

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0326-R

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 17, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132618). Claimant filed a timely request for hearing. On February 14, 2014, ALJ Logan conducted a hearing, and on February 25, 2014 issued Hearing Decision 14-UI-11091, affirming the Department's decision. On February 26, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On March 13, 2014, EAB issued Appeals Board Decision 2014-EAB-0326, reversing this matter for want of a complete record and remanding it to the Office of Administrative Hearings (OAH). On March 13, 2014, OAH supplemented the record and returned this matter to EAB.

This decision is issued pursuant to EAB's authority under ORS 657.290(3).

Claimant submitted a written argument to EAB which he did not certify that he served on the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's written argument also included information that was not part of the hearing record and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing as required under OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Clatsop Community College employed claimant as a security officer from September 7, 2005 until December 21, 2013.

(2) Claimant's job duties required him to drive the employer's vehicles while on patrol. The employer expected claimant to have and maintain a valid driver's license at all times to continue in his job. Claimant was aware of the employer's expectations.

(3) On October 29, 2013, claimant was driving his car when he was arrested for the crime of driving under the influence of intoxicants (DUII). The arresting police officer administered an alcohol test to claimant at that time. Claimant failed that test. The officer notified claimant that his driver's license was suspended for 90 days from the date of the arrest because he had failed the alcohol test. The officer confiscated claimant's driver's license and gave him a temporary license that was valid for the next 30 days. Claimant appealed the suspension of his driver's license to the Department of Motor Vehicles (DMV), but the 90-day suspension was upheld.

(4) On November 28, 2013, the day claimant's temporary driver's license expired, the employer placed claimant on a 30 day unpaid administrative leave to allow him to resolve his inability to drive for work. Later, claimant determined that he might be able to obtain a special hardship permit that would allow him to drive for purposes of employment. Claimant thought that to meet the conditions for a hardship permit he needed either to have an ignition interlock device (IID) installed in the vehicle he drove at work or to have the employer sign and submit to DMV a form that requested an exemption from the IID requirement when claimant's driving was for purposes of work.

(5) On December 21, 2013, claimant met with his supervisor. Claimant told the supervisor he would be able to obtain a hardship driving permit that would allow him to drive for work if the employer agreed to install an IID in one of its vehicles or to complete the IID exemption request form. The supervisor told claimant that the employer would not do either one. The supervisor told claimant that the employer intended to discharge him after his administrative leave was over on December 27, 2013 because, without a valid driver's license, he was unable to perform essential requirements of his job. The supervisor offered claimant the option to resign in lieu of a discharge, which would maintain claimant's eligibility for re-hire after his driver's license suspension was over.

(6) On December 21, 2013, claimant quit work to avoid a discharge.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

Claimant voluntarily left work to avoid a discharge based on his inability to lawfully drive during work. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Leaving work without good cause includes resigning from work to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). The threshold issue in determining whether claimant's resignation was or was not a leaving for good cause is whether the employer intended or potentially intended to discharge claimant for reasons that constituted misconduct.

OAR 471-030-0038(3)(a) (August 3, 2011) 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 carries the burden to

demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute that he knew he needed to maintain a valid driver's license as a condition of his employment as a security officer. Transcript at 10, 15, 18. There is no issue that claimant was aware of the employer's expectation. *Weyerhaeuser Company v Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) holds that individual's off duty behavior constitutes misconduct if the individual willfully or with wanton negligence created a situation that made it impossible for the individual to comply with the employer's standards or expectations. Claimant reasonably should have known that if he failed an alcohol test after being stopped for DUII he could lose his driver's license since this consequence is a matter of common knowledge and appears in published statutes. See ORS 813.010 (driver fails to pass an alcohol test if blood alcohol is greater than 0.08 percent and, if so, driver is subject to various sanctions); ORS 813.100(3) (driver's license suspended if driver fails to pass an alcohol test); ORS 813.420(2) (driver's license suspension for failure to pass an alcohol test is for 90 days). Claimant admitted at hearing that he failed whatever type of alcohol test was administered to him, and claimant did not suggest there was any plausible explanation for this result other than that he had consumed alcohol before driving. Transcript at 11. He specifically did not contend that the apparatus used to administer the alcohol test was faulty, that he did not think he was impaired when driving or that he had inadvertently consumed the alcohol before driving. Transcript at 11. Because, more likely than not, claimant drove a vehicle on October 29, 2012 after knowingly and consciously drinking an amount of alcohol that caused him to register at least 0.08 percent in an alcohol test, under circumstances where he knew or should have known that his driver's license would be suspended if he was stopped and tested, his behavior in driving a vehicle showed at a minimum an indifference to reasonably known consequences and the employer's expectation that he maintain a valid driver's license. Claimant's behavior was wantonly negligent.

Claimant's behavior on October 29, 2012 is not excusable under any of the exculpatory provisions of OAR 471-030-0038(3)(b). To excuse claimant's behavior as an "isolated instance of poor judgment," that behavior must not have caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, claimant's wantonly negligent behavior rendered him unable to lawfully drive and unable to perform essential duties of his job. It is without question that by creating a situation in which he could not fulfill integral duties of the job for which he was hired, claimant made a continued employment relationship impossible. For this reason, claimant's behavior is not excusable as an isolated instance of poor judgment. Nor is claimant's behavior excusable as a "good faith error" under OAR 471-030-0038(3)(b). Claimant did not contend at hearing that he behaved as he did on October 29, 2012 due to a mistaken belief that the employer would condone his drinking and driving and losing his ability to lawfully drive. Absent evidence of such a belief, claimant's behavior was not shown to be based on a good faith error and is not excusable on this ground.

Based on the evidence presented at hearing, the suspension of claimant's driver's license was due to wantonly negligent behavior that was not excused under any of the exceptions to misconduct. Claimant's behavior on October 29, 2013 that gave rise to his inability to drive was misconduct. Since claimant resigned to avoid a discharge that would have been for misconduct, OAR 471-030-0038(5)(b)(F) establishes that he voluntarily left work without good cause. Despite the plain meaning of OAR 471-030-0038(5)(b)(F), claimant argued at hearing he should not be disqualified from benefits

because his inability to obtain a special hardship permit that would have allowed him to continue to drive was a consequence of the employer's refusal to complete and submit a DMV exemption form. However, the employer had no obligation to take measures to mitigate the work-related consequences of claimant's misconduct. That the employer did not act does not make claimant's behavior on October 29, 2012 any less wantonly negligent or any more excusable. Whatever the employer did or did not do, the fact remains that claimant resigned on December 21, 2012 to avoid a discharge that would have been for misconduct. Under OAR 471-030-0038(5)(b)(F), such a resignation is a disqualifying act because it is a voluntary leaving without good cause.

On the facts of this case and the applicable law, claimant voluntarily left work without good cause. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-11091 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: March 31, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.