

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0505

Reversed & Remanded

PROCEDURAL HISTORY: On March 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84704). Claimant filed a timely request for hearing. On April 20, 2015, ALJ Seideman conducted a hearing, and on April 24, 2015 issued Hearing Decision 15-UI-37463, affirming the Department's decision. On April 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

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. 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 her to comply with those requirements. See *Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991).

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 are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). An act is isolated if the exercise of poor judgment is 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, that are tantamount to unlawful conduct, 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).

In this case, the record shows that on January 29, 2015, claimant was arrested for allegedly driving under the influence of alcohol, and incarcerated until February 5, 2015. In Hearing Decision 15-UI-37463, the ALJ concluded that claimant's failure to personally contact the employer during her incarceration was a willful disregard of the employer's attendance policy and expectations.¹ However, the record shows that claimant was unable to report for work or personally contact the employer while incarcerated. Thus, the relevant inquiry is whether claimant willfully, or with wanton negligence, created the situation that resulted in her incarceration. The ALJ failed to conduct a full inquiry into the facts necessary for consideration of that issue, including the events resulting in claimant's arrest, and the disposition of any criminal proceedings against her. Absent such an inquiry, we cannot determine whether the employer discharged claimant for misconduct.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant consciously engaged in conduct she knew or should have known would probably result in her arrest and incarceration, Hearing Decision 15-UI-37463 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-37463 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.

DECISION: Hearing Decision 15-UI-37463 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: June 2, 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. 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.

¹ Hearing Decision 15-UI-37463 at 3.

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