

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1088**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On July 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct, and canceling all his benefit rights based on wages earned prior to the date of discharge (decision # 91445). Claimant filed a timely request for hearing. On August 13, 2015, ALJ Vincent conducted a hearing, and on September 1, 2015 issued Hearing Decision 15-UI-43781, concluding claimant was discharged, not for misconduct, and that his benefit rights were not subject to cancellation. On September 14, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-43781 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. 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. The employer bears the burden to prove misconduct occurred by a preponderance of the 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).

The employer discharged claimant for a final incident that occurred when claimant took three marijuana plants from the employer's property on May 29, 2015. The employer asserted that claimant engaged in theft of the employer's property when he took the plants. "Theft" under Oregon law requires that an individual take or obtain the property of another with the intent to permanently deprive the owner of either the property or its value. ORS 164.015(1). The ALJ concluded that claimant did not act with the requisite intent necessary to commit theft, and therefore did not admit to theft when he admitted to the Department that he took the plants, and that his benefit rights based on wages earning prior to his discharge on May 29, 2015 should not be canceled under ORS 657.176(3)(c).<sup>1</sup> The ALJ found that the text messages claimant provided (Exhibit 1 at 20-23) established that claimant had discussed the removal of surplus plants with the employer in early May 2015, and had a good faith belief that taking the plants was permissible.<sup>2</sup> However, the ALJ failed to ask the employer's witness about the meaning and context of the text messages, what was discussed during the meeting referred to in the messages, and what the employer permitted claimant to do with the plants, if anything, on May 9 and May 11. Moreover, the record is not clear what claimant did with the plants on May 9 and May 11, and what he intended to do with the plants on May 29, 2015. Claimant's testimony is unclear if he intended to use them himself as a patient, or to sell or donate them, and to whom.

The ALJ also failed to ask the employer, and the record otherwise fails to show, whether the employer would have discharged claimant because of his other behavior during the final incident even had claimant not taken any plants. The employer's owner testified that, during the final incident on May 29, claimant was "attacking" the other owner, "tore up" that owner's shirt and neck, and struck the employer's witness in the testicles with his fist. Audio Record at 19:55 to 20:34, 21:17 to 21:54. Remand is required to develop the record regarding the basis of the employer's discharge decision and, if appropriate, what occurred during the alleged altercations, and prior incidents of misconduct, if any.

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-43781 is reversed, and this matter remanded to OAH for further development of the hearing record.

**DECISION:** Hearing Decision 15-UI-43781 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 30, 2015**

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<sup>1</sup> Hearing Decision 15-UI-43781 at 2-3.

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

**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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