

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0337**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On January 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103139). Claimant filed a timely request for hearing. On March 11, 2015, ALJ Murdock conducted a hearing, and on March 12, 2015 issued Hearing Decision 15-UI-35021, affirming the Department's decision. On March 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-35021 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings consistent with this order.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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) (August 3, 2011). Otherwise, OAR 471-030-0038(3)(a) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment

relationship 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 had a state-issued restricted provider number to work for the employer as a care provider for one specific client, her mother. Audio Record at 4:20 to 4:29. Claimant was required to have the provider number to work as a care provider in Oregon. In Hearing Decision 15-UI-35021, the ALJ found that claimant's work separation occurred on October 19, 2014, when claimant was arrested for assault for pinching her husband, and her mother was moved to a hospital.<sup>1</sup> However, the record shows the employer first learned of the October 19 incident on October 21, 2014. That information prompted the employer to conduct a new criminal background check, and to terminate claimant's provider number on November 17, 2014 after using a "weighing test" to consider claimant's pending criminal charges and prior convictions. Audio Record at 5:26 to 5:55, 17:14 to 17:44. The ALJ failed to develop the record necessary for a determination as to when the employer was no longer willing to allow claimant work, and thus whether the work separation occurred on October 21, November 17, or some other date.

The ALJ determined claimant was discharged pursuant to OAR 471-030-0038(3)(c) for failing to maintain a license, and that her failure to maintain a license was "reasonably attributable" to her.<sup>2</sup> Based on those findings, the ALJ concluded that the employer discharged claimant for misconduct, reasoning as follows:

"The employer discharged claimant because she was arrested for pinching her husband, her mother was moved to a residential care facility and she lost her provider number, which authorized her to care for her mother only. Claimant knew or should have known that she would jeopardize her job if she committed assault. Given that she physically assaulted her husband, her loss of authority to provide services for the employer was reasonably attributable to her and, pursuant to OAR 471-030-0038(3)(c), she was discharged for misconduct."<sup>3</sup>

To conclude claimant was discharged for failing to maintain a license, the conduct that causes the loss of the license must be willful or wantonly negligent, and attributable to claimant. With respect to OAR 471-030-0038(3)(a), the employer must show the conduct that caused the discharge was 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. Claimant testified that she was arrested for pinching her husband on the cheek on October 19, 2014 (Audio Record at 9:48 to 9:55), but that her "criminal charges have been dropped," and will be "expunged off [her] record" if she completes counseling. Audio Record at 10:05 to 10:11. However, claimant also testified that, at the time of the hearing, she was not participating in a diversion program, was on "bench probation," had to report to her judge every two weeks, and take random urinalysis tests. Audio Record at 20:35 to 21:38. These facts are consistent with a person on probation

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<sup>1</sup> Hearing Decision 15-UI-35021 at 1.

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

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

after a judgment has been entered, and not with a closed criminal case where the charges have been dismissed. The employer also testified that claimant had two adult protective services orders against her. One was a substantiated claim of physical abuse that was opened on October 23, 2014. The other was a substantiated claim opened on December 9, 2014 that claimant engaged in financial exploitation. Audio Record at 4:30 to 5:14.

The ALJ failed to conduct a full and fair inquiry sufficient to determine if claimant engaged in willful or wantonly negligent conduct. The ALJ did not clarify the status of claimant's criminal case, such as by asking whether the charges were changed post-arrest, and if so, what the current charges were, and if claimant entered a plea to the charges, had a trial, or what the conditions of her probation were. Nor did the ALJ inquire about the details of the incident that lead to claimant's arrest, such as what occurred, why the police were called for a "pinch," and whether claimant thought her conduct was criminal at the time she pinched her husband.

The record also shows claimant's mother was hospitalized on October 19, but does not show why her mother was hospitalized, or whether claimant's criminal case prevented her from caring for her mother before her provider number was terminated on November 17, 2014. The ALJ did not inquire about the details of the adult protective orders, such as whether they were part of the reason claimant lost her provider number and the employer discharged her, what conduct the reports alleged, and the relevant dates of the conduct and orders. If the work separation occurred when the state terminated claimant's provider number on November 17, 2014, additional evidence is needed about the nature of the "weighing test," and the role of claimant's criminal charges, past and present, and protective services orders in the test. Moreover, claimant testified that she had post-partum and other medical issues and was in the process of restarting her medication (Audio Record at 15:08 to 15:39), but the ALJ did not inquire whether claimant had any diagnoses that affected her mental state during the October 19, 2014 incident or, if relevant, the incidents that generated the adult services complaints.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That necessarily requires the ALJ to ensure that the record developed at hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in the case. ORS 675.270(5). Because the ALJ failed to develop the record necessary for a determination as to whether the employer discharged claimant for misconduct, Hearing Decision 15-UI-35021 is reversed, and this matter remanded to OAH for further development of the hearing record.

**DECISION:** Hearing Decision 15-UI-35021 is set aside, and this matter remanded for further proceedings consistent with this order.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-35021 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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

**DATE of Service:** May 13, 2015

**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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