

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0835**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142342). Claimant filed a timely request for hearing. On August 6, 2018, ALJ S. Lee conducted a hearing at which the employer did not appear, and on August 10, 2018 issued Order No. 18-UI-114776, affirming the Department's decision. On August 24, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. Claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering this new information during the hearing. Under OAR 471-041-0090(2) (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Rodda Paint Co. employed claimant as an outside sales representative from April 9, 1985 until June 8, 2018.

(2) As a condition of working as an outside sales representative, the employer required claimant to hold and maintain a valid driver's license. Driving was an essential function of the job of outside sales representative, as the employer described that job. Claimant understood the employer's requirements.

(3) On Saturday, April 7, 2018, claimant was off work and had a meal at a restaurant. During the meal, claimant drank some alcoholic beverages. While driving home, claimant looked in his rear view mirror and saw an injured woman down on the pavement in a crosswalk that he had just travelled through. Claimant was not aware of his vehicle striking or making contact with the woman, but he pulled over and stopped. Police arrived at the scene and questioned claimant. The police administered a breathalyzer test to claimant and he failed that test. Claimant was cited for driving under the influence of intoxicants (DUI).

(4) Sometime after April 7, 2018, claimant's driver's license was suspended. Claimant notified the employer of the suspension. The employer assigned claimant to work for which he did not need to drive until June 6, 2018, when a hearing on his DUI was scheduled. The employer notified claimant that if he did not obtain a valid driver's license by June 7, 2018, he would be discharged. Later, the June 6, 2018 hearing was postponed until June 26, 2018. As a result, claimant did not hold a valid driver's license on June 7, 2018.

(5) On June 8, 2018, the employer discharged claimant because he did not have a valid driver's license and was unable to perform his duties as an outside sales representative.

(6) On June 26, 2018, claimant pleaded guilty to DUI.

**CONCLUSIONS AND REASONS:** 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 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 has the burden to show by a preponderance of the evidence that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As distinct from the general misconduct standard set out at OAR 471-030-0038(3)(a), a more specific misconduct standard is set out at OAR 471-030-0038(3)(c) for the failure to maintain an occupational license. However, the more specific standard is limited to situations where the license is "necessary to the performance of an *occupation*," and not merely to the performance of a particular job for a particular employer. OAR 471-030-0038(3)(c) (emphasis added). There is insufficient evidence in this record for us to conclude that a driver's license is necessary under all circumstances to provide services as an outside sales representative for all employers who employ individuals in such a capacity. For this reason, it is most appropriate to apply the general misconduct standard to claimant's situation rather than the more specific one for the loss of an occupational license.

At hearing, claimant appeared to contend that since he lost his driver's license as a result of behavior that occurred while he was off-duty and that was outside the course and scope of his employment, it was not the sort of work-connected misconduct that should disqualify him from benefits. Audio at ~9:40, ~19:49. However, it has been consistently held that if off-duty behavior has a reasonable likelihood of affecting the individual's ability to perform his or her work for the employer, it is sufficiently work-connected that it may constitute disqualifying misconduct. *See Barnes v. Employment Department*, 171 Or App 342, 15 P3d 599 (2000) (off-duty DUII arrest and subsequent loss of driver's license was work connected and might constitute work-related misconduct because possession of driver's license was a job requirement, and claimant's off-duty behavior created the situation that made it impossible for him to continue to comply with the employer's job requirement); *see also Levu v. Employment Department*,

149 Or App 29, 941 P2d 1056 (1997); *Sun Veneer v. Employment Division*, 105 Or App 198, 804 P2d 1174 (1991); *Geise v. Employment Division*, 27 Or App 929, 557 P2d 1354 (1976). Because the employer required claimant to maintain a valid driver's license as a condition of employment, claimant's off-duty behavior that caused him to lose his driver's license may constitute work-related misconduct if it was the result of willful or wantonly negligent off-duty behavior.

Claimant did not contend that he was not driving under the influence on April 7, 2018 or that the breathalyzer test that was administered to him did not accurately reflect his blood alcohol content at that time. Claimant chose to drink alcohol and drive on April 7 under circumstances when he knew or should have known that he risked being stopped and tested for DUI and, if his blood alcohol tested above the legal limit, he likely would lose his driver's license. Claimant's behavior in doing so was at least wantonly negligent.

Although claimant's behavior was wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment if, among other things, it did not violate the law or was not tantamount to unlawful conduct. OAR 471-030-0038(1)(d)(D). Here, the behavior that led to claimant's loss of his driver's license violated Oregon criminal statutes. *See* ORS 813.010. As such, it may not be excused as an isolated instance of poor judgment.

Nor may claimant's behavior be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that his behavior in driving under the influence was due to having misunderstood the employer's standards or based on a good faith belief that the employer would allow him to do so. There is insufficient evidence in the record to find that claimant's behavior on April 7, 2018 was the result of a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-114776 is affirmed

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

**DATE of Service:** September 26, 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](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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