

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1337**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74828). Claimant filed a timely request for hearing. On October 21, 2015, ALJ Logan conducted a hearing, and on October 23, 2015 issued Hearing Decision 15-UI-46439, affirming the Department's decision. On November 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**EVIDENTIARY MATTER:** During the hearing the ALJ admitted three exhibits into the record, including one that purported to include a recording of the transaction in which claimant sold alcohol to a minor. None of the exhibits were marked, but the ALJ described each in sufficient detail that we were able to identify and mark them as a clerical matter, and we reviewed Exhibit 1 and Exhibit 2 when reaching this decision.

The ALJ stated that he marked as Exhibit 3 a copy of a recording the employer submitted into evidence. However, the Office of Administrative Hearings (OAH) did not transmit the recording to EAB as part of the hearing record. We therefore reached this decision without having reviewed Exhibit 3.

**FINDINGS OF FACT:** (1) Hood River Mixer Shop employed claimant as a clerk from May 1, 2009 to July 15, 2015.

(2) Oregon law prohibits the sale of alcohol to a minor. ORS 471.140(2). The employer's policies and state law required that, before selling alcohol to individual that appeared to be under age 26, employees must verify the customer's age by checking the customer's date of birth as printed on either state-issued identification or a passport. Claimant understood the employer's expectations with regard to verifying the age of customers purchasing alcohol and selling alcohol to minors. The employer also provided employees with a point of sale system that allowed employees to scan customers' Oregon identification

electronically to verify they were of legal age before selling alcohol to them, and required them to use it when customers presented Oregon identification cards for age verification.

(3) On July 15, 2015, claimant sold alcohol to an 18-year old customer. The customer was part of an Oregon Liquor Control Commission (OLCC) sting operation, and was accompanied by an OLCC inspector and a state trooper. Prior to making the sale, claimant asked to see the customer's identification. The customer provided claimant with an Oregon provisional driver's license that stated his date of birth was March 12, 1997. The identification included a prominent banner that stated "Under 21 until 3-12-2018."

(4) Claimant quickly looked at the customer's provisional driver's license and handed it back to the customer. She did not scan the customer's identification on the employer's point of sale system as required. She concluded the customer was old enough to purchase the alcohol and completed the alcohol sale. The state trooper issued claimant a citation for selling alcohol to a minor.

(5) On July 15, 2015, the employer discharged claimant for selling alcohol to a minor. Claimant later pled guilty to the charge that she had sold alcohol to a minor.

**CONCLUSIONS AND REASONS:** We agree with 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. 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.

The employer prohibited employees from selling alcohol to minors. Claimant understood the expectation, and violated the prohibition and state law when she sold alcohol to a minor on July 15, 2015. Claimant admitted the violation, but argued that she did not commit misconduct. Claimant argued that she did her job by checking the identification, made a mistake by transposing the numbers in the customer's birth year, and was not required to use the employer's point of sale system to scan the identification. Audio recording at ~19:35-20:55. We disagree that claimant's violation was the result of an inadvertent mistake or simple negligence.

Claimant's job was to inspect the customer's identification until she was satisfied that the customer was over 21 years old before selling alcohol to the customer. The Oregon Department of Motor Vehicles issues provisional licenses for minors that include features to differentiate them from non-minors as notices to alcohol and tobacco vendors, including putting the minors' photos on the right side of the identification card instead of the left, and by placing a red border around the photo that states, "Under 21

until [date]."<sup>1</sup> Even a cursory glance at a minor's Oregon provisional driver's license would have revealed the red border with the banner. Claimant made a conscious choice not to scan the identification on the point of sale system to prevent errors. Furthermore, in order for claimant to have reasonably concluded that the customer's birth year was 1979, as she claimed, she must have believed that the customer was 36 years old. It is implausible that claimant, who was an experienced alcohol sales clerk responsible for checking the identification of customers unless they looked like they were at least 26 years old, would then reasonably conclude that the customer was 36 years old based on her quick glance at the customer's license. Under those circumstances, claimant's failure to exercise due diligence when checking the customer's identification was not an unconscious mistake, it was a conscious failure to verify the customer's age before completing the liquor sale, making her failure wantonly negligent.

Although some wantonly negligent conduct is excusable if it is an isolated instance of poor judgment, claimant's is not because it violated state law. OAR 471-030-0038(1)(d)(D) states as a matter of policy that unlawful conduct exceeds mere poor judgment and cannot be excused.

We therefore conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 15-UI-46439 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** December 18, 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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<sup>1</sup> We take notice of the features the DMV uses on Oregon identification cards to identify minors, which are generally cognizable facts. *See e.g.* <http://www.oregon.gov/ODOT/DMV/pages/driverid/samplecards.aspx>. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.