

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0108

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133807). Claimant filed a timely request for hearing. On January 8, 2016, ALJ Monroe conducted a hearing, and on January 14, 2016 issued Hearing Decision 16-UI-51137, affirming the Department's decision. On January 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Burns Paiute Tribe employed claimant as a drug and alcohol prevention manager. Claimant's duties required participation in community activities promoting abstinence from or moderation in using alcohol. Claimant's position involved extensive public contact. As a condition of her employment, claimant was required to hold a drug and alcohol prevention specialist certificate issued by the Addiction Counselor Certification Board of Oregon (ACCBO).

(2) The employer expected employees to refrain from behaviors on or off the job that reflected negatively on the employer or on the employee's capacity to perform his or her job on behalf of the employer. The employer also expected claimant to comply with the ACCBO's code of ethical conduct for prevention specialists. ACCBO's code required claimant to act with "integrity" and in a manner that would "maintain and broaden public confidence" in her ability to perform the professional responsibilities of a prevention specialist.¹ Claimant understood the employer's expectations.

(3) On Saturday, October 17, 2015, claimant attended a college football game at which she consumed "quite a few" alcoholic beverages. Audio at ~11:42. Although claimant was aware that her blood alcohol content might be higher than 0.08 percent, the limit to lawfully drive a motor vehicle, she began to drive home from the game. While driving, claimant was stopped by a law enforcement officer,

¹ We take notice of the content of ACCBO's code, which is generally cognizable information available at http://www.accbo.com/general_images/pdf_files/prevention/pdf. 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.

administered a breathalyzer test and arrested for the crime of driving under the influence of intoxicants (DUI).

(4) On Monday, October 19, 2015, claimant reported to her supervisor, the general manager, that she had been arrested for DUI over the weekend. The general manager left claimant while she consulted with the employer's human resources manager about how to proceed. When the general manager returned, she told claimant that unless the DUI charge "was thrown out," the employer intended to discharge her for violating the employer's and ACCBO's code of ethics because she had been involved in an alcohol-related crime that negatively impacted her integrity and the public's perception of her credibility when performing professional duties as a drug and alcohol prevention manager and as a certified prevention specialist. Audio at ~20:44. The general manager offered claimant the alternatives of taking a leave of absence until judicial processes resulted in a final disposition on the DUI charge, resigning, or being discharged. Claimant chose to resign.

(5) On October 19, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. Leaving work without good cause includes a resignation to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F).

Having declined the employer's offer to allow her to take a leave until a final judicial disposition was reached on her pending DUI charge, claimant was left with the alternatives of being discharged or resigning. Because claimant resigned in lieu of discharge, whether she had good cause for leaving work depends on whether or not her discharge would have been for misconduct. We turn to that issue.

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. 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 testified she was "very aware" of the employer's code of ethical conduct for employees. Audio at ~9:35. While claimant vigorously argued that she thought the employer would not discharge her for the behavior underlying the DUI charge, but would merely suspend her or issue a disciplinary warning to her, she ultimately conceded she understood that engaging in behavior that constituted the crime of DUI violated the employer's code of ethics. Audio at ~37:21, ~40:50. However, it is claimant's reasonable awareness that behavior he or she has engaged in violated the employer's standards that is at issue, which does not require an awareness that the behavior likely will result in discharge as opposed to some other sort of disciplinary sanction. As well, if only as a matter of common

sense, claimant was reasonably aware that committing an alcohol-related crime like DUI would substantially undercut her credibility to interact with the public on behalf of the employer as a drug and alcohol prevention manager who presumably advocated against excessive alcohol use or abuse. Claimant also reasonably understood that, given the nature of her position and the employer's code of ethics, the employer prohibited her from criminal behavior like DUI that involved alcohol use and subjected others to a risk of harm as a result of alcohol-impaired behavior.

Although claimant testified that she did not recall the blood alcohol content she registered on the breathalyzer test, she admitted she was under the influence of "quite a few" alcoholic drinks when she was arrested and further admitted that she was consciously aware when she drove on October 17, 2015, that her blood alcohol content might be greater than the legal threshold for DUI. Audio at ~34:17. Before her arrest, the law enforcement officer who stopped and arrested claimant for DUI on October 17, 2015 was required to have probable cause for the arrest. ORS 133.310(1). "Probable cause" means that there was a "substantial objective basis for believing that more likely than not an offense has been committed and the person to be arrested has committed it." ORS 131.005(11). Based on claimant's acknowledgement that she might well have been violating the law when she drove October 17, 2015 and the standards required for an arrest by a law enforcement officer, it is more likely than not that claimant's behavior on October 17, 2015 constituted the crime of DUI. By choosing to drink and then drive when she consciously knew she had consumed an amount of alcohol that could cause her to violate DUI laws, claimant engaged in behavior that violated the employer's standards with at least wanton negligence.

Claimant's wantonly negligent behavior on October 17, 2015 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as excusable behavior, claimant's wanton negligence must, among other requirements, not have exceeded "mere poor judgment" by violating the law or being tantamount to unlawful conduct. OAR 471-030-0038(1)(d)(C). Here, claimant's driving after having consumed alcohol on October 17, 2015 likely constituted DUI, and therefore violated ORS 813.010(1)(a). Because the behavior underlying claimant's wantonly negligent violation of the employer's standards was against the law, it cannot be excused as an isolated instance of poor judgment.

Nor was claimant's wantonly negligent behavior on October 17, 2015 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant knew she was intoxicated when she drove, and her arrest for DUI was the foreseeable result of that conduct. In light of claimant's testimony that she knew the employer prohibited her from engaging in behavior that amounted to DUI, it is not plausible she mistakenly thought the employer would for some reason allow her to do so on October 17, 2015. Audio at ~40:50. Although claimant repeatedly insisted she did not think the employer would discharge her as the sanction for violating its standards and committing a DUI, she notably did not contend that she thought she was not intoxicated or that the employer would condone driving while knowingly intoxicated. Claimant's conduct was not the result of a good faith error.

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

DECISION: Hearing Decision 16-UI-51137 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 29, 2016

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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