

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0225

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153638). Claimant filed a timely request for hearing. On February 13, 2018, ALJ Seideman conducted a hearing, and on February 16, 2018 issued Hearing Decision 18-UI-103475, affirming the Department's decision. On March 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Love's Travel Stops employed claimant as a fuel attendant from September 21, 2017 to November 26, 2017.

(2) The employer expected claimant to fuel vehicles with the correct kind of fuel. Claimant understood the employer's expectation.

(3) In approximately September 2017, claimant mistakenly filled a diesel-engine vehicle with gasoline. He realized his error before the car left and the employer resolved the problem. The employer orally warned claimant to fill vehicles with the correct kind of fuel.

(4) On October 23, 2017, a customer asked claimant to fill his vehicle with gasoline. Claimant told the customer that his vehicle said "diesel fuel only." The customer said that he wanted gasoline. Claimant noticed that the fuel cap was black, which indicated gasoline, and not green to indicate diesel, and asked the customer a third time, at which time the customer said he wanted gasoline. Claimant fueled the vehicle with gasoline as instructed by the customer. The vehicle actually required diesel. The employer corrected the misfuel and gave claimant a written warning.

(5) After receiving the written warning claimant did not want to make any further misfueling errors. He double-checked every vehicle for a green diesel fuel cap before fueling the vehicle and asked to make sure that the customers wanted diesel instead of gas.

(6) On November 25, 2017, claimant fueled a customer's diesel-fueled vehicle with gasoline. The vehicle broke down and was towed back to the employer's facility for repair, at which time the customer identified claimant as the individual who had misfueled her vehicle. That night, two managers told claimant that he needed to focus more. Claimant did not think he had any misfuels, and told the managers that he had not misfueled any vehicles that weekend.

(7) On November 26, 2017, the employer discharged claimant for misfueling the customer's vehicle on November 25, 2017.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, claimant denied that he misfueled the customer's vehicle on November 25th. While the employer's evidence that claimant was responsible for that misfuel was based upon hearsay, the record evidence suggested that claimant did in fact misfuel the vehicle. For example, two other individuals were on duty at the time of the misfuel, but both of them were managers, and claimant was the only fuel attendant working at the time. Audio recording at ~ 21:00-22:15. Additionally, both of those managers interacted with the customer after the misfuel, and the customer still identified claimant as the individual who had misfueled her vehicle. *Id.* We therefore find it more likely than not that claimant misfueled the customer's vehicle.

The employer had the right to expect claimant not to misfuel customers' vehicles. Claimant understood the expectation, and violated it on November 25th when he put gasoline in a diesel vehicle. For the misfuel to amount to misconduct, however, the employer must show more than mere negligence. Mere negligence, even repeated negligence, in the performance of work-related duties may be a valid basis for discharge, but it is not sufficient to establish misconduct. To prove misconduct, the employer must demonstrate by a preponderance of the evidence that claimant acted willfully or with wanton negligence. In this case, there is no evidence suggesting that claimant put gasoline in the diesel vehicle on purpose. Nor is there any evidence suggesting he was conscious that he was putting gasoline into a diesel vehicle at the time of the incident. Additionally, after receiving a written warning in October 2017 for

misfueling a different vehicle claimant began to take extra steps to try to ensure that he did not misfuel any more vehicles, efforts that suggest that claimant was not acting with indifference to the consequences of his conduct when he misfueled the vehicle on November 25th. In the absence of evidence proving that the November 25th misfuel occurred because claimant acted willfully or with wanton negligence, the employer has not proven misconduct.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-103475 is set aside, as outlined above.¹

D. P. Hettle and S. Alba;
J. S. Cromwell, 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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¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.