

**SAMPLE ACCEPTABLE
PETITIONER'S OPENING BRIEF
UNEMPLOYMENT CASE**

(updated January 1, 2011)

Disclaimer: This sample brief is adapted from a real brief filed in a real case. Identifying information, including names, addresses, and telephone numbers, has been altered or omitted. The substance is either unchanged or, in only a few places, slightly modified or shortened. The court does not offer this brief for or otherwise endorse the substance of the arguments. This brief is presented only as a sample brief that acceptably complies with the form and format requirements of the Oregon Rules of Appellate Procedure (ORAP).

[Note: this page (the "cover") must be blue paper
of at least 65 lb. weight]

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN DOE,)	
)	
Petitioner,)	EAB No. 00AB0000
)	
v.)	CA A000000
)	
EMPLOYMENT DEPARTMENT)	
and EDEN COUNTY,)	
)	
Respondents.)	

PETITIONER'S OPENING BRIEF

Judicial Review from the decision of the Employment Appeals Board
dated February 29, 2000.

Michael A. Lawyer (OSB No. 000000)
[address]
Telephone: 503-555-1212 / E-mail address: m.a.lawyer@firm.com
Attorney for Petitioner

Philip Attorney (OSB No. 000000)
Department of Justice
[address]
Telephone: (503) 555-1212 / E-mail address: philip.attorney@state.or.us
Attorney for Respondent Employment Division

Reginald Barrister (OSB No. 000000)
[address]
Telephone: 503-555-1212 / E-mail address: r.barrister@edencounty.gov
Attorney for Respondent Eden County

INDEX

STATEMENT OF THE CASE

- 1. The Nature of the Proceeding and the Relief Sought.....1
- 2. The Nature of the Decision To Be Reviewed.....1
- 3. Statement of the Statutory Basis for Appellate Jurisdiction.....1
- 4. Statement of Appellate Jurisdiction.....1
- 5. Questions Presented on Review.....2
- 6. Summary of Argument.....2
- 7. Statement of Material Facts.....2

ASSIGNMENT OF ERROR.....4

The Employment Appeals Board erred in affirming the hearing decision denying petitioner benefits by ruling:

"Claimant's willful behavior resulted in the loss of a license necessary to perform his work. We conclude that the employer discharged claimant for misconduct connected with work. Claimant is disqualified from receiving unemployment insurance benefits." (Rec 100.)

ARGUMENT

- A. EAB erred in finding that a driver's license was a necessary requirement of petitioner's occupation.....5
- B. EAB erred in finding that petitioner willfully failed to maintain his driver's license.....7

CONCLUSION.....9

APPENDIX

OAR 471-030-0038.....APP-1

TABLE OF AUTHORITIES

Case:

Weyerhaeuser Co. v. Employment Div., 107 Or App 505, 812 P2d 44 (1991).....6

Statutes:

ORS 657.282.....1
ORS 657.176.....1
ORS 183.482.....1

Administrative Rule:

OAR 471-030-0038.....1, 4, 6, 7

SAMPLE

PETITIONER'S BRIEF

STATEMENT OF THE CASE

The Nature of the Proceeding and the Relief Sought

This is a Petition for Review of a decision of the Employment Appeals Board affirming the decision of an Administrative Law Judge decision denying unemployment benefits to petitioner. Petitioner requests that the decision be reversed.

The Nature of the Decision To Be Reviewed

A final decision made and entered on February 29, 2000 by the Employment Appeals Board.

Statement of the Statutory Basis for Appellate Jurisdiction

This court has appellate jurisdiction over this matter pursuant to ORS 657.282.

Statement of Appellate Jurisdiction

The Employment Appeals Board entered its decision on February 29, 2000. The Petition for Judicial Review was filed on March 3, 2000 and an Amended Petition for Judicial Review was filed on March 7, 2000.

Questions Presented on Review

A. Did the Employment Appeals Board err in finding that petitioner's action constituted misconduct under OAR 471-030-0038(3)(c)?

B. Did the Employment Appeals Board err in finding that petitioner willfully failed to maintain his driver's license?

Summary of Argument

The loss of petitioner's driver's license was not misconduct because a driver's license was not necessary to the performance of petitioner's job. For at least five (5) years, petitioner had not driven a county vehicle as part of his job and his performance reviews all accepted this conduct as satisfactory.

Petitioner did not willfully fail to maintain his driver's license, and EAB should have considered whether petitioner was wantonly negligent in not maintaining his driver's license. Under that standard, petitioner had no reason to believe that his conduct would violate the standards of behavior which an employer had a right to expect.

Statement of Material Facts

Petitioner was employed by Eden County (county) as a building official on April 1, 1989. (Tr 7.) As such, he supervised up to 12 employees. (Tr 7.) On April 1, 1993, petitioner's job description was changed to add a requirement of a current, valid driver's license. (Ex 4, pg 3.)

On October 31, 1998, petitioner's driver's license was suspended as the result of a DUII arrest. (Tr 9.) On November 2, 1998, petitioner was instructed to cease driving a county-owned vehicle at any time and to cease driving any personal vehicle on county business. (Ex 4, pg 15.) Petitioner continued to perform his duties with the exception of 12 weeks of Family Medical Leave (Tr 13) and was terminated on November 16, 1999 after a conviction for DUII. (Tr 7, 11.) The rationale given for the termination was:

"At that point, we had a conviction, we had a, you know, rather lengthy history of this kind of being a problem, we have the concerns of having a supervisor with nine field employees that couldn't do supervision, and we had the building expert in Eden County who couldn't leave his office and travel to any location, unless by foot, to be a resource to the taxpayers, the builders, and the employees of this department." (Tr 11.)

The October 31, 1998 matter did not occur while petitioner was driving a county vehicle nor during work hours. (Tr 17.) On July 26, 1995, petitioner had his driver's license suspended and that lasted until September 4, 1996 when he was cleared by his employer to drive again. (Ex 4, pg 22.) He was not disciplined as a result of this suspension (Tr 19) nor were there any warnings given to him that losing his driver's license in the future would jeopardize his employment. (Tr 19-20.)

As to petitioner's October 31, 1998 DUII arrest, he retained his driver's license following a DMV hearing (Tr 26) but the county continued to prohibit him

from driving while working for them. (Tr 26.) This was even after he notified them that he was no longer suspended. (Tr 27.) Indeed, petitioner testified that he had not been required to drive as part of his job for over five years. (Tr 26.) Petitioner testified that at no time in the prior five years had his supervisors ever complained about the level of supervision that he provided (Tr 27) nor that there was any complaint that he was not getting out to do inspections. (Tr 28.) This testimony was uncontradicted.

Petitioner's performance evaluation dated May 5, 1999 was introduced, and it showed that, as to his ability to supervise, he was doing as expected and that his operating the controls of an automobile was as expected. (Ex 4, pg 12.) Likewise, his 1996 performance evaluation (Ex 4, pg 23) and his 1997 performance evaluation (Ex 4, pg 27) all rated his supervision as being as expected, even though the undisputed testimony is that he did not drive as part of his duties.

ASSIGNMENT OF ERROR

Preservation of Error

The Employment Appeals Board erred in affirming the ALJ decision denying petitioner benefits by ruling:

"Claimant's willful behavior resulted in the loss of a license necessary to perform his work. We conclude that the employer discharged claimant for misconduct connected with work. Claimant is disqualified from receiving unemployment insurance benefits."

(Rec 100.)

Standard of Review

The Court of Appeals reviews findings of the Employment Appeals Board for substantial evidence. ORS 657.282; ORS 183.482(8)(c).

ARGUMENT

A. **Petitioner's loss of his driver's license was not misconduct.**

ORS 657.176(2)(a) requires disqualification of benefits if an employee is discharged for misconduct. Misconduct is not defined in the statute but the Employment Department has adopted OAR 471-030-0038(3)(c), which provides:

"The 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."

In this case, petitioner admits that the failure to maintain a driver's license is attributable to him. However, he contends that the evidence shows that a driver's license was not necessary to the performance of his occupation. The evidence is undisputed that for over five years, petitioner had not operated a county vehicle as part of his job and that he had essentially worked in the office. The few times he had to go out to a job site were with building inspectors to assist them and that only happened twice in the last 10 years. (Tr 29.) In the last five or six years, petitioner was out of the office for no more than one-half hour per day. (Tr 30.)

Between July 26, 1995 and September 4, 1996, a period of 406 days, petitioner was prohibited from driving as part of his duties. During that time, he

continued to perform his supervisory and building official duties as expected by his employer. No discipline resulted from this, even through the "requirement" of a driver's license was in existence, and no warning was given to petitioner that another suspension would result in any discipline, much less termination of his job.

From November 2, 1998 until his termination, petitioner was prohibited from driving while on duty, even though he got his driver's license reinstated. Petitioner's performance evaluation dated May 5, 1999 set out that he was supervising his employees as expected and was doing his duties as expected.

In contradiction to all of the evidence, employer presented testimony only from its director of human resources and risk management who testified that it was necessary for petitioner to drive as part of his supervisory duties and as part of his building official duties.

The issue then in this case was whether a driver's license was really necessary in the adequate performance of petitioner's occupation. On one hand, the court has undisputed testimony of petitioner and performance evaluations of employer which show that employer considered petitioner to be doing his job as expected without driving and even during times when his driver's license was suspended. On the other hand, the court has the unsupported assumptions of employer's director of human resources that driving was necessary to supervise and to perform building official duties. This testimony is completely contradicted by

the performance evaluations, which consistently rated petitioner as performing as expected in his supervisory and other official roles.

The standard of review in this case is whether the order is supported by substantial evidence in the record. "Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding." ORS 183.482(8)(c). Petitioner contends that no reasonable person could make a finding that a driver's license was necessary in the performance of his occupation given the fact that the county deemed his work to be as expected when he did not have a driver's license and when, for over five years, he did not drive a county vehicle in the performance of his duties.

B. Petitioner did not willfully fail to maintain his driver's license.

In order to conclude that a failure to maintain a license is grounds for disqualification, EAB must find that petitioner's conduct was either willful or wantonly negligent. OAR 471-030-0038(3)(c). In this case, EAB found that petitioner willfully failed to maintain his driver's license and based that finding on the fact that petitioner intentionally ingested intoxicants and operated a motor vehicle.

Unlike this court's decision in *Weyerhaeuser Co. v. Employment Div.*, 107 Or App 505, 812 P2d 44 (1991), cited by EAB, petitioner did not willfully create a situation that made it impossible for him to maintain his driver's license. He

successfully fought and prevailed in his DMV hearing and had his driving rights reinstated. There is no evidence from which a fact finder could conclude that it was impossible for him to prevail in his criminal case. Likewise, as set out in the first portion of this argument, petitioner was never put on notice that a failure to maintain a driver's license would result in any discipline, much less termination.

EAB should have reviewed this matter to determine if petitioner was "wantonly negligent" in failing to maintain his driver's license. OAR 471-030-0038(1)(b) provides:

"As used in this rule, 'wantonly negligent' means 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."

Given that employer did not discipline petitioner in any fashion following his 1995/96 suspension and the fact that petitioner had not drive a county vehicle in over five years, he could not have known that his conduct in driving while under the influence of alcohol on October 31, 1998 would result in a violation of the standards of behavior that employer has a right to expect of him because driving was not something that employer actually expected of him.

CONCLUSION

In conclusion, this court should set aside the order of the Employment Appeals Board.

Respectfully submitted,

Michael A. Lawyer, OSB #000000
Of Attorneys for Petitioner

EXCERPT OF RECORD

INDEX

ALJ Decision (Rec 20).....ER-2
Appeals Board Decision (Rec 35).....ER-3

SAMPLE

ALJ DECISION

[A copy of the opinion and order of the Administrative Law Judge (ALJ) was included with this brief. *See* ORAP 5.50.]

SAMPLE

APPEALS BOARD DECISION

[A copy of the Appeals Board decision was included with this brief. *See* ORAP 5.50.]

SAMPLE

APPENDIX

[A copy of OAR 471-030-0038 was included with this brief. *See* ORAP 5.52.]

SAMPLE

**CERTIFICATION OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 1,838 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Michael A. Lawyer, OSB No. 000000
Attorney for Petitioner

