

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0617**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104856). Claimant filed a timely request for hearing. On May 4, 2015, ALJ Shoemake conducted a hearing, and on May 12, 2015 issued Hearing Decision 15-UI-38294, affirming the Department's decision. On May 26, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument. Claimant's written argument contained a witness statement that was new information that was not part of the hearing record. Claimant argued that he did not present the information at hearing because the witness was not available at the time of hearing due to her work schedule. Claimant did not address the matter at hearing, ask for a continuance, request a subpoena for the witness or offer the witness's statement in writing. Thus, because it was within his control to do so, he failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered claimant's written argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Mid Valley Foods Inc. employed claimant from June 1, 2013 to February 11, 2015 as a supervisor in a fast food restaurant.

(2) Prior to June 9, 2015, claimant, who is an adult, had sexual contact at work with an employee who was under 18 years of age. Claimant knew such conduct could result in his discharge from employment. On June 9, 2015, claimant was arrested for his conduct toward the minor employee.

(3) On February 10, 2015, the minor employee told the general manager that claimant had sexual contact with her at work. Claimant was to be held in custody until the criminal matter was resolved, and was prohibited from having contact with the victim, who continued to work for the employer. On February 11, 2015, the employer discharged claimant for his conduct toward the minor employee.

(4) On March 4, 2015, claimant pleaded guilty to the crime of sexual abuse in the third degree. Claimant was given a jail sentence of 30 days and is prohibited from contacting the victim. He was incarcerated for 25 days.

**CONCLUSIONS AND REASONS:** We agree 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. 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).

The employer discharged claimant for having sexual contact with a minor employee at work. The employer had a right to expect claimant to refrain from engaging in such conduct. Claimant understood that expectation as a matter of common sense. Absent evidence to the contrary, claimant's conviction for sexual abuse is sufficient to show that, more likely than not, he consciously engaged in the conduct. Claimant's conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions, and therefore was wantonly negligent.

Claimant argued at hearing, and in his written argument, that the employer discharged him because it could not hold his job for him during his incarceration, and not due to the illegal conduct itself. Audio Record at 14:40 to 15:16; Claimant's Written Argument (June 5, 2015). Assuming, *arguendo*, that the employer discharged claimant, in part, due to his inability to report to work, the employer discharged claimant for misconduct. Claimant knew or should have known the employer expected him to maintain his ability to report to work. When a claimant's inability to comply with an employer's expectation is caused by claimant's incarceration, *Weyerhaeuser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) holds that, for purposes of determining whether claimant is disqualified from benefits, the issue is whether claimant willfully or with wanton negligence created the situation that made it impossible to comply with the employer's expectation. Claimant's incarceration and his inability to work with the minor employee were caused by his arrest for having sexual contact with the employee. Claimant created the situation which led to his incarceration with the mental state required for finding willfulness or wanton negligence. The situation which made it impossible for him to comply with the employer's expectations was caused by claimant's misconduct.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that violate the law 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 violated ORS 163.415 by committing the crime of

sexual abuse in the third degree at work. Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that claimant sincerely believed, or had a rational basis for believing, that the employer condoned his violating the law at work.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-38294 is affirmed.

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

**DATE of Service:** July 8, 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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