

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1259

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103900). Claimant filed a timely request for hearing. On July 11, 2014, ALJ Monroe conducted a hearing, and on July 18, 2014 issued Hearing Decision 14-UI-21825, affirming the Department's decision. On July 23, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Oregon Department of Transportation (ODOT) employed claimant from August 17, 1987 to May 9, 2014, last as a transportation services representative.

(2) As a transportation services representative, claimant's duties included conducting behind-the-wheel motor vehicle skills tests. The employer therefore expected claimant to maintain a valid driver license. Claimant understood that expectation.

(3) On December 24, 2013, claimant drove his vehicle after consuming four beers on an empty stomach. Claimant was stopped by a police officer, failed a field sobriety test, and registered a blood alcohol content level over 0.08%. Claimant was arrested and charged with driving under the influence of intoxicants (DUII).

(4) On March 3, 2014, claimant appeared in Clackamas County Circuit Court and entered a plea of guilty to one count of DUII. Claimant's driver license was suspended for one year.

(5) On May 9, 2014, the employer discharged claimant for failing to maintain a valid driver license.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. A willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c) (August 3, 2011). Otherwise, OAR 471-030-0038(3)(a) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). Acts that violate the law exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

The employer discharged claimant for failing to maintain a valid driver license. In Hearing Decision 14-UI-21825, the ALJ analyzed claimant's discharge under OAR 471-030-0038(3)(c).<sup>1</sup> However, the record shows only that the employer expected its transportation services representatives to maintain a valid driver license, and not that transportation services representatives were legally required to do so. Maintaining a valid driver license therefore was not necessary to the performance of claimant's occupation, and his discharge must be analyzed under OAR 471-030-0038(3)(a).

The employer had a right to expect claimant to maintain a valid driver license, given that his duties included conducting behind-the-wheel motor vehicle skills tests. Claimant knew or should have known driving his vehicle after consuming four beers on an empty stomach would probably result in being stopped by a police officer, arrested and charged with DUII, and ultimately having his driver license suspended. Claimant's conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions. His failure to maintain a valid driver license therefore was wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment because his conduct violated the law. *See* ORS 813. Nor can claimant's conduct be excused as a good faith error. Claimant understood the employer expected him to maintain a valid driver license. His conduct was not the result of an error in his understanding of the employer's expectations.

**DECISION:** Hearing Decision 14-UI-21825 is affirmed.

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

**DATE of Service:** August 21, 2014

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<sup>1</sup> Hearing Decision 14-UI-21825 at 3.

**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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