

State of Oregon  
**Employment Appeals Board**  
875 Union St. N.E.  
Salem, OR 97311

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1107**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142827). Claimant filed a timely request for hearing. On September 1, 2015, ALJ Wyatt conducted a hearing, and on September 9, 2015 issued Hearing Decision 15-UI-44074, affirming the Department's decision. On September 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Coast Rehabilitation Services employed claimant as a direct support professional for developmentally disabled individuals from June 9, 2009 until June 12, 2015.

(2) The employer expected claimant to maintain the legal authority to provide care to the employer's developmentally disabled clients, which included passing a criminal background check performed by the Oregon Department of Human Services' (DHS) background check unit. DHS authorization was a prerequisite for the employer's employees to provide direct care to the developmentally disabled in Oregon.

(3) On January 25, 2014, claimant was arrested in Vancouver, Washington for several criminal offenses, including reckless driving and driving with a suspended driver's license. Sometime before April 2015, claimant pleaded guilty in Washington State Superior Court to the reckless driving charge in return for which the other charges were dismissed. As a result of the plea, claimant was assessed a monetary fine and placed on two years' probation. Claimant did not inform the employer of her arrest or conviction.

(4) In April 2015, the employer notified claimant that she needed to have a DHS criminal background check because more than two years had passed since one was last performed. On April 27, 2015, claimant completed the DHS form to authorize DHS to perform a background check. Exhibit 1 at 8-10. On that form, claimant stated that she was arrested in Portland, Oregon in 2015 and again in 2014, but

both charges were dismissed. Exhibit 1 at 10. Claimant also stated that she had been convicted of a crime in Portland in 2001. Claimant did not disclose that she was convicted of reckless driving as a result of the incident occurring on January 25, 2014.

(5) On June 4, 2015, DHS notified the employer that it had revoked its authorization for claimant to continue work as a direct support professional because of issues arising from claimant's background check. Exhibit 1 at 6. The notice instructed the employer it could not allow claimant to work pending DHS's final fitness determination. *Id.* Upon receiving this notice, the employer suspended claimant from further work. Sometime after June 4, 2015, claimant contacted DHS and was told that her background check was in question because she had been convicted of a reckless driving crime arising from the 2014 arrest.

(6) On June 12, 2015, DHS notified the employer that its final fitness determination was that claimant was denied the authorization to work with the developmentally disabled. Exhibit 1 at 4. The notice instructed the employer that claimant "may not hold the position listed above [direct support professional] effective immediately." Exhibit 1 at 4. Upon receiving this notice, the employer discharged claimant for failing to maintain the legal authority necessary to perform the position for which she was hired in the state of Oregon.

**CONCLUSIONS AND REASONS:** 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. ORS 471-030-0038(3)(c) (August 3, 2011) states that a claimant's willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to perform an occupation is misconduct, so long as the failure is reasonable attributable to the individual. In this context, 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 the individuals' failure to maintain the necessary license, certification or other similar authority.

Claimant was required to have authorization from DHS to work as a direct support professional for developmentally individuals, which included passing criminal background checks periodically administered by DHS. *See* OAR 407-007-0000(1) (January 1, 2010) OAR 407-007-0010(19)(e)(A) (January 10, 2010); OAR 407-007-0210(31) (December 1, 2014); OAR 407-007-0230(2) (December 1, 2014). DHS may deny an individual authorization to work with the developmentally disabled if the individual has been convicted of reckless driving, as defined by Oregon laws, or has been convicted of a crime in another jurisdiction that is substantially equivalent to the Oregon crime of reckless driving. OAR 407-007-0280(2)(q) (December 1, 2014); OAR 407-007-0280(2)(a). Under Oregon law, the crime of reckless driving is a class A misdemeanor and its elements are that one has operated a vehicle in a manner that willfully, knowingly, recklessly or wantonly endangered the safety of other persons or property. ORS 161.085(6); ORS 811.140. The Washington reckless driving crime of which claimant was convicted is classified as a "gross misdemeanor" and, substantially the same as in Oregon, its elements are "driv[ing] any vehicle in willful or wanton disregard for the safety of persons or property." RCW 46.61.500(1). Since DHS had the authority to deny claimant the continued authority to work with developmentally disabled individuals based on her conviction of a crime that was the substantial

equivalent of reckless driving in Oregon, it had the authority to deny claimant that authority after she was convicted in a Washington State court under RCW 46.61.500.

Claimant's guilty plea to the Washington state crime of reckless driving establishes that she engaged in the behavior underlying that crime and, more likely than not, that she had the willful or wantonly negligent mental state required for a conviction under RCW 46.61.500. Since the Washington and Oregon statutes and regulations are published and readily available, it can be imputed that claimant knew or should have known that the behavior in which she engaged on January 25, 2014 would probably result in her failure to maintain the legal authority necessary to work as a direct support professional to the developmentally disabled in Oregon. Claimant's failure to maintain that legal authority was reasonable attributable to her own behavior and her indifference to the consequences of her actions, and therefore was wantonly negligent.

Claimant's behavior on January 25, 2014 cannot be excused from constituting misconduct as an "isolated instance of poor judgment" or a "good faith error" under OAR 471-030-0038(3)(b). Since 2004, the Department has interpreted OAR 471-030-0038(3)(c) to mean that the willful or wantonly loss of the legal authority to perform an occupation is a form of misconduct per se that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). See December 27, 2004 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling within OAR 471-030-0038(3)(c). Since we have determined that the behavior for which the employer discharged claimant falls within OAR 471-030-0038(3)(c), it cannot be excused either as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b).

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

**DECISION:** Hearing Decision 15-UI-44074 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

**DATE of Service:** October 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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