

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0993

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124947). Claimant filed a timely request for hearing. On May 15, 2014, ALJ Triana conducted a hearing, and on May 23, 2014 issued Hearing Decision 14-UI-18326, concluding the employer discharged claimant, but not for misconduct. On June 6, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Renew Consulting employed claimant as a program manager from February 21, 2013 to March 25, 2014.

(2) The employer operated residential group homes for autistic children. The employer expected claimant to maintain her ability to pass a criminal background check conducted by the Oregon Department of Humans Services (DHS). Claimant understood that expectation.

(3) On February 25, 2014, claimant's nephew asked claimant to drive him home to the apartment he shared with claimant's sister, and claimant did so. In the adjacent apartment lived an individual who had applied for work for the employer, but whose application had been denied after she failed a pre-employment drug test. The individual invited claimant into her apartment to discuss the matter. After leading claimant into her apartment, the individual punched claimant in the face, knocking her down. The individual held claimant on the ground until claimant was able to remove her and push her away as she fled the apartment. Claimant returned to her vehicle and drove home.

(4) On February 26, 2014, claimant was arrested and charged with felony kidnapping, burglary and assault. The kidnapping charge was dropped a few hours later. The employer learned of the felony charges, and on February 27, 2014 asked DHS to conduct a criminal background check. Claimant failed the criminal background check due to the felony burglary and assault charges.

(5) On March 17, 2014, DHS notified the employer that claimant had failed the criminal background check. On March 25, 2014, the employer discharged claimant for failing to pass the criminal background check.

(6) As of May 15, 2014, claimant had not pled guilty or no contest to, or been convicted of, felony burglary or assault, or lesser charges.

**CONCLUSIONS AND REASONS:** We agree with the ALJ 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. 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. 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 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. OAR 471-030-0038(3)(c).

In Hearing Decision 14-UI-18326, the ALJ asserted that OAR 471-030-0038(3)(c) applied to claimant's work separation because claimant was discharged for failing to maintain the authority necessary to "hold the position of program manager for the employer."<sup>1</sup> However, OAR 471-030-0038(3)(c) only applies if claimant was discharged for failing to maintain the authority necessary for the performance of her *occupation*. Because the record fails to show claimant failed to maintain the authority necessary to work as a program manager for other employers, OAR 471-030-0038(3)(a) applies to claimant's work separation, and not OAR 471-030-0038(3)(c). However, we still agree with the ALJ that claimant's discharge was not for misconduct.

The employer had a right to expect claimant to maintain her ability to pass a criminal background check conducted by DHS. Claimant violated the expectation by failing DHS's criminal background check after being charged with felony burglary and assault following the incident with her sister's neighbor on February 25, 2014. At hearing, however, claimant testified that her sister's neighbor invited her into her apartment, after which she punched claimant and held her on the ground until claimant until claimant was able to remove her and push her away as she fled the apartment. Transcript at 25-27. The record fails to show claimant pled guilty or no contest to, or was convicted of, felony burglary or assault, or lesser charges. Absent such a showing, or another basis for concluding that claimant was not a credible witness, the record fails to show she consciously engaged in conduct she knew or should have known would probably result in her being charged with felony burglary or assault. The record therefore fails to establish that claimant violated the employer's expectations willfully or with wanton negligence.

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<sup>1</sup> Hearing Decision 14-UI-18326 at 3.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 14-UI-18326 is affirmed.

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

**DATE of Service:** July 11, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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