

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0859**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73614). Claimant filed a timely request for hearing. On July 15, 2015, ALJ Seideman conducted a hearing and issued Hearing Decision 15-UI-41527, affirming the Department's decision. On July 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Multnomah County employed claimant from January 1, 1993 to May 18, 2015 as an inventory specialist.

(2) As an inventory specialist, the employer expected claimant to have valid Oregon driver's license and necessary certification to drive trucks of up to 33,000 pounds gross vehicle weight in capacity. Exhibit 2. Claimant understood the employer's expectation. Claimant's duties included driving the employer's vehicles two or three days per week to pick up materials from vendors and deliver them to county departments and other agencies.

(3) Claimant was convicted of driving under the influence of intoxicants (DUII) in 2000 and 2011. Both arrests resulted in license suspensions. Exhibit 1.

(4) On February 14, 2014, while off duty, claimant consumed multiple alcoholic beverages while eating dinner with friends. He was later arrested for DUII.

(5) On April 6, 2015, claimant was convicted of DUII and his driver's license was suspended for one year, effective April 6. Exhibit 1.

(6) On April 16, 2015, claimant requested a hardship permit from the Oregon Department of Motor Vehicles (DMV). Claimant fulfilled all the applicant requirements for the hardship permit application. As part of the hardship permit process, DMV also required that every vehicle claimant drove for the employer have an ignition interlock device, or that the employer agree to exempt claimant from that

requirement and sign a DMV “Request for Exemption from Ignition Interlock Device Requirement.” Exhibit 1.

(7) On May 15, 2015, the employer notified claimant that it would not install an interlock device on any of its vehicles. The employer was not willing to assign one vehicle to claimant for his exclusive use, or to install the interlock device on multiple vehicles. An interlock device requires the driver of a vehicle to blow into the device in order for the vehicle to start. Nor was the employer willing to approve a DMV exemption waiver allowing claimant to drive an employer vehicle without an interlock device. Exhibit 1.

(8) On May 18, 2015, the employer discharged claimant because he was unable to drive due to the loss of his license.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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 because he was unable to perform his job duty of driving without a driver’s license. In Hearing Decision 15-UI-41527, 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 inventory specialist to maintain a valid driver’s license to be able to perform his duty to drive, and not that inventory specialists 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 he could have continued to work for the employer if the employer had agreed to an exemption from the ignition interlock device requirement (Audio Record at 19:10 to 20:17) or reassigned his driving duties to other employees (Audio Record at 22:05 to 23:00). However, the employer had a right to expect claimant to maintain a valid driver’s license, given that the work the

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<sup>1</sup> Hearing Decision 15-UI-41527 at 3.

employer hired claimant to perform included driving employer vehicles. Although another employee could have assumed claimant's driving duties, the employer was under no obligation to install ignition interlock devices, allow claimant to drive its vehicles after his license was suspended due to a DUII, or alter claimant's work assignments to accommodate the loss of his license due to a DUII.

Claimant consciously consumed alcohol, and drove a vehicle after doing so. Claimant was convicted of DUII, thus it is more likely than not that claimant drove while intoxicated, in violation of ORS 813.010. From past experience, and as a matter of common sense, claimant knew or should have known that driving while intoxicated could result in a DUII conviction and cause him to lose his driver's license. Claimant's decision to drive despite having consumed alcohol demonstrates an indifference to the employer's requirement that he maintain a valid driver's license. 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 because it exceeded mere poor judgment. Claimant's conduct prevented him from performing job duties that were an essential duty for his position as an inventory specialist. Claimant's wantonly negligent behavior caused the suspension of his driver's license and made continued employment as the employer's inventory specialist 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 15-UI-41527 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** September 3, 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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