

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0481

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2018, the Oregon Employment Department (Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132056). Claimant filed a timely request for hearing. On May 1, 2018, ALJ Janzen conducted a hearing, and on May 2, 2018 issued Order No. 18-UI-108534, concluding that claimant's discharge was not for misconduct. On May 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Reed's Fuel and Trucking employed claimant as a truck driver from March 14, 2016 until March 13, 2018.

(2) The employer expected claimant to drive defensively when operating his truck and to avoid preventable accidents. The employer's written policies also prohibited claimant from driving his truck at speeds exceeding 55 miles per hour. Notwithstanding the employer's written policy, however, the employer's dispatcher urged drivers to deliver loads as quickly as possible, which would enable them to return to the mill and deliver subsequent loads. Based on the dispatcher's attitude, claimant understood the employer to allow him to operate his truck at speeds somewhat in excess of 55 miles per hour when it was safe to do so.

(3) On March 2017, while operating one of the employer's trucks, claimant was involved in a traffic accident. The accident resulted when another driver left a parking lot on the side of the road opposite to the lane in which claimant was traveling, crossed the opposite lane and entered the center lane of the road, intending to merge into the lane in which claimant was travelling. When claimant noticed the driver in the center lane, claimant applied the brakes of his truck, but his truck struck the rear of other vehicle. The investigating police agency found the other driver to have been at fault for the accident and cited the other driver for failing to yield the right of way to claimant.

(4) On September 11, 2017, while driving one of the employer's trucks, claimant was involved in a second traffic accident. This accident occurred at daybreak when it was still quite dark outside. As

claimant drove downhill around a blind corner at 55 mph, he saw that another vehicle was stopped in his lane because a deer was crossing the road. Due to the weight of the load claimant was hauling in his truck, there was insufficient time for claimant to stop his truck after he saw the other vehicle and, although he tried to swerve onto the road shoulder to avoid it, his truck struck the rear of the stopped vehicle. The investigating police officer advised claimant he would report the accident as a “no fault” accident. Audio at ~34:30. The police officer did not issue a traffic citation to claimant.

(5) On March 12, 2018, while driving one of the employer’s trucks, claimant was involved in a third traffic accident. This accident occurred when claimant was travelling on a state highway with two vehicles in the lane in front of him. Claimant was travelling at around 60 mph despite the employer’s written prohibition of speeds in excess of 55 mph since it was daytime, traffic was light and claimant thought that it was safe to do so under these road conditions. At one point around this time, claimant’s speed reached 64 mph “for a split second” before he slowed his truck back down to 60 mph when he noticed how fast he was traveling. Audio at ~32:35. While driving, claimant was “day dreaming” and “not paying attention” and did not immediately see that the lead vehicle of the two vehicles in front of him had stopped to make a left hand turn, and the second was stopping in response to the first vehicle having stopped. Audio at ~31:03, ~43:45. When claimant noticed both vehicles stopping, he tried to stop his truck but could not so in time to avoid the stopped vehicles, and swerved onto the shoulder of the road. Despite claimant’s efforts, his truck struck the rear of the second stopped vehicle, which itself struck the first vehicle that was trying to make the left turn. At the time claimant struck the second vehicle, his truck was travelling at 58 mph. The investigating police agency issued a traffic citation to claimant for following too closely. Claimant was not issued a traffic citation for speeding. Claimant contested the citation for following too closely and was found not guilty at trial.

(6) On March 13, 2018, the employer discharged claimant for the pattern of traffic accidents in which he was involved since March 2017.

CONCLUSIONS AND REASONS: 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) (January 11, 2018) 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show by a preponderance of the evidence that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At the outset, the employer appeared at certain points during the hearing to contend that it discharged claimant not for the traffic accident on March 12, 2018 but based on his pattern of traffic accidents and because he had been involved in three accidents since March 2017. Audio at ~21:05, ~23:40. However,

for purposes of determining if claimant is disqualified from receiving benefits, claimant must be found to have been discharged for misconduct, or for willful or wantonly negligent behavior. To focus its inquiry in this respect, EAB customarily analyzes claimant's behavior only in connection with the final incident resulting in discharge. Accordingly, the proper focus of the misconduct analysis is claimant's behavior that gave rise to the March 12, 2018 traffic accident.

Claimant testified that he was consciously operating the employer's truck at around 60 mph before the March 12, 2018 accident, or in excess of the employer's maximum allowable speed of 55 mph. Audio at ~ 33:32. Claimant did not dispute that he knew the employer's written policies prohibited driving the employer's trucks at speeds over 55 mph. Audio at ~30:06. However, the employer did not dispute claimant's testimony that based on the dispatcher's attitude and comments he believed in good faith that he was allowed to drive his truck at speeds somewhat greater than 55 mph if traffic and road conditions allowed him to safely do so. Audio at ~ 33:32. Given the employer's failure to rebut claimant's testimony, it appears that there were plausible grounds for claimant to believe that the employer would allow him to deviate from the 55 mph prohibition in its written policies if that deviation was minor and not unsafe. The employer did not show that it was unsafe for claimant to travel at the speed he was admitted he was traveling before the accident. On this record, it cannot be concluded that claimant travelling at speeds around 60 mph prior to the March 12, 2018 accident was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b).

With respect to claimant's alleged failure to drive defensively on March 12, 2018, the employer's witness appeared to accept claimant's explanation that it was his "day dreaming" and "not paying attention" that proximately caused the traffic accident. Audio at ~11:44, ~13:52. To disqualify claimant from benefits, the employer must show that the behavior of claimant that gave rise to a violation of its expectations was undertaken with a willful or wantonly negligent state of mind. *See* OAR 471-030-0038(1)(c); OAR 471-030-0038(3)(a). By definition, mistakes, accidents, lapses of attention, oversights, and failures of perception are not accompanied by the consciously aware mental state necessary to establish the type of willful or wantonly negligent behavior that will disqualify a claimant from benefits. On this record, claimant's act of day dreaming or failing to pay attention was not sufficient to show that he engaged in disqualifying misconduct. In addition, while travelling at 64 mph might have been an excessive deviation from the employer's written prohibition against speeds in excess of 55 mph and would constitute misconduct if claimant had been driving at that speed with conscious awareness, it appears that claimant was initially not aware that he was traveling at 64 mph, and promptly slowed down to 60 mph when he became aware of the speed at which he was driving. . Audio at ~32:35. For this reason, that claimant operated his truck for a "split second" at 64 mph, does not constitute willful or wantonly negligent behavior given that prompt correction.

The employer did not show by a preponderance of the evidence that claimant's behavior resulting in the March 12, 2018 accident was accompanied by a willful or wantonly negligent mental state and that it therefore was disqualifying misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Order No. 18-UI-108534 is affirmed.

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

DATE of Service: June 13, 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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