

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0703**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #92951). Claimant filed a timely request for hearing. On April 14, 2014, ALJ Monroe conducted a hearing, and on April 21, 2014 issued Hearing Decision 14-UI-15662, concluding the employer discharged claimant, not for misconduct. On April 29, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer failed to certify that it provided a copy of its argument to claimant as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Sears employed claimant from May 10, 2005 to December 22, 2013 as a delivery lead supervisor.

(2) The employer expected claimant to report to work as scheduled, and prohibited unexcused absences. Claimant understood the employer's expectation.

(3) Claimant has two daughters with an ex-girlfriend. On November 27, 2013, claimant went to the ex-girlfriend's home to pick up his daughters for parenting time. Claimant and his ex-girlfriend argued outside her home, and she spit at him while he was in his truck. Claimant got out of his truck and engaged in a physical altercation with his ex-girlfriend. Claimant was not injured. His ex-girlfriend was injured. Claimant then returned to his truck and left.

(4) Claimant's regular work schedule was Monday through Friday, 8:30 a.m. to 4:30 p.m. On December 2, 2013, the Umatilla County police arrested claimant "on suspicion of domestic violence." Audio Record ~ 15:06 to 15:13. The police took claimant to jail where he remained until December 26, 2013.

(5) From December 3, 2013 to December 22, 2013, claimant did not report to work, and was unable to inform the employer when he would return to work. On December 22, 2013, the employer discharged claimant for failing to report to work.

(6) On February 24, 2014, claimant was sentenced to 30 days in jail as a result of the incident with his ex-girlfriend on November 27, 2013.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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. 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. When a claimant is discharged for failure to comply with an employer's attendance requirements due to incarceration, the relevant inquiry is whether claimant willfully, or with wanton negligence, created the situation that made it impossible for him to attend work. *See Weyerhaeuser Co. v. Employment Division*, 107 Or App 505 (1991). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he failed to report to work from December 3, 2013 to December 22, 2013 due to his incarceration. The employer reasonably expected claimant to report to work as scheduled. Claimant understood that expectation.

In Hearing Decision 14-UI-15662, the ALJ concluded that, "given claimant's testimony that his ex-girlfriend abuses medication that causes her to experience fits of anger and rage and that he acted in self-defense," claimant did not willfully or with wanton negligence create the circumstances that resulted in his inability to attend work.<sup>1</sup> The ALJ reasoned that, although claimant also engaged in the argument with his ex-girlfriend, a reasonable and prudent person would not necessarily believe that he may end up arrested and in jail for arguing with his former partner.<sup>2</sup>

However, claimant testified that he was arrested on December 2, 2013 "on suspicion of domestic violence," and that he was "charged and sentenced" on February 24, 2014. Audio Record ~ 15:06 to 15:13. Claimant also testified that his arrest resulted in a "30-day sentence." Audio Record ~ 28:30 to 28:40. Claimant did not state that he was convicted of a crime. However, based on claimant's description of the November 27, 2013 incident, and his testimony that he was sentenced to 30 days in jail, we conclude that claimant was, more likely than not, convicted of assault in the fourth degree. *See* ORS 163.160.

To have committed assault in the fourth degree under ORS 163.160, the person must have intentionally, knowingly or recklessly caused physical injury to another person. *See* ORS 163.160. Thus, if claimant was convicted of assault in the fourth degree, at minimum, claimant must have been aware of and

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<sup>1</sup> Hearing Decision 14-UI-15662 at 4.

<sup>2</sup> *Id.* at 3.

consciously disregarded a substantial and unjustifiable risk that his actions would result in physical injury to his ex-girlfriend. *See* ORS 161.085(9) (defining “recklessly”).

A conviction for assault shows that clear and convincing evidence existed to conclude that claimant committed the elements of that offense. Here, the employer must establish misconduct by a preponderance of the evidence, which is a lower evidentiary burden. Thus, claimant’s conviction is a sufficient basis upon which to conclude that claimant more probably than not committed the elements of assault. Thus, claimant was aware of and consciously disregarded the substantial risk that he would physically injure his ex-girlfriend by his actions on November 27, 2013, and claimant knew or should have known his conduct could result in incarceration and his inability to report to work. Moreover, even had claimant not been convicted of a crime, we are persuaded that claimant knew or should have known that getting out of his truck during an argument to engage in a physical altercation with his ex-girlfriend could lead to his arrest and incarceration and prevent him from reporting to work. Thus, claimant willfully or with wanton negligence created the circumstances that made it impossible for him to report to work.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Acts that violate the law or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant’s assault of his ex-girlfriend was an act that violated the law and thus exceeded mere poor judgment. Claimant’s subsequent incarceration was a foreseeable result of that conduct. Moreover, due to claimant’s extended incarceration and inability to tell the employer when he could return to work, claimant’s incarceration made a continued employment relationship impossible.

Claimant’s conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant had no reason to believe the employer might excuse his absences from work for twenty days because he was incarcerated.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-15662 is set aside, as outlined above.

Tony Corcoran and J.S. Cromwell;  
Susan Rossiter and D. E. Larson, not participating.

**DATE of Service:** June 4, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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