

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0457

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 153927). Claimant filed a timely request for hearing. On February 10, 2015, ALJ Seideman conducted a hearing, and issued Hearing Decision 16-UI-52710, affirming the administrative decision. On February 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On March 16, 2016, EAB issued Appeals Board Decision 2016-EAB-0239, reversing and remanding the hearing decision under review for further development of the record. On April 11, 2016, ALJ Seideman conducted a hearing, and on April 15, 2016, issued Hearing Decision 16-UI-57351, concluding that the employer discharged claimant for misconduct. On April 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Pamplin Broadcasting Oregon employed claimant as an account executive from November 12, 2012 until December 2, 2015. Claimant's job duties consisted of selling radio advertising to businesses and individuals. As a condition of her employment, the employer required that claimant maintain a valid driver's license and insurance and comply with the employer's driving policy. The driving policy specified that employees whose driving record was unacceptable could be discharged, and also specified that a conviction for Driving Under the Influence of Intoxicants (DUI) created an unacceptable driving record.

(2) In 2006, claimant was diagnosed as having the disease of alcoholism. Also in 2006, claimant was convicted of DUI. Claimant sought and received treatment for her alcoholism, but was not successful in recovering from the disease until 2010. From 2010 until June 2015, claimant relapsed and consumed alcohol on a few occasions.

(3) In June 2015, claimant relapsed and consumed alcohol. Claimant immediately sought treatment and counseling in an effort to resume her recovery and prevent future relapses.

(4) On October 27, 2015, claimant purchased alcohol which she took to her home and consumed. She then drove, and was arrested and subsequently convicted for DUII. As a result of this conviction, claimant's driver's license was suspended for one year.

(5) On December 2, 2015, the employer discharged claimant because, due to the loss of her driver's license, she was unable to fulfill the conditions of her employment as an account executive.

CONCLUSION 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. 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.

Claimant knew that in order to keep her job with the employer, she needed to maintain a valid driver's license and an acceptable driving record; she understood that conviction of DUII would make her driving record unacceptable to the employer. Claimant also knew that despite her serious and sustained efforts to recover from alcoholism, she occasionally relapsed and drank. Finally, claimant was aware of the consequences of driving after consuming alcohol, since she had been convicted of DUII in 2006. On October 27, 2015, claimant nonetheless chose to drive after she consumed alcohol. She therefore consciously engaged in conduct that she knew or should have known would cause her to lose her job due to an inability to fulfill the requirements of her position.

Claimant argued, however, that her behavior on October 27 was not volitional. She asserted that when she relapses and consumes alcohol, the disease of alcoholism prevents her from thinking logically or rationally. According to claimant, the drive that resulted in her arrest occurred because of a disordered thought process caused by her disease, and not from by any deliberate decision on her part. Although claimant may have been unable to refrain from consuming alcohol, she was capable of deciding whether to drive. Claimant's choice to leave her home and drive after she had been drinking was a conscious act, and one undertaken with the knowledge that it violated the employer's expectations and requirements.

Claimant's actions cannot be excused as an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). Conduct that violates the law, such as claimant's driving while under the influence of intoxicants, is not an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(D). Nor is conduct that makes a continued employment relationship impossible, such as engaging in conduct that results in an unacceptable driving record when driving is a condition of employment, an isolated instance of poor judgment. *Id.*

Nor can claimant's behavior be excused as a good faith error. Based on the evidence in the record, we find no reason to conclude that claimant sincerely but mistakenly believed that the employer would excuse the conduct that resulted in her conviction for DUII.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-57351 is affirmed.

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

DATE of Service: May 19, 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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