

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0884

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 130934). Claimant filed a timely request for hearing. On April 2, 2014, ALJ Murdock conducted a hearing, and on May 1, 2014, issued Hearing Decision 14-UI-16526, affirming the administrative decision. On May 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Quarter Twenty employed claimant from April 13, 2012 to January 6, 2014.

(2) The employer maintained a company car which the employer's owner often allowed claimant's coworker Sonny to use after work hours. Occasionally, the owner gave claimant permission to use the company car after work hours. Claimant knew and understood that he could only use the company car if the owner gave him permission to do so.

(3) On Friday, January 4, 2014, the owner, claimant, and his co-workers left work at approximately 4 p.m. and went to a nearby brew pub to celebrate Sonny's last day of work for the employer. Claimant, Sonny, and the owner left the brew pub at approximately 6:30 p.m. Claimant understood that the owner told him and Sonny they could take the company car home for the weekend. The owner, however, did not intend to give claimant or Sonny permission to use the company car.

(4) On Saturday, January 5, 2014, the owner realized that the company car was missing from the space where it was normally parked outside the employer's shop. The owner called and texted claimant, but was unable to reach him. The owner contacted the police and reported the car stolen. Late Saturday

afternoon, the employer finally spoke to claimant who told the owner he had taken the car home. The owner told claimant to immediately return the car to the employer's shop.

(5) On January 7, 2014, the employer discharged claimant for unauthorized use of the company car.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that 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. 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 bears the burden to establish misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct.

The employer discharged claimant for unauthorized use of the company car. The employer's owner testified that on January 4, 2014, he never gave claimant or his coworker permission to use the company car for the weekend, and that claimant took the car without the owner's permission. (Audio at 19:17). Claimant, however, testified that the owner told him and Sonny that they could take the car home for the weekend. (Audio at 10:17). Based on this record, the ALJ concluded that "it was not logical" for the owner to offer the car to Sonny and claimant, because Sonny was leaving the employer, and the owner, claimant, Sonny had just been drinking at a brew pub. The ALJ then concluded that the claimant acted in willful disregard of the owner's expectations when he took the car home without permission. We disagree.

The owner's offer of the company car was not uncharacteristic; claimant and the employer agreed that Sonny had often been permitted to use the company car after work hours and claimant occasionally had been allowed to do so. In addition, the owner's testimony regarding the use of the company car was not unequivocal. Although he denied giving Sonny and claimant permission to use the car, the owner also testified that he did not remember a conversation where he told Sonny and claimant they could use the car over the weekend. (Audio at 15:41). At best, evidence of whether the owner offered the company car to claimant and Sonny was equally balanced. The owner therefore failed to show by a preponderance of evidence that claimant took the car, knowing that he did not have permission to do so. Absent such a showing, the employer did not demonstrate that claimant violated its expectations wilfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-16526 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service: July 1, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.