

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0291**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 65309). Claimant filed a timely request for hearing. On February 23, 2015, ALJ M. Davis conducted a hearing, and on February 25, 2015 issued Hearing Decision 15-UI-34094, reversing the Department's decision. On March 12, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) The City of Medford employed claimant as a public works technician from January 19, 2005 until December 17, 2014

(2) Claimant's position as a public works technician required him to drive commercial vehicles and the employer required him to have and maintain a valid commercial driver's license (CDL) as a condition of employment. The employer expected claimant to refrain from behavior that reasonably jeopardized his ability to hold a CDL. Claimant understood the requirements of his position and the employer's expectation.

(3) On August 29, 2014, when claimant was off-duty, he drove his personal vehicle while under the influence of alcohol. That day, claimant was involved in several incidents that resulted in his arrest. When claimant was taken into custody, a deputy sheriff administered a breathalyzer test to him and his blood alcohol content registered 0.14 percent. Claimant was charged with the crime of driving under the influence of intoxicants (DUII) as well as other crimes and was transported to jail.

(4) On August 30, 2014, claimant was released from custody and reported to his supervisor, among other things, that he had been arrested on DUII charges the day before. After the employer became aware of claimant's arrest, its representatives investigated the facts underlying the alleged DUII charges.

The representatives spoke with the deputies, read their reports and interviewed the witnesses to claimant's behavior on August 29, 2014.

(5) Sometime after August 30, 2014, an administrative hearing was held to decide whether claimant's CDL would be suspended as a result of his blood alcohol reading when he was arrested. The deputy sheriff who administered the breathalyzer test did not appear at the hearing. As a result, the administrative processes to suspend claimant's CDL were dismissed. Claimant retained a valid CDL unless or until he was convicted on the DUII charge.

(6) On September 8, 2014, the employer placed claimant on administrative leave while it continued its investigation of the August 29, 2014 events. After September 8, 2014, the employer interviewed claimant. Claimant told the employer that he was "impaired" or "under the influence" when he drove his personal vehicle on August 29, 2014. Audio at ~10:38, ~35:39.

(7) On November 13, 2014, a county grand jury indicted claimant on the charges of DUII, reckless driving, attempted assault in the second degree and three counts of criminal mischief arising from his behavior on August 29, 2014. Claimant pleaded not guilty to all the charges on which he was arraigned.

(8) Sometime after approximately November 13, 2014, employer representatives again spoke with claimant about the August 29, 2014 incident and the pending DUII charge. Claimant again agreed that he had been "under the influence" when he drove on August 29, 2014. Audio ~36:27.

(9) Sometime after approximately November 13, 2014, the district attorney dismissed three of the charges on which claimant was indicted. The DUII charge was not dismissed and remained pending. A trial on the remaining charges was scheduled for March 29, 2015.

(10) On December 17, 2014, the employer discharged claimant because, based on its investigation, it concluded that claimant's behavior on August 29, 2014 placed his ability to retain his CDL in substantial jeopardy. At the time he was discharged claimant still had a valid CDL.

**CONCLUSIONS AND REASONS:** 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. 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 Hearing Decision 15-UI-34094, the ALJ concluded that the employer did not establish it discharged claimant for misconduct. The ALJ reasoned that, because claimant had pleaded not guilty to the charge of DUII and retained a valid CDL at the time he was discharged, no misconduct had occurred as of his

discharge date. Hearing Decision 15-UI-34094 at 3. We disagree, based principally on the admissions that claimant made at hearing.

At hearing, claimant agreed that he was aware that needed to maintain a valid CDL as a condition of his job. Audio at ~26:50. Claimant also conceded that he knew engaging in behavior that constituted the crime of DUII, even if he was driving his personal vehicle, could cause the loss of his CDL. Audio at ~27:30. From this knowledge, claimant's awareness that the employer expected him to avoid behavior that substantially jeopardized his CDL is reasonably inferable as a matter of logic and common sense. The employer's expectations of claimant were not limited, as the ALJ suggested, only to avoiding a conviction for DUII.

In this case, claimant acknowledged that his blood alcohol content when he was arrested immediately after driving his vehicle was 0.14. Audio at ~32:52. Claimant did dispute the accuracy of that result or suggest in any way that it did not correctly represent his condition when he drove on August 29, 2014. Claimant agreed that on two occasions, he told employer representatives that he was either "impaired" or "under the influence" at the time he was arrested for DUII on August 29, 2014. Audio at ~35:39. ~36:27. While the ALJ did not directly ask claimant at hearing if the statements he made to the employer's representatives were accurate descriptions of his condition on August 29, 2014, his failure to make any attempt to retract or qualify them suggests most strongly that they were and are accurate. That claimant might hope to avoid conviction when the DUII charge is tried, and thereby to avoid a suspension of his CDL, cannot mask his admissions at hearing and his failure to dispute the relevant evidence. Claimant all but conceded that he engaged in behavior on August 29, 2014 that constituted the crime of DUII. *See* ORS 813.010(1)(a) (person commits the offense of DUII if he drives with a blood alcohol content of 0.08 percent or more). A conviction for a first offense of DUII causes the suspension of an individual's driver's license, including a CDL, for one year. *See* ORS 813.400, 809.428(2)(a).

While claimant was correct that he still had a valid CDL at the time the employer discharged him, and there is a remote chance that he will be able to avoid a suspension of his CDL after he is tried on the August 29, 2014 DUII charge, the employer reasonably expected more of claimant than that he would avoid a conviction and attendant CDL suspension. Audio at ~27:48, ~28:05, ~28:27. The employer reasonably expected, in addition, that claimant would not knowingly engage in behavior that put his CDL in substantial jeopardy, regardless of the ultimate outcome of that behavior on his retaining or losing his CDL. Audio at ~38:25, ~39:35. By choosing to drive after he had been drinking, with a blood alcohol content well in excess of the legal limit, and with knowledge that if he was stopped his CDL would be subject to suspension, claimant violated the employer's expectations with at least wanton negligence.

Claimant's behavior on August 29, 2014, is not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The type of behavior that may be excused as mere poor judgment is, among other things, behavior that does not violate the law or is not tantamount to unlawful behavior. OAR 471-030-0038(1)(d)(D). Here, claimant's admitted behavior, whether or not he is ultimately convicted at trial, constituted the crime of DUII. Claimant's behavior on August 29, 2014, is therefore not excused as an isolated instance of poor judgment.

Claimant's behavior on August 29, 2014, also was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(c). Claimant did not assert or present any evidence showing that his behavior in driving under the influence on that day was the result of a sincere belief that the employer would condone his behavior or attributable to a misunderstanding of the employer's standards. There is no evidence in the record to support the application of the excuse for a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-34094 is set aside, as outlined above.

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

**DATE of Service:** May 8, 2015

**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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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