

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1318

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #172531). Claimant filed a timely request for hearing. On November 9, 2016, ALJ McGorin conducted a hearing, and on November 9, 2016 issued Hearing Decision 16-UI-70877, concluding the employer discharged claimant, but not for misconduct. On November 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB with its application for review, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, including the exhibits admitted at hearing, but did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant from March 17, 2015 to August 25, 2016 as a delivery specialist.

(2) Claimant's duties included driving the employer's vehicle to deliver auto parts to professional customers on a daily basis. As a driver for the employer, the employer expected claimant to refrain from being charged or convicted with driving under the influence of intoxicants (DUI), and from engaging in activities that could result in an arrest for DUI. Claimant knew or should have known the employer's expectations from its policy manual and as a matter of common sense.

(3) On August 24, 2016, claimant went to a bar after work and consumed two beers and no food. As he left the bar in his vehicle, he noticed a police officer parked across the street. The police officer began to follow claimant. Claimant did not feel impaired by alcohol while he was driving. Shortly after he left the bar, he dropped a lit cigarette while driving, and swerved and crossed the outside line on the road, while trying to pick up the cigarette in his vehicle. The police officer then pulled claimant over. Claimant stopped, and as he exited the car, bumped against his vehicle when the police officer pointed his flashlight in claimant's eyes. The police officer administered a field sobriety test, including three

breathalyzer tests, told claimant that he smelled of alcohol, and arrested claimant. One of the three breathalyzer tests showed claimant had a blood alcohol level of 0.14 percent. Claimant was released 45 minutes after being taken into custody.

(4) Claimant was never charged with DUII and his license was not suspended as a result of the arrest.¹

(5) On August 25, 2016, claimant reported to work on time and told his supervisor he was arrested for DUII on August 24, 2016.

(6) On August 26, 2016, the employer discharged claimant because claimant was arrested for DUII.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant, but not 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) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer's policy manual only prohibited an employee from driving when he had a recent conviction or currently pending charges for DUII (Exhibit 1 at 20, 25), and did not state that claimant must refrain from a mere arrest for DUII, claimant knew or should have known as a matter of common sense that, as a driver for the employer, the employer expected him to refrain from engaging in conduct that could result in a DUII arrest. Considering that claimant left a bar immediately before he drove, swerved when he was driving, bumped against his vehicle when he exited, smelled like alcohol, and had a breathalyzer test showing a blood alcohol level above the legal limit in Oregon,² the police officer likely had probable cause for a DUII arrest.

¹ OAR 471-030-0038(3)(c) (August 3, 2011) provides that 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. EAB did not analyze this case under OAR 471-030-0038(3)(c) because the record shows claimant's license was not suspended as a result of the DUII arrest.

² ORS 813.010(1)(a) states that a person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person has 0.08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath of the person.

However, to conclude that claimant's discharge was for misconduct, the preponderance of the evidence must show that claimant acted with a willful or wantonly negligent disregard of the employer's expectations by consciously engaging in conduct he knew or should have known would probably result in a DUII arrest. The record shows that claimant consumed two beers before driving and did not feel impaired when he was driving. That he drove despite seeing a police officer parked across the street from him when he left the bar tends to corroborate his testimony that he did not believe he was impaired. Although the breathalyzer test result indicated that claimant consumed more than two beers, claimant suggested at hearing that the results of the breathalyzer tests were unreliable because the officer had him take the test three times, and may not have administered it correctly. Moreover, claimant was never charged with DUII despite the breathalyzer results. Audio Record at 25:04 to 26:09. Regarding claimant's behavior at the time of arrest, claimant's uncontroverted testimony was that he swerved because he dropped a cigarette and bumped into his car because the officer shined a light into his eyes, and not because he was impaired by alcohol. In sum, the preponderance of the evidence shows that more likely than not, claimant's conduct was not the result of his alcohol consumption or other conscious conduct that he knew or should have known would result in a DUII arrest.

Because the record fails to show that claimant made a conscious decision to engage in behavior that he knew or should have known would result in a DUII arrest, the record does not show claimant acted with a willful or wantonly negligent disregard of the employer's expectations or interest on August 24. Thus, the record does not show the employer discharged claimant for misconduct. Claimant is not disqualified from the receipt of benefits based on his work separation from the employer.

DECISION: Hearing Decision 16-UI-70877 is affirmed.

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

DATE of Service: December 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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