

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0893**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On June 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114829). Claimant filed a timely request for hearing. On June 30, 2015, ALJ Wyatt conducted a hearing, and on July 8, 2015 issued Hearing Decision 15-UI-41226, reversing the Department's decision. On July 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Shari's Management, Inc. employed claimant as a server from January 23, 2008 until March 13, 2015.

(2) The employer expected claimant to refrain from fighting with coworkers or guests of the employer's restaurant. Claimant understood the employer's expectation as a matter of common sense.

(3) On March 23, 2014 and May 9, 2014, the employer issued warnings to claimant, respectively, for arguing with a restaurant guest and for arguing with coworkers on May 1, 2 and 4, 2014 in the presence or within the hearing of restaurant guests. Exhibit 1 at 7; Exhibit 1 at 8.

(4) On December 24, 2014, some restaurant guests complained to the employer's general manager that claimant was rude to them and, while the general manager spoke with the guests, the general manager observed claimant approach the guests' table. The general manager documented her observations in an incident report. Exhibit 1 at 11. The general manager did not issue a warning to claimant for her behavior on December 24, 2014. Transcript at 15.

(5) On March 10, 2015, when claimant arrived at work, she was assigned to station one. A coworker reported for work some time later and complained to claimant about claimant's assignment to station one, which the coworker thought would generate more in tips than the station to which she was assigned

Claimant and the coworker started to argue about which one would work at station one. The coworker went to speak to the evening manager about their dispute. The evening manager went to speak to the day manager, who was still on the premises, about the station assignments. The coworker left and returned to the dining floor. Claimant and the coworker then began to yell loudly at each other about who should work at station one, within the hearing of restaurant guests. The day manager told claimant to go to the back room of the restaurant and also sent the coworker to the back. Both claimant and the coworker continued to argue loudly and to exchange insults with each other in the backroom. The coworker told claimant "You need to talk [to me] like a lady." Transcript at 34. The coworker pointed her finger at claimant as she spoke to her. Claimant then pushed the coworker's hand away from her, and both of them began to push and shove each other. The evening manager stepped between both employees. The evening manager sent both employees home.

(6) On March 11, 2015, the employer issued a warning to claimant for her behavior during the argument with the coworker on March 10, 2015. On March 13, 2015, the employer discharged claimant for fighting with the coworker on March 10, 2015.

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-41226 is reversed and this matter is remained for further development of the record.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-41226, the ALJ concluded that claimant was discharged, but not for misconduct. The ALJ reasoned that while the employer might have reasonably concluded that claimant was fighting with the coworker on March 10, 2015, the employer did not demonstrate that claimant behaved with wanton negligence because he concluded that claimant's actions in pushing the coworker's hand away from her and shoving the coworker "may well have been reflexive and essentially unthinking." Hearing Decision 15-UI-41226 at 3. As such, the ALJ implicitly concluded that claimant did not act with the "conscious" awareness of her conduct needed to establish willful or wanton negligence under OAR 471-030-0038(1)(c). The record as it currently exists does not support the ALJ's conclusion.

While claimant contended at hearing that she was not the aggressor in her March 10, 2015 argument with the coworker, this does not establish that she did not violate the employer's prohibition against fighting. While claimant might not have been the instigator of the fight, she would reasonably have violated the employer's standard if she did more than merely act in self-defense and escalated the fight. Transcript at 36-39. Claimant described the incident as one in which the coworker approached her when she was sitting down at a table in the back room of the restaurant, the coworker threatened to punch her

and, as the coworker approached her and tried to push her down in the chair, claimant attempted to ward off the coworker's attack, cut herself on the coworker's fingernails but never pushed, shoved or touched the coworker. Transcript at 37-39. Claimant's account is implausible. Claimant never persuasively explained why she did not simply get up from the table to avoid the coworker's attack other than to state that she somehow felt trapped in the chair by the presence of both managers who were onlookers. Transcript at 36. Claimant did not attempt to explain why both the day and evening managers would have written such markedly similar statements about the incident that contradicted her own, or why the managers failed to describe the type of physical attack that she contended was undertaken by the coworker. Accepting claimant's account of the actions of her coworker as accurate, it is further unlikely that claimant would not under the circumstances have pushed, shoved or touched the coworker at some point in the melee. In view of its implausibility, we cannot accept claimant's description of the incident and we accept the description of the employer's witnesses.

Assuming claimant pushed the coworker's hand away from herself and shoved the coworker, it is difficult to conclude that claimant's actions were merely "reflexive" or "unthinking," as the ALJ believed. Notably, claimant did not contend that she did not know what she was doing in the altercation with the coworker, could not control or was not aware of her behavior and did not reasonably consider that she was probably violating the employer's prohibition against fighting when she touched and pushed her coworker. However, claimant did testify at hearing that the coworker had in the past physically attacked and slapped another coworker, which was a circumstance that could have interfered with claimant's reasonable awareness that she was likely violating the employer's standards when she behaved as she did on March 10, 2015. Transcript at 35, 39. In light of this testimony, the ALJ should have, but did not, ask both parties to describe the coworker's past attack on or slapping of the other employee. The ALJ should also have explored any other factors or circumstances that might have caused claimant not to have had a conscious awareness of her behavior on March 10, 2015. Absent additional evidence, there is an insufficient evidentiary basis for the ALJ to conclude that claimant's behavior on March 10, 2015 was not willful or wantonly negligent.

If the ALJ concludes that claimant's behavior on March 10, 2015 was a willful or wantonly negligent violation of the employer's standards, the ALJ must further consider whether it was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). In this respect, the ALJ should pay particular attention to claimant's alleged past behavior on December 24, 2014. It appears to us that claimant's other behaviors allegedly in violation of the employer's standards about which she was warned on March 23, 2014 and May 9, 2014 were too remote in time to form a pattern with her behavior on March 10, 2015 that would exclude it from being excused as an isolated instance of poor judgment. *See* OAR 471-030-0038(1)(d)(A). With respect to the incident on December 24, 2014, the ALJ should inquire about the specific details of what claimant did and said in relation to the restaurant guests, and how specifically it violated an employer standard of which she was reasonably aware. As the record currently exists, there are only the conclusory statements of the employer's witness that claimant was "rude" to the guests, "argued" with them and "walked off muttering under angrily under her breath." Transcript at 13, 14; Exhibit 1 at 11. The employer should provide a particularized account of claimant's behavior on December 24, 2014 and claimant should be allowed to give her own account of what happened that day and to explain the circumstances, if any, that might mitigate her behavior on that day from otherwise being willful or wantonly negligent.

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 was discharged for misconduct or misconduct that was not otherwise excused, Hearing Decision 15-UI-41226 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 15-UI-41226 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell, participating.

**DATE of Service:** September 10, 2015

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-41266 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.

**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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