

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1292

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 112315). Claimant filed a timely request for hearing. On July 14, 2014, ALJ Seideman conducted a hearing, and on July 25, 2014 issued Hearing Decision 14-UI-22214, affirming the Department's decision. On July 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stadelman Fruit, LLC employed claimant from October 20, 2008 to June 4, 2014 as a ranch foreman.

(2) The employer farmed several hundred acres of orchards in the Parkdale, Oregon area, and maintained an office approximately two hours' drive from Parkdale, in Zillah, Washington. As a ranch foreman, claimant's duties included driving between the employer's orchards, warehouse, local towns, and its main office in Zillah while on duty. Claimant understood the employer expected him to maintain a valid driver's license to perform his duties.

(3) During the first week of May 2014, claimant was arrested and charged with driving under the influence of intoxicants (DUII) after consuming alcohol.

(4) During the last week of May 2014, claimant was arrested and charged with DUII after again consuming alcohol.

(5) On June 1 or June 2, 2014, claimant's driver's license was suspended as a result of the DUII charges.

(6) The employer expected claimant to transport a tractor from the Parkdale area to Yakima, Washington on June 4, 2014. On June 3, 2014, claimant told the employer he could not drive to Yakima because his license had been suspended due to the two DUII charges.

(7) On June 4, 2014, the employer discharged claimant for failing to maintain a valid driver's license.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that 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. 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 make a continued employment relationship impossible 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's license. In Hearing Decision 14-UI-22214, the ALJ analyzed claimant's discharge under OAR 471-030-0038(3)(c).¹ However, the record shows only that the employer expected its ranch foreman to maintain a valid driver's license to be able to perform his or her duties, and not that ranch foremen were legally required to do so. Therefore, the record does not show that maintaining a valid driver's license was necessary to perform claimant's occupation, and his discharge must be analyzed under OAR 471-030-0038(3)(a).

Claimant asserted at hearing that the license suspension did not affect his ability to perform his duties, because he could have paid another person to drive him. Audio Record ~ at 11:30 to 12:22, 21:16 to 21:21. However, the employer had a right to expect claimant to maintain a valid driver's license, given that his duties included driving between the employer's orchards in Parkdale, local towns, and the employer's office in Zillah. Although another person could drive claimant from his home to work, the employer was under no obligation to permit another person to perform claimant's driving duties while on duty due to his suspended license, nor, to the extent claimant's duties involved operating the employer's vehicles, to allow another person to do so on claimant's behalf.

The record does not show that claimant's alcohol consumption before driving was inadvertent or anything other than a conscious act on claimant's part. The fact that claimant was charged with DUII under the Oregon vehicle code means it is more likely than not that claimant drove while intoxicated, in violation of ORS 813.010. Police had to have probable cause to believe that claimant was intoxicated while driving. ORS 133.055(1). "Probable cause" means "there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it." ORS 131.005(11). Claimant knew or should have known that driving his vehicle while intoxicated would probably result in being stopped by a police officer, arrested and charged with DUII,

¹ Hearing Decision 14-UI-22214 at 4.

and ultimately having his driver's license suspended. Claimant's conscious decision to drive while intoxicated demonstrated indifference to the consequences of his actions. His failure to maintain a valid driver's license therefore was wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Claimant's conduct prevented him from performing job duties that were an integral part of his position as ranch foreman. Claimant's wantonly negligent behavior caused the suspension of his driver's license and made continued employment as the employer's ranch foreman impossible. Nor can claimant's conduct be excused as a good faith error. Claimant did not show that he sincerely believed, and had a rational basis for believing, the employer would allow him to continue working if his license was suspended due to DUII charges.

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

DECISION: Hearing Decision 14-UI-22214 is affirmed.

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

DATE of Service: September 3, 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. 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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