

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1360

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 17, 2015, the Employment Department issued an administrative decision concluding the employer discharged claimant for misconduct (decision # 92005). Claimant filed a timely request for hearing. On October 24, 2015 ALJ Holmes-Swanson conducted a hearing, and on October 30, 2015 issued Hearing Decision 15-UI-46889, affirming the Department's decision. On November 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which contained information that she did not present at the hearing. Claimant did not explain why she was unable to present this information during the hearing or show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only evidence in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Next Door, Inc. employed claimant as a home visitor from December 8, 1999 until August 7, 2015. As a home visitor, claimant was required to visit clients in their homes to provide services to them, and it was necessary to drive a car to do so.

(2) The employer expected claimant to have and maintain a valid driver's license as a condition of her continued employment. Claimant understood the employer's expectation.

(3) On Friday, January 9, 2015, claimant drank a great deal of wine. Claimant was in her house in Washington state and went to sleep intoxicated. Audio at ~11:00. In the middle of the night, claimant's son entered claimant's house and awakened her. Claimant did not want to encounter her son so she took her car keys and left the house in her pajamas, intending to drive away from her house. Claimant's son followed claimant to the driveway, told her she was in no condition to drive and he was going to call emergency services if she tried to drive. Claimant ignored her son and drove away. Claimant's son

called emergency services. A short distance from her home, claimant saw a deputy sheriff on patrol and pulled off the road. The deputy approached claimant's vehicle and administered a breathalyzer test to her. The deputy arrested claimant for driving under the influence.

(4) On Monday, January 11, 2015, claimant notified her employer that she had been arrested for driving under the influence. The employer did not take immediate action because the Washington Department of Licensing (DOL) had not yet taken any action to suspend claimant's driver's license due to the blood alcohol content she registered on the breathalyzer test administered on January 9, 2015. Sometime in February 2015, claimant had a hearing before DOL, but at that time DOL did not issue a decision about whether it or would not suspend claimant's driver's license because the breathalyzer test administered on January 9, 2015. DOL had the discretion not to suspend her driver's license or to impose a suspension of 30 days or one of 90 days as a result of the breathalyzer test result. Sometime later, claimant spoke to the employer about her continued employment if DOL suspended her license. The employer told her that if DOL suspended her driver's license only for 30 days, she could take personal leave during the suspension and the employer would arrange for someone else to make the necessary home visits during the time she was on leave.

(5) By letter dated March 11, 2015, DOL informed claimant that her driver's license was going to be suspended for 90 days beginning on March 25, 2015. By letter dated March 13, 2015, DOL notified claimant that it had issued a stay of the suspension scheduled to begin on March 25, 2015. Claimant confirmed with DOL that her license would remain valid after March 25, 2015 until DOL issued a final decision on the suspension. Sometime later, claimant discussed her situation with the employer. Claimant was told that if she could arrange to obtain a hardship driver's license that would allow her to continue to drive for employment purposes during the time her regular license was suspended and she would install an ignition interlock device on her car she could remain employed. The employer wanted claimant to install the interlock device even if it was not required for claimant to obtain a hardship license because it had concerns about liability if she was involved in an accident during the time she was driving under the restricted license.

(6) Beginning on June 10, 2015, DOL suspended claimant's regular driver's license for 90 days, or through September 11, 2015. Claimant did not receive the letter notifying her of the suspension. In late July 2015, a law enforcement officer saw that claimant was driving and told her that her driver's license had been suspended. Claimant immediately informed the employer that her driver's license was suspended through September 11, 2015. The employer permitted claimant to take a two week personal leave to try to resolve the suspension or to obtain a hardship license and have an ignition interlock device installed in her car.

(7) By August 5, 2015, claimant's personal leave was over and claimant had not been able to arrange for a hardship license or the installation of the interlock device. That day, the employer told claimant that it was going to discharge her because she no longer had a valid license and had not been able to obtain a hardship license. The employer allowed claimant to work until Friday, August 7, 2015 to clean out her office. The employer discharged claimant effective August 7, 2015.

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)(c) (August 3, 2011) sets out the standard for determining whether a claimant's failure to maintain a license, certification or other similar authority necessary to the performance of an occupation is misconduct. However, while the employer required claimant to have a valid driver's license as a condition of her continued employment as a home visitor, it appears that the driver's license was a *job requirement* rather than an *occupational* requirement of being a home visitor. OAR 471-0030-0038(3)(c) is not, by its terms applicable to this case. Rather OAR 471-030-0038(3)(a) is applicable.

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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant repeatedly testified that the employer required her to have and maintain a valid driver's license as a condition of her employment, and she was aware of this requirement throughout her employment. Audio at ~7:53, ~9:28, ~32:39. While the behavior that led to claimant's losing her driving license occurred when she was off-duty, off-duty conduct may constitute work-related behavior if it affects or has a reasonable likelihood of affecting claimant's ability to perform her job. *Levu v. Employment Department*, 149 Or App 29, 34, 941 P2d 1056 (1997) (so stating and finding that claimant's off-duty behavior of shoplifting, an act of dishonesty, was work-related since honesty was essential requirement of claimant's job as an auditor); *Erne v. Employment Division*, 109 Or App 629, 633, 820 P2d 875 (1991) (so stating). Here, because maintaining her driver's license was an integral part of claimant's qualifications to work as a home visitor, behavior that reasonably jeopardized her continued ability to drive was work-related. When off-duty behavior is determined to be work-related, the standard for determining whether that off-duty behavior was misconduct is whether claimant willfully or with wanton negligence created the circumstances that gave rise to her inability to meet the employer's job standards or requirements. *Weyerhaeuser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) (where claimant unable to notify the employer of his absences from work and unable to report for work as a result of his incarceration, the issue for purposes of determining whether claimant engaged in misconduct was whether claimant willfully or with wanton negligent created the situation - his incarceration - that made it impossible to comply with the employer's attendance policy).

Claimant very forthrightly admitted that she was "intoxicated" and drove under the influence on January 9, 2015. Audio at ~11:00, ~12:46, ~30:49. Claimant did not dispute that the sheriff who administered the breathalyzer test to her had grounds to arrest her based on the test results, and did not dispute that DOL had the authority, based on the blood alcohol content recorded on January 9, 2015, to suspend her driver's license. On this record, it appears that claimant chose to drink until she was intoxicated and later decided to drive while she was still intoxicated under circumstances where she knew or should have known that she could be arrested for driving under the influence and lose her driver's license for up

to 90 days. By engaging in such behavior, claimant violated the employer's standards with at least wanton negligence. While claimant contended at hearing that the employer could have accommodated her and kept her working and did not give her sufficient time to arrange for the issuance of a hardship driver's license, that contention does not obviate that it was her own wantonly negligent behavior that caused her to lose her driver's license when she knew that having a valid license was essential to maintain her continued employment. Regardless of steps the employer might have taken to assist claimant in avoiding the consequences of her admitted behavior, that behavior remains wantonly negligent.

Although it was wantonly negligent, claimant's behavior on January 9, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Before may be excused as an "isolated instance or poor judgment" it did not, among other things, "exceed mere poor judgment" by violating the law, being tantamount to an unlawful conduct or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, by her statements at hearing about her condition when she drove on January 9, 2015, it appears that claimant violated RCW 46.61.502(1)(a) when she drove under the influence on January 9, 2015. Even though claimant might have entered into a form of diversion in which an arrest for driving under the influence and a criminal charge would ultimately not appear on her record, from what she admitted during the hearing, she still engaged in behavior that violated the law or was tantamount to unlawful conduct. Audio at ~11:00, ~30:49. In addition, a reasonable employer would conclude that, by losing her driving privileges for 90 days, a continued employment relationship with claimant was impossible because she could not perform the essential driving duties of her position. For either of these reasons, claimant's loss of her driver's license exceeded mere poor judgment and may not be excused as an isolated instance of poor judgment.

Nor was claimant's behavior on January 9, 2015 that caused her to lose her driver's license excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend she thought the employer would condone her driving under the influence on January 9, 2015, or that she mistakenly thought the employer would allow her to continue working for it without a valid driver's license. Because there was no evidence in this record that claimant's misunderstanding of the employer's standards led her to engage in the behavior that she did on January 9, 2015, the excuse of good faith error is not applicable in this case.

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

DECISION: Hearing Decision 15-UI-46899 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: December 24, 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. 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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