empty from Boise to the employer's location in Central Point, after which the employer would arrange to fly claimant back to Boise or rent a car for him to make the return trip. Claimant refused.

(8) On July 11, 2017, the employer discharged claimant for refusing to haul the load he was assigned on that day and refusing to drive the empty truck to Central Point, despite the accommodations the employer was willing to make to enable claimant to return to Boise in time to attend the medical appointment scheduled from July 14, 2017.

CONCLUSIONS AND REASONS: 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. The employer carries the burden of proving the claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While claimant might have been confused about whether his regularly scheduled four days off would be appended to or immediately follow his approved vacation time and effectively extend his time away from work to include the day on which his doctor's appointment fell, he learned this was not the case when he spoke with the dispatcher on July 11, 2017. Claimant did not dispute that he refused to haul to loads he was assigned on that day or return the empty truck to Central Point, citing the physician's appointment that was scheduled for July 14, 2017. Although claimant told the employer the physician's appointment was "important," claimant did not suggest that keeping that appointment was critical, that pushing it back would cause harm to him or that there were overriding reasons related to that appointment or a medical condition that prevented claimant from rescheduling it and hauling the load he was assigned, or at least returning the empty truck to Central Point. Transcript at 21.

In addition, the employer offered claimant alternatives that reasonably would allowed him to haul the load or take the truck to Central Point and return to Boise with enough time to keep the appointment, principally by offering to fly claimant at the employer's expense from Central Point to Boise. While claimant justified his continued refusal to leave his home with the truck because he had "lost trust" in the employer and he "didn't know if I was gonna be stranded down there at Central Point," there did not appear to be a factual basis for claimant's alleged concerns, and claimant at one point in this testimony appeared to concede that, barring unforeseen occurrences, the alternatives the employer proposed would have gotten him back to Boise in time for his medical appointment. Transcript at 27. Viewing the totality of the evidence in his record as to why claimant allegedly refused to haul to load he was assigned on July 11, 2017 or to drive the empty truck to the employer in Central Point, claimant's alleged reasons neither validate nor justify his refusal, but appear only to be rationalizations for it. On this record, claimant's refusals to haul the assigned loads or to return the empty truck to Central Point, in

light of the employer's willingness to accommodate claimant's return to Boise by July 14, 2017, were willful or wantonly negligent violation of the employer's standards.

Throughout the hearing, claimant took the position that, based on the employer's driver's handbook, he thought the most severe sanction the employer would impose on him for refusing to haul a load on July 11, 2017 would be rotate him to the bottom of the rotation list for the next series of loads and not to discharge him, presumably as a basis for arguing that the employer should not have discharged him for that reason. Transcript at 14, 15, 36; Claimant's Written Argument. However, nothing in the provisions of the handbook cited by claimant guaranteed that he would not receive more severe disciplinary sanctions for refusing to haul an assigned load, particularly when the refusal was not based on exigent circumstances beyond claimant's control. In addition, the issue before EAB is whether claimant is disqualified from benefits due willful or wantonly negligent behavior in violation of the employer's standards. The issue is not whether the employer should have discharged claimant for that willful or wantonly negligent behavior, or whether claimant reasonably should have expected that the penalty imposed on him would be discharge.

Although claimant's refusals to haul the load he was assigned on July 11, 2017 or to return the empty truck to Central Point were willful or wantonly negligent violations of the employer's expectations, they may be excused from constituting misconduct if they were isolated instances of poor judgment within the meaning of OAR 471-030-0038(3)(b). To be excused as an isolated instance of poor judgment, claimant's behavior on July 11, 2017 must have been a single or infrequent occurrence rather that a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards and it must not have exceeded mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). Here, claimant violated the employer's standards twice on July 11, 2017, first by refusing to haul the load from Boise ending up in Central Point and second by refusing to drive the empty truck to Central Point. On that day, claimant made two separate and discrete decisions to violate the employer's standards willfully or with wanton negligence. Because claimant's behavior in violation of the employer's standards was repeated, it may not be excused as an isolated instance of poor judgment.

Nor was claimant's behavior on July 11, 2017 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). While claimant contended at hearing that he thought the employer would penalize him less severely than it did for refusing to haul the loads or return the empty truck to Central Point as he was instructed, he did not state that his acts of refusal on July 11, 2017 were based on sincere misunderstanding as to what the employer expected of him or his belief that the employer would allow him under the circumstances to refuse to haul the load or disobey instructions about where he was to move an empty truck. As such, there is insufficient evidence in this record to show that claimant's behavior on July 11, 2017 is excusable as an isolated instance of poor judgment.

DECISION: Hearing Decision 17-UI-95933 is affirmed.

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

DATE of Service: <u>December 22, 2017</u>

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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