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BYE: 201846

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

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EMPLOYMENT APPEALS BOARD DECISION 2018-EAB-0213

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151821). Claimant filed a timely request for hearing. On February 12, 2018, ALJ Clink conducted a hearing, and on February 15, 2018 issued Hearing Decision 18-UI-103317, affirming the Department's decision. On February 28, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision to the extent it was relevant and based upon the hearing record.

FINDINGS OF FACT: (1) Miller Paint Co. Inc. employed claimant as a depot driver from May 21, 2012 to November 20, 2017.

(2) The employer expected claimant to carry transfer paperwork and a hazardous materials bill of lading when transporting hazardous materials, as required by U. S. Department of Transportation regulations. The employer trained claimant about that expectation, and claimant routinely adhered to it. The employer also expected claimant to keep his work cell phone turned on during his working hours.

(3) On January 27, 2017, the employer last provided claimant with hazardous materials transportation training and certified that he had completed the training. Claimant correctly answered questions on a hazardous materials quiz, including, "True of False? Hazardous materials 'shipping papers' must contain a 24-hour emergency telephone number," and "True or False? If you are delivering less than 440 lbs of Hazardous materials . . . you are not required to complete a Hazmat Bill of Lading." Exhibit 1. Claimant also correctly answered that when transporting hazardous materials the "[d]river must be aware of what Hazardous materials and quantities they are carrying." *Id.*

(4) On November 15, 2017, the employer assigned claimant to transport 600 pounds of flammable materials from its Grand Avenue store to its Tualatin store. Claimant reviewed the transfer paperwork and bill of lading, set them aside, loaded the materials into a van, and transported the materials without

taking the transfer paperwork or bill of lading with him. The employer's depot manager discovered what claimant had done, and attempted to call him on his work and personal cell phones. Claimant did not answer either phone. At 3:45 p.m., claimant returned the depot manager's calls. The depot manager described the problem; claimant replied, "Oh, it's OK don't worry about it, it's all good. I got there just fine." *Id.* The depot manager was concerned about claimant's conduct and his "casual and unconcerned attitude" about the matter. *Id.*

(5) On November 20, 2017, the employer discharged claimant for failing to carry the hazardous materials bill of lading and not answering his work cell phone during his working hours.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant argued that he was too upset to work on November 15th because of a coworker's threat to shoot him over playing Christmas music. Transcript at 48. Claimant thought the coworker's comment put everyone at risk, but that the employer did not take the threat seriously and felt the employer "never should have let me drive . . . [i]n fact, they should have drove me." *Id.* Claimant also argued, however, based on his duress, that the employer did not prove that he drove on November 15th, that he did not remember hauling hazardous materials that day, and that the employer should have done more to inform him that he was transporting hazardous materials. *See* Transcript at 25-26, 37-39. However, the employer provided consistent and credible evidence that claimant drove that day, the depot manager saw claimant review the bill of lading that listed 600 pounds of flammable materials as his cargo, claimant loaded his van himself that day and drove the items between the stores, and the employer also testified that claimant acknowledged to one employee on November 20th that he had driven without having the requisite paperwork with him. *See e.g.* Transcript at 44-45, 47. It is therefore more likely than not that claimant drove hazardous materials on November 15th without having a bill of lading in the vehicle.

The employer had the right to expect claimant to adhere to its expectations and federal Department of Transportation regulations with respect to carrying a hazardous materials bill of lading with him when transporting flammable materials between its stores. The employer also had the right to expect claimant to carry transfer paperwork with him and to leave his work cell phone on during his working hours. It appears on this record that claimant was trained about those expectations, routinely complied with them prior to November 15th, and therefore knew or should have known that failing to comply with those

expectations on November 15th would probably violate the standards of behavior the employer had the right to expect of him, making his failure to comply with them, at a minimum, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error. He did not believe in good faith that he was complying with the employer's expectations when he transported hazardous materials without a bill of lading and did not have his cell phone turned on during his working hours. Nor is there evidence that he sincerely but mistakenly believed that he had the bill of lading with him in the van on November 15th or that his work cell phone was turned on while he was working that day.

Nor can claimant's conduct be excused as an isolated instance of poor judgment. An isolated instance is a single or infrequent occurrence of poor judgment, rather than a repeated act or pattern of other willful or wantonly negligent behavior, and cannot exceed mere poor judgment by, for instance, being unlawful or tantamount to an unlawful act. OAR 471-030-0038(1)(d). In this case, claimant's transport of hazardous materials without a bill of lading violated federal regulations. His conduct therefore exceeded mere poor judgment and cannot be excused.

For those reasons, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-103317 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: March 28, 2018

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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