

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0243

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100057). Claimant filed a timely request for hearing. On February 14, 2018, ALJ S. Lee conducted a hearing, and on February 16, 2018 issued Hearing Decision 18-UI-103493, affirming the Department's decision. On March 7, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Double Mountain Brewery employed claimant as a warehouse assistant from April 2014 to January 4, 2018.

(2) The employer required that claimant maintain a valid driver's license as a condition of employment, because her duties routinely necessitated that she drive between the employer's warehouse and brewery. Claimant understood the employer's requirement.

(3) On December 30, 2017, claimant consumed three beers then drove her vehicle and was in an accident. Police administered a breathalyzer test to claimant after the accident, and the result showed a .21 blood alcohol content. Claimant was cited for driving under the influence of intoxicants (DUII) and notified that her driver's license was suspended effective January 30, 2018.

(4) Claimant reported the DUII and loss of license to the employer. The employer's insurance company refused to extend coverage for drivers cited for DUII. The employer did not have sufficient non-driving work to keep claimant employed, and, on January 4, 2018, discharged claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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.

The employer discharged claimant because of the effects her off-duty conduct, the DUII and resultant loss of license and insurability, had on her ability to meet the requirements of her job. When an individual's off-duty conduct results in their discharge, the relevant inquiry is whether claimant willfully or with wanton negligence created the situation that made it impossible to comply with the employer's requirements. *See accord Weyerhauser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991). In this case, claimant chose to consume three beers and drive her vehicle, consciously engaging in a course of action that foreseeably resulted in her loss of license and insurability, both of which meant she was no longer capable of performing her job for the employer. Claimant's conduct was unlawful, and, therefore, was not the result of a good faith error and cannot be excused as an isolated instance of poor judgment.¹

Claimant argued that the employer should have kept her employed performing non-driving work, as it had in the case of another employee. The question in a discharge case, though, is not whether the employer could or should have kept an individual employed, but whether the conduct that prompted the employer to discharge the individual was misconduct. In this case, for the above-stated reasons, it was. Claimant's discharge was for misconduct, and she is therefore subject to disqualification from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-103493 is affirmed.

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

DATE of Service: April 4, 2018

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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¹ Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). A good faith error occurs when an individual sincerely but mistakenly believes that they are engaging in appropriate behavior or that their inappropriate behavior would be excused or condoned. An isolated instance of poor judgment does not include unlawful conduct. OAR 471-030-0038(1)(d)(D).