

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0879

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100228). Claimant filed a timely request for hearing. On August 13, 2018, ALJ S. Lee conducted a hearing, and on August 22, 2018 issued Order No. 18-UI-115343, concluding that the employer discharged claimant, but not for misconduct. On September 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant did not have a driver's license before 2017, but learned to drive and obtained a license so she would be able to work for Advanced Recovery Corporation. Claimant was in an auto accident as a passenger in 1971 and had residual effects from the traumatic brain injury into her adult life. She did not know that the residual effects might affect her ability to drive safely.

(2) Advanced Recovery Corporation employed claimant from June 2017 until June 10, 2018 as a customer service representative. Claimant's duties included driving a company car around the employer's coverage zone delivering small client appreciation gifts.

(3) The employer expected claimant 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.

(4) On April 2018, claimant was involved in an auto collision when driving the employer's car along her work route. Claimant stopped at a stop sign and then proceeded to make a turn in the intersection when she did not see any cars in the intersection. Another vehicle that did not have a stop sign and was driving through the intersection struck claimant's car. Claimant suffered a concussion in the accident. The car was "totaled." The employer's president reprimanded claimant for exhibiting poor driving skills and causing the accident.

(5) Claimant returned to work sometime after the April 2018 accident. On June 8, 2018, while driving a car the employer planned to purchase as another company vehicle, claimant got into another auto accident. Claimant was driving on a highway and hit another vehicle that she did not see was attempting to pass her. The police officer who arrived at the scene observed that claimant's balance and speech seemed affected, which claimant attributed to her traumatic injury and concussion. Claimant was arrested at the accident site and was charged with reckless driving and driving under the influence of intoxicants.

(6) On June 9, 2018, claimant met with a medical provider who confirmed her prior diagnosis of traumatic brain injury and diagnosed her as having post concussive syndrome from the April 2018 accident. The doctor concluded that claimant was experiencing vision limitations including having areas in what would be her normal field of vision that she did not see. Claimant told her supervisor the information she had received from the doctor and that she was no longer willing to drive due to safety concerns. The employer also decided that claimant was no longer able to safely perform her job.

(7) On June 10, 2018, the employer discharged claimant because her position required her to drive and she was no longer able to drive safely for the employer.

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

The employer discharged claimant after she had a second serious vehicular accident while driving at work and was no longer willing to drive for the employer. Claimant understood as a matter of common sense that the employer expected her to operate its vehicles safely and in a manner that would not endanger persons or property. Although claimant probably caused the June 8, 2018 accident, the preponderance of the evidence shows that the accident was due to an unconscious act or to vision or other impairments associated with claimant's brain injuries. That claimant was charged with reckless driving and DUII is not persuasive here to show a conscious disregard of the employer's interest because of claimant's medical condition that was, at least on this record, the likely reason that claimant did not see the other vehicle in the accident. Moreover, claimant was not aware of the impact of her injuries on her driving ability until she met with her doctor on June 9, 2018, and at that time, made the reasonable decision to refrain from driving thereafter. Absent evidence of claimant's indifference to the employer's interest in safe driving practices, the employer failed to show that claimant engaged in misconduct when she had the June 8, 2018 accident or in deciding that she could no longer safely drive for the employer.

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 this work separation.

DECISION: Order No. 18-UI-115343 is affirmed.

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

DATE of Service: October 16, 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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