

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

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0649

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110215). The employer filed a timely request for hearing. On May 29, 2018, ALJ Frank conducted a hearing, and on June 6, 2018 issued Order No. 18-UI-110756, concluding the employer discharged claimant for misconduct. On June 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jake’s Holdings, Incorporated, dba A&M Transport, employed claimant as a tractor-trailer truck driver from May 5, 2015 to April 12, 2018.

(2) The employer expected its drivers to operate its vehicles safely, in accordance with traffic laws and in a manner that would not endanger persons or property. Claimant was aware of and understood the employer’s expectations as a matter of common sense.

(3) During claimant’s employment but prior to April 10, 2018, the employer gave claimant at least three verbal warnings for minor accidents he had been involved in, and offered him both online and in yard training opportunities to improve his driving abilities, which claimant “blew off.” Audio Record ~ 20:00 to 21:00. The last minor accident occurred in March 2018, when claimant backed his tractor-trailer into some landscaping rocks that were visible “on approach” at his destination. Audio Record ~ 19:00 to 20:00. Although the employer had a policy that required drivers to get out and look when backing a tractor-trailer rig in such situations, which claimant typically followed, he did not on that occasion, resulting in the collision with the landscaping rocks that caused property damage.

(4) On April 10, 2018, claimant was operating an employer tractor-trailer in the center lane of a three lane interstate freeway when he decided that the motor vehicle in front of him was travelling too slowly. Although claimant knew it was illegal for him to move into the left lane to pass the slower moving vehicle, he did so anyway, and after doing so, moved back into the center lane without knowing if he had completed the pass of the vehicle in question, causing a collision and injury accident with that

vehicle. Claimant later was cited by law enforcement personnel for making an “unlawful lane change”, causing the accident. Audio Record ~ 11:00 to 12:10.

(5) On April 12, 2018, the employer discharged claimant for causing the April 10 injury accident by committing an “unlawful lane change.”

CONCLUSIONS AND REASONS: We agree with the ALJ. 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) (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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to operate its vehicles safely, in accordance with traffic laws and in a manner that would not endanger persons or property as a matter of common sense. At hearing, claimant acknowledged that he was aware that it was illegal for him to move his vehicle into the left lane of the interstate highway in question on April 10, 2018 and that when he attempted to maneuver his rig back into the center lane, causing the collision, he was not certain he had passed the vehicle he intended to pass. Audio Record ~ 24:00 to 30:00. Viewed objectively, claimant's conduct demonstrated conscious indifference to the consequences of his actions for both the driver in question and the employer. Claimant's conduct constituted a wantonly negligent, if not willful, violation of the employer's expectations regarding how its drivers were to operate its tractor-trailers.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's wantonly negligent conduct on April 10 was not an isolated instance. Claimant's March 2018 conduct in failing to exit his truck and look to determine if his truck would clear the landscape rocks that were visible “on approach” before proceeding, also demonstrated conscious indifference to the employer's interests particularly after admitting that he typically exited his vehicle and looked before proceeding in such circumstances.

Some conduct, even if isolated, which violates the law, is tantamount to unlawful conduct, creates irreparable breaches of trust in the employment relationship or otherwise makes a continued employment relationship impossible, exceeds mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Here, claimant admitted that he was aware on April 10 that it was unlawful for him to enter the left lane to pass the vehicle in question which, moments thereafter, resulted in a collision with that vehicle when he

attempted to return to the center lane without knowing if he had passed the vehicle. Accordingly, claimant's unlawful conduct on that date exceeded mere poor judgment and may not be excused under OAR 471-030-0038(3)(b).

Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's driving expectations. Claimant did not assert or show that he sincerely believed, or had a factual basis for believing, that the employer would condone his unlawful and wantonly negligent operation of its motor vehicle.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-110756 is affirmed.

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

DATE of Service: July 31, 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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