

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0104**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 170240). Claimant filed a timely request for hearing. On January 23, 2017, ALJ Shoemake conducted a hearing, and on January 26, 2017 issued Hearing Decision 17-UI-75493, reversing the Department's decision. On January 30, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** Although the ALJ stated in Hearing Decision 17-UI-75493 that Exhibit 1 had been admitted into evidence, she actually excluded it because it was not provided to the employer prior to the hearing. Audio at ~6:21. We correct the hearing decision to reflect the ALJ's evidentiary decision. Accordingly, EAB did not consider Exhibit 1 when reaching this decision.

**FINDINGS OF FACT:** (1) City of Salem employed claimant as an electrician in its signal shop from June 2, 2014 until November 8, 2016.

(2) The employer required claimant to hold and maintain a valid commercial driver's license (CDL) to perform his job duties. Claimant understood this requirement.

(3) On or shortly before October 11, 2016, a law enforcement officer stopped claimant when he was driving. The officer told claimant that he suspected claimant had been driving while under the influence of intoxicants (DUII). The officer read claimant his Miranda rights and asked claimant to submit to a breathalyzer test. Claimant told the officer he was not intoxicated and he would take the breathalyzer test, but he wanted to speak with an attorney before he "did anything." Audio at ~20:46. The officer told claimant, "That's not how it works." Audio at ~21:06. Claimant did not intend to refuse the breathalyzer test by asking to speak first with an attorney. The officer did not administer a breath test to claimant and reported that claimant had refused to take the breathalyzer test. The officer cited or arrested claimant for DUII.

(4) On October 11, 2016, claimant's class C driver's license and his CDL were suspended for his alleged refusal to submit to the breathalyzer test. On or shortly before October 11, 2016, claimant reported to the employer that he had been stopped for a suspected DUII and that his class C driver's license and his CDL had been or was going to be suspended. Sometime after October 11, 2016, claimant learned that his class C driver's license was suspended for one year and his CDL was suspended for three years as a result of his alleged refusal to submit to the breathalyzer test.

(5) On November 8, 2016, the employer discharged claimant because his CDL and regular driver's license were suspended and it was determined that claimant could no longer perform the duties of the job for which he had been hired.

(6) Sometime after November 8, 2016, the DUII charges against claimant were dismissed. The suspension of claimant's driver's licenses remained in effect since his alleged refusal to submit to the breathalyzer test remained undisturbed.

**CONCLUSIONS AND REASONS:** 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 connected with work. 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 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).

Although the ALJ determined that OAR 471-030-0038(3)(c) applied in considering whether claimant engaged in misconduct, we disagree. That regulatory provision is limited to situations where a claimant was discharged for failure to maintain a license, certification or similar authority necessary to the performance of an *occupation*. OAR 471-030-0038(3)(c) (emphasis added). Here, claimant was employed as an electrician. The CDL that claimant failed to maintain was not required for him to engage in the occupation of an electrician. While maintaining a valid CDL was a requirement of working for the employer as an electrician in its signal department, a job requirement is different from an occupational requirement. As such, whether claimant's loss of the CDL was misconduct is properly assessed under the general misconduct provision at OAR 471-030-0038(3)(a).

Even though the DUII charges brought against claimant were ultimately dismissed, and he might not have been intoxicated at the time he was stopped by law enforcement, his CDL and his class C driver's license could still lawfully be suspended for three years and one year, respectively, based on a refusal to submit to a breathalyzer test. *See* ORS 813.420(1) (class C license); ORS 809.510(4) (CDL). The issue is whether claimant's behavior that led the law enforcement officer to report that claimant had refused to submit to the breathalyzer test constituted willful or wantonly negligent behavior. As claimant

described his encounter with the law enforcement officer, he was willing to take the breath test, but asked to speak first with an attorney. We cannot conclude that claimant knew or should have foreseen that his request to consult with an attorney would be interpreted by the officer as a refusal to take the breath test and that such an interpretation would result in the suspension of both his class C driver's license and his CDL. At worst, it appears that claimant's behavior that led to the suspensions was inadvertent or the result of a mistaken understanding of how the officer would interpret his request to consult with an attorney. Because there is no evidence in this record that claimant knew or should have known that what he said to the officer would probably result in the loss of his driver's licenses, that behavior was neither willful nor wantonly negligent, and the loss of license that resulted from that behavior did not constitute misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

**DECISION:** Hearing Decision 17-UI-75493 is affirmed.

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

**DATE of Service:** February 23, 2017

**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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