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

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0849

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155305). Claimant filed a timely request for hearing. On July 31, 2018, ALJ Snyder conducted a hearing, and on August 8, 2018 issued Order No. 18-UI-114580, concluding that claimant's discharge was not for misconduct. On August 28, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that included documentary evidence that it did not offer during the hearing, stating that it was doing so now "in an attempt to clarify what appears to be a misunderstanding of, or incomplete, testimony during the July 31, 2018 hearing." The employer's witness testified at length during the hearing about why the employer discharged claimant and touched on much of the information contained in its submission to EAB. The employer did not explain how the testimony of its witness at hearing was incomplete or unclear, or show, as required by OAR 471-041-0090(2) (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from offering at hearing the documents that it seeks to present to EAB by way of the submission accompanying its written argument. For these reasons, EAB declines to consider the new evidence that the employer has proffered.

Claimant submitted a written argument in response to the employer's submission and which contained new information that was apparently offered in rebuttal of the employer's new information. Because EAB has declined to consider the employer's new information, it would serve no purpose to consider claimant's new information and EAB has not done so.

FINDINGS OF FACT: (1) The Oregon Department of Transportation employed claimant from November 2006 until June 7, 2018, last as an incident response operations specialist.

(2) The employer expected claimant to respond to roadway incidents to which he was dispatched or that he observed by assisting the motoring public, other incident responders and other involved parties, as

needed. The employer also expected claimant to report all hours that he worked, and prepare and submit accurate timecards. The employer also expected that claimant would not work overtime hours unless he had prior permission to do so. Claimant understood those expectations as he reasonably interpreted them based on practices he observed in the workplace.

(3) On August 30, 2017, claimant was driving on Interstate 5 when he observed a roadway incident in which a motorist had driven off the road. Another incident responder and law enforcement personnel were already on the scene and several traffic control cones had been placed on the road to divert traffic around the scene. At the time claimant drove by the scene, the responder and law enforcement were preparing to leave the scene. Claimant determined that the scene no longer posed a hazard and there was nothing for him to do that would assist those on the scene. However, claimant made a video of the scene on his cell phone because he had concerns about the traffic control measures taken by the on-scene incident responder. Claimant showed the video to his supervisor shortly after he had taken it and expressed his concerns. Claimant's supervisor did not tell claimant that he should not have taken the video, that he should have offered on scene assistance even though he had concluded that the scene was under control, or that his behavior that day had not met the employer's expectations.

(4) On November 12, 2017, claimant was driving on Interstate 5 when he observed another roadway incident. Two incident responders were already on the scene along with two of the employer's maintenance workers, for a total of four of the employer's personnel at the scene. Claimant observed that the on-scene incident responders had closed all three lanes of the interstate around the scene, but he did not recall seeing any signs advising oncoming motorists of the closure. Rather than reporting to the scene, claimant drove back down the interstate to determine if he had overlooked any advisory signs that had been placed on the roadway. The employer's traffic control materials provided guidelines for the placement of signs warning motorists that roadway lanes were closed ahead. Because no signs had been placed to warn motorists of the lane closures, claimant made a video on his cell phone to show his supervisor how the traffic control measures taken in response to this incident were inadequate.

(5) After taking the video, claimant called a supervisor and asked what he should to provide assistance on the scene. The supervisor told claimant to do what he could. The supervisor did not specify the steps that he wanted claimant to take. Based on the supervisor's instructions, claimant decided to rectify the inadequacy of the notice to oncoming motorists and placed a sign on the road shoulder some distance from the scene that advised motorists, "Wreck ahead. Freeway closed," which was all that claimant thought he could accomplish given the limited resources in his vehicle. Audio at ~29:40. After doing so, claimant thought there was nothing more that he could accomplish to assist the personnel on the scene and left. Approximately three days later, claimant showed his supervisor the video he had made and they discussed claimant's concerns. The supervisor did not tell claimant that he should not have taken the video, that he should have offered different on-scene assistance despite believing that the scene was under control, or that his behavior that day did not meet the employer's expectations.

(6) On February 14, 2018, the employer gave claimant a performance review because it had received a complaint about how he responded to incidents. During that review, claimant was told that his incident responses needed to include actually exiting his vehicle and being physically present on the roadway scene.

(7) On March 13, 2018, dispatch called claimant a few minutes after his shift was over and requested that he respond to a report of tire debris on the road. Claimant told the dispatcher that he was already off duty, that he did not want to handle the call, and that requiring him to respond would mean that the employer would have to pay him a minimum of two hours overtime. In claimant's experience, a report of tire debris was a low priority that usually did not warrant payment of overtime. Claimant did not respond to the tire debris report.

(8) Also on March 13, 2018, claimant stayed at the workplace for an hour after his scheduled shift ended to prepare for an upcoming instructional presentation that he was going to give. Because he was updating and improving a presentation that he had already prepared and given, claimant did not expect to be paid for the time he spent on it and considered that time to be a matter of personal skills development. Claimant also did not think to report the time he spent on the presentation because had not sought and did not have approval to work overtime. Claimant did not report the time as work time on his timecard. On March 20 and 21, 2018, claimant also spent three-quarters of an hour longer at the workplace than his scheduled shift. Claimant spent the time improving the same instructional presentation as on March 13. For the same reasons as on March 13, claimant did not report those three-quarters of an hour on his timecards for March 20 and 21.

(9) On March 23, 2018, the employer held a second performance review with claimant. During that meeting, the employer discovered that claimant had spent time on March 13, 20 and 21 on the instructional presentation which it believed was work time that claimant should have reported on his timecards for all of those days. At the meeting, employer representatives instructed claimant to change his time cards for March 13, 20 and 21 to include the one hour, the three quarters of an hour and the second three quarters of an hour that he had not reported on those days. Although the employer required claimant to record the hours that placed him in overtime status, the employer did not approve those overtime hours.

(10) On May 7, 2018, the employer placed claimant on administrative leave while its investigation continued and while it determined appropriate disciplinary sanctions.

(11) On June 7, 2018, the employer discharged claimant for the manner in which he responded to the incidents on August 30, 2017 and November 12, 2012, for not responding to the call from dispatch about tire debris on March 13, 2018, for failing to record all time worked on March 13, 20 and 21, 2018, and for working unapproved overtime on March 13, 20 and 21, 2018.

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. The employer has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to how claimant responded to the roadway incidents on August 30, 2017 and November 12, 2017, claimant testified that he thought his responses were adequate and in compliance with the employer's standards. On August 30, while claimant did not exit his vehicle at the scene, the employer did not rebut his testimony that he did not do so because, by the time he arrived, the incident responders and law enforcement had concluded their work on the scene and were preparing to leave, and claimant did not think that he could offer meaningful assistance under those circumstances. On November 12, while claimant also did not exit his vehicle at the scene, the employer did not rebut his testimony that he did not do so because he needed to determine if adequate signage had been placed to warn oncoming motorists of upcoming lane closures, after which he contacted a supervisor about how best to assist and the supervisor left it to claimant's discretion. Claimant's subsequent decision to set up warning signs on the roadway does not appear to have been inconsistent with the supervisor's instructions to him or not to have been in furtherance of the employer's purpose of an incident response that served the needs of the motoring public.

While claimant may have made videos in the course of his responses to both incidents, it does not appear that doing so detracted from his actual actions in responding, and the employer did not suggest that claimant did not take the videos for the purpose of showing his supervisor that the incident responses were inadequate, or that claimant did not show and discuss those videos with his supervisor. The employer also did not show that claimant did not take those videos for legitimate purposes. Furthermore, the employer did not present evidence showing that before November 12, it had instructed claimant that he was required to physically exit his vehicle at the scene in order to effectuate an adequate incident response, or that he was prohibited from taking cell phone videos for any purpose when he was responding to a scene. On this record, there was insufficient evidence to show that by his response to the roadway incidents on August 30 and November 12, claimant violated employer standards of which he was reasonably aware willfully or with wanton negligence.

With respect to how claimant reacted to the call from dispatch about the tire debris on March 13, 2018, the employer did not contend that claimant's shift was not over when he received the call. The employer did not contend that the call of roadway tire debris was an urgent circumstance, or controvert claimant's testimony that responding to such reports was usually considered a low priority. As well, the employer did not present evidence showing that the dispatcher or any other employer representative told claimant that that particular report of tire debris was an emergent situation or ordered claimant to respond and report to that scene. On this record, there was insufficient evidence to show that claimant's reaction to the call from dispatch on March 13 was a willful or wantonly negligent violation of the employer's standards of which he was reasonably aware.

With respect to the accuracy of claimant's timecards for March 13, 20 and 21, 2018, claimant contended that he did not think the time he spent at the workplace in excess of his scheduled shift was time that he should be compensated for because he considered it to have been undertaken for personal development purposes and he had not sought prior approval for overtime. While claimant's conclusion that time devoted to improving the instructional materials was not compensable work time might have been negligently reached, mere negligence is not accompanied by the state of mind necessary to establish the willful or wantonly negligent behavior that will disqualify a claimant from benefits. The employer did

not present sufficient evidence to show that claimant willfully or with wanton negligence prepared inaccurate timecards for March 13, 20 and 21, 2018 by failing to report the time he spent on those days improving the instructional presentation. Although the employer contended that claimant claimed unauthorized overtime on those days, claimant did so only after the employer ordered him to report those hours on his timecards. On this record, claimant did not willfully or with wanton negligence work unauthorized overtime on March 13, 20 and 21, 2018.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-114580 is affirmed.

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

DATE of Service: October 1, 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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