

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0909

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155353). Claimant filed a timely request for hearing. On September 13, 2018, ALJ Shoemake conducted a hearing, and on September 18, 2018 issued Order No. 18-UI-116789, affirming the Department's decision. On September 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Beverage Recycling Cooperative employed claimant as an IT helpdesk specialist from March 1, 2016 to July 31, 2018.

(2) The employer required claimant to drive a company vehicle to perform his duties, and required that he obey all traffic laws while doing so. Claimant understood the employer's requirements.

(3) The employer had concerns about claimant's driving. In January 2018, claimant drove 92 miles per hour in a 65 mile per hour zone, and exceeded 80 miles per hour for an extended period of time. In June 2018, claimant drove on the right shoulder of the road to pass other vehicles. The employer issued claimant warnings after each incident, and after the second incident warned him that he would be discharged if he had another driving incident within six months. Thereafter, claimant was very careful to drive the speed limit and obey traffic laws while at work.

(4) On July 27, 2018, claimant drove through a complicated intersection. Claimant was familiar with the intersection and understood the rules of the road when driving through it. At all relevant times he knew the employer could track his speed, was being careful of the speed and manner in which he drove, and did not think he was violating any traffic laws. A citizen contacted the employer to complain that claimant failed to signal a turn, ran a red light, and drove 10 miles per hour over the speed limit through that intersection. The employer concluded that claimant had again violated traffic laws at work, and, on July 31, 2018, discharged claimant based upon the July 27, 2018 incident.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that 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.

The ALJ concluded that claimant's discharge was for misconduct, finding as fact that claimant "was travelling in excess of the speed limit" and noting that although claimant denied having run a red light or failed to signal a turn, he "did not deny that he was exceeding the posted speed limit" in the final incident. Order No. 18-UI-116789 at 2, 3. The ALJ reasoned that "[a]t a minimum, claimant's exceeding the speed limit was a wantonly negligent violation of the employer's policy." *Id.* at 3. We disagree.

In a discharge case, the employer bears the burden to prove by a preponderance of the evidence that a claimant's discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In this case, the employer's evidence that claimant sped, ran a red light, and turned without signaling in the final incident was based entirely on a complaint from an unknown individual. Audio recording at ~ 10:55; 11:43. The employer did not otherwise confirm that claimant had, in fact, sped, run a red light or turned without signaling, or go over all aspects of the citizen complaint with claimant. *Id.* at 21:50. The employer did not review the tracking system installed on claimant's company vehicle to determine whether or not he had actually been exceeding the speed limit on the occasion in question. *Id.* at 31:35. Contrary to the ALJ's Order, claimant not only denied having run a red light and failed to signal a turn, he also implicitly denied having exceeded the speed limit on July 27th. *Id.* at 28:15 (the allegations were "manufactured" by the another driver who was upset because they mistakenly thought claimant had cut the driver off in traffic); 28:25 (does not know his speed on July 27th, but was "very attentive" to his "speed and manner of driving" after the last warning he had received, and knew the employer could track his speed). The only reasonable inference to be reached from that testimony is that claimant disagreed with the allegation that he was speeding on July 27th. The record therefore shows claimant's firsthand testimony that he did not speed, and the employer's unverified hearsay that claimant had. Claimant's testimony therefore outweighs the employer's allegations of misconduct, and the employer did not meet its burden to prove that claimant acted as alleged.

In the absence of evidence suggesting it is more likely than not that claimant ran a red light, failed to signal a turn, and/or exceeded the speed limit on July 27th, the record fails to show that claimant's discharge was for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-116789 is set aside, as outlined above.¹

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

¹ This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

DATE of Service: October 24, 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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