

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0538

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152219). Claimant filed a timely request for hearing. On April 30, 2018, ALJ Monroe conducted a hearing at which the employer failed to appear, and on May 8, 2018 issued Order No. 18-UI-108933, affirming the Department's decision. On May 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cascadia Behavioral employed claimant from February 2015 to March 6, 2018 as a mental health intake specialist.

(2) The employer expected claimant to be able to pass a Department of Human Services (DHS) background check as a condition of employment as an intake specialist. Claimant submitted to a background check through DHS at hire, but the employer did not inform claimant that he was required to notify the employer or pass a background check again during his employment if he were arrested for or convicted of a crime.

(3) On January 7, 2018, after consuming two beers within 60 to 90 minutes, claimant did not feel intoxicated and did not feel as though he had consumed more than the legal limit of alcohol permitted before driving. Claimant drove a vehicle and a police officer pulled him over for allegedly driving in excess of the speed limit. The officer told claimant that he smelled alcohol. Claimant submitted to a breathalyzer test and it showed a blood alcohol level of 0.09 percent. The officer arrested claimant and he was charged with driving under the influence of intoxicants (DUII) and driving in excess of the speed limit.

(4) On January 12, 2018, claimant reported the January 7 arrest to the employer because he wanted to ensure that he was in "good standing" with the employer. Audio Record at 17:31 to 18:00. The employer gave claimant no instructions or other response at that time. On January 16, 2018, the employer asked claimant to submit to a background check through DHS, and claimant complied.

(5) On January 22, 2018, claimant's supervisor told claimant not to report to work because the employer was placing him on administrative leave while the background check was pending. Claimant's supervisor told him that the DUII charge would not necessarily result in termination and that other employees had been arrested for DUII and been permitted to continue working for the employer.

(6) On March 2, 2018, claimant entered a plea of no contest to the DUII charge and entered the court's diversion program.

(7) In early March 2018, DHS notified the employer that claimant did not pass the background check. On March 6, 2018, the employer discharged claimant because he did not pass the background check.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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) (January 11, 2018) 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).

In Order No. 18-UI-108933, the ALJ implicitly applied OAR 471-030-0038(3)(c) in considering whether claimant engaged in misconduct. In doing so, the ALJ concluded that claimant was discharged for misconduct because he chose to drink and drive under circumstances where he knew or should have known that his behavior "could foreseeably result in his no longer having the legal authority" to keep working for the employer.¹ OAR 471-030-0038(3)(c) 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). Claimant was employed as a mental health intake specialist, and the evidence shows that the requirement that claimant have and maintain a criminal background acceptable to DHS was a condition of his employment in the position of intake specialist with the employer. However, because there is no evidence in the record showing that a DHS-approved criminal background check was necessary to maintain a license or certification necessary to perform the general occupation of a mental health intake specialist, we do not apply OAR 471-030-0038(c) to this case. Nor does the record show that claimant's conduct on January 7, 2018 constituted willful or wantonly negligent behavior.

Although the employer never told claimant that it would require him to have a new background check after an arrest for DUII, claimant knew or should have known as a matter of common sense that the

¹ Order No. 18-UI-108933 at 3.

employer would probably require him to maintain his ability to pass a DHS criminal background check to continue working for the employer. Therefore, claimant knew or should have known as a matter of common sense that the employer expected him to refrain from engaging in conduct that could result in criminal charges, such as a DUII charge. 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 charge. Although the breathalyzer test result indicated that claimant's blood alcohol content was more than the legal limit, the uncontroverted evidence in the record is that claimant consumed two beers within one and one half hours and did not feel as though he was impaired when he drove. The evidence does not show that it was more likely than not that claimant knew or should have known that his alcohol consumption on January 7 would probably result in a DUII charge or a failed DHS background check, or that he was indifferent to the consequences of his actions.

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 charge, the record does not show claimant acted with a willful or wantonly negligent disregard of the employer's expectations or interest on January 7. 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: Order No. 18-UI-108933 is set aside, as outlined above.

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

DATE of Service: June 29, 2018

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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