

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0266

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132034). Claimant filed a timely request for hearing. On March 5, 2018, ALJ Amesbury conducted a hearing, and on March 7, 2018, issued Hearing Decision 18-UI-104591, concluding the employer discharged claimant, but not for misconduct. On March 12, 2018, the employer filed an application for review of Hearing Decision 18-UI-104591 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tradewinds Transportation, LLC employed claimant as a long-haul driver from August 22, 2016 to January 8, 2018.

(2) On January 8, 2018, the employer summoned claimant to a meeting with the safety director and human resources manager to discuss certain performance issues with claimant – namely, claimant’s failures to follow procedures concerning contact with the dispatch office and the manner in which he interacted with the dispatchers. Prior to the meeting, claimant spent an extended period of time in the dispatch office waiting for the safety director, who was out road-testing a truck, to arrive for the meeting. While waiting, claimant asked the dispatcher on duty if there were any loads assigned to him to take that day and was told that there were not.

(3) After the safety director returned from the road test, he, claimant and the human resources manager met and discussed the employer’s concerns regarding claimant’s failures to contact the dispatcher on duty at regular intervals and upon the occurrence of certain events and claimant was warned that he needed to improve in those areas as well as regarding his interactions with the dispatchers. The employer reiterated to claimant the times of day or events in question when claimant was expected to communicate with the dispatcher.

(4) After the meeting ended, claimant went home to get food, clothing and other materials he would need for an overnight trip he was scheduled to make. He had not brought those items with him because he was not scheduled to work that day. He had not heard anyone tell him during the meeting that he had

just attended to go from the meeting to the dispatch office and did not realize until after he returned home that he had been assigned to haul a load that day.

(5) The employer summoned claimant back to the office and discharged him for failing to report directly to the dispatcher after the performance meeting.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectation.

The employer discharged claimant for failing to report directly to the dispatcher after the performance meeting on January 8, 2018. However, claimant denied knowing or hearing that he was expected to do so immediately after the meeting and none of the other events that required him to contact dispatch had occurred that day. Moreover, claimant reasonably believed that he had not been assigned a load that day because he had just been told prior to the meeting that he had not been assigned any loads for that day. When asked, the employer's witness responded that no one told claimant during the meeting that he had a load to drive that day and that it was possible that claimant did not know that a load had been assigned. Audio Record ~ 32:30 to 33:00. Accordingly, the evidence regarding whether claimant consciously violated the employer's expectation that he speak with the dispatcher immediately after the meeting was no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. The employer failed to establish that on January 8, 2018, claimant consciously violated an employer directive or was consciously indifferent to the employer's interests by returning home to prepare for an overnight trip without speaking directly to the dispatcher first. Without either willful or wanton negligence, misconduct has not been shown.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 18-UI-104591 is affirmed.

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

DATE of Service: April 6, 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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