

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1234

*Reversed  
Disqualification*

**PROCEDURAL HISTORY:** On May 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 144400). The employer filed a timely request for hearing. On June 30, 2014, ALJ Monroe conducted a hearing, and on July 1, 2014 issued Hearing Decision 14-UI-20703, affirming the Department's decision. On July 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) JP Morgan Chase employed claimant from September 26, 2011 to April 29, 2014 as a personal banker.

(2) The employer expected claimant to follow its code of conduct, in part, by refraining from engaging in behavior that is illegal or could damage the employer's reputation. Claimant received training regarding the employer's expectations at hire and annually, including on June 11, 2013.

(3) During March 2014, claimant obtained a new Oregon driver's license to replace her old one. Claimant knew it was illegal to give her license to another person to use. Claimant did not turn her old license in to the Department of Motor Vehicles. While at a coworker's house, claimant gave the coworker her old license, knowing the coworker was not yet 21 years of age and that she planned to use the license to purchase alcohol. The coworker used the license to consume alcohol at a bar. Exhibit 1.

(4) On March 31, 2014, while in the employer's break room, the coworker who received claimant's driver's license told another employee that she had false identification and used it to purchase alcohol. She told the other employee that claimant gave her the false identification. The employee knew claimant was also employed by the employer because she worked with her during 2011 and 2012. The employee reported the employee's statements to the employer, and the employer investigated the matter. Exhibit 1.

(5) On April 29, 2014, the employer discharged claimant for violating its code of conduct by giving her Oregon driver's license to her underage coworker to purchase alcohol.

**CONCLUSIONS AND REASONS:** We disagree with the Department and the ALJ and conclude the employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected work. 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

When a claimant was discharged for off-duty conduct, the first issue is whether the conduct was "connected with work," so that the employer had the right to expect her to refrain from such conduct. For off-duty conduct to be connected with work, it must affect, or have a reasonable likelihood of affecting, the workplace. *Levu v. Employment Department*, 149 Or App 29, 941 P2d 1056 (1997). It is enough that the ramifications that flow from the claimant's actions have a reasonable likelihood of negatively impacting the morale or atmosphere of the workplace. *Id.* In Hearing Decision 14-UI-20703, the ALJ concluded that claimant's conduct was not "connected with work" because there was "insufficient evidence to conclude that claimant's conduct affected, or had a reasonable likelihood of affecting, claimant's work or workplace."<sup>1</sup> We disagree. Claimant's conduct affected her workplace when another employee learned of claimant's illegal conduct from the underage coworker's statements in the break room. Although claimant did not make the statements in the break room, it was reasonably likely that the coworker would discuss claimant's conduct in the workplace. Moreover, given that claimant worked for a bank, having engaged in an illegal act involving personal identification had a reasonable likelihood of negatively impacting the morale or atmosphere of the workplace, and the employer's reputation. Claimant's conduct therefore was connected to work, and the employer had a right to expect her to refrain from such conduct.

Claimant asserted at hearing that she did not understand that her conduct was prohibited by the code of conduct because it occurred outside of work. Audio Record ~ at 22:50 to 23:03. However, claimant knew that the employer expected her to refrain from engaging in illegal conduct or conduct that could harm the employer's reputation, and knew or should have known as a matter of common sense that her commission of a crime, especially one involving personal identification, probably violated the employer's expectations. Her conscious decision to engage in such behavior demonstrated indifference to the consequences of her actions, and therefore was, at best, wantonly negligent.

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<sup>1</sup> Hearing Decision 14-UI-20703 at 3.

Claimant's conduct cannot be excused as a good faith error. Claimant could not hold any reasonable good faith belief that the employer would condone her conduct of engaging in illegal activities, given that such conduct would negatively reflect on her trustworthiness to interact with other employees and customers.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that violate the law exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Permitting misuse of a license, and failing to surrender a prior license before accepting another license, violate the law. *See* ORS 807.590 and 807.540. Claimant's decision to engage in conduct that violated the law cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 14-UI-20703 is set aside, as outlined above.

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

**DATE of Service:** August 19, 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.

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