

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1185**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On July 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125949). Claimant filed a timely request for hearing. On September 11, 2015, ALJ Shoemake conducted a hearing, and on September 15, 2015 issued Hearing Decision 15-UI-44376, affirming the Department's decision. On October 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). Isolated instances of poor judgment and good faith errors are not misconduct.

EAB considered the employer's written argument and the entire hearing record.

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-44376 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. 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).

In Hearing Decision 15-UI-44376, the ALJ found that the employer discharged claimant for soliciting a loan from a coworker on May 3, 2015.<sup>1</sup> The ALJ concluded that claimant's conduct on May 3, 2015 was a willful violation of the employer's expectations and was misconduct and not an isolated instance of poor judgment.

An instance of poor judgment is isolated if it 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). The ALJ concluded that the May 3, 2015 incident was not isolated because claimant had previously requested loans from coworkers in May 2013.<sup>2</sup> However, this conduct was too remote in time to constitute a repeated act or pattern of willful or wantonly negligent behavior.

At hearing, the employer's witness testified that the employer received information about other incidents of poor judgment after May 2013.<sup>3</sup> However, the ALJ did not allow the witness to testify about the prior incidents because she concluded, incorrectly, that those incidents were irrelevant because the employer did not know about those incidents at the time of discharge.<sup>4</sup> It is immaterial to the isolated instance of poor judgment analysis whether an employer considered the prior instances in deciding to discharge the claimant. The prior conduct is relevant to determine if the final incident was a repeated act or pattern of other willful or wantonly negligent behavior. *See Michael W. Smith* (Employment Appeals Board, 09-AB-0553, March 20, 2009). The ALJ did not develop the record adequately to determine the nature of the prior incidents in question, or if any or all constituted willful or wantonly negligent conduct.

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's conduct on May 3, 2015 was an isolated instance of poor judgment, Hearing Decision 15-UI-44376 is reversed, and this matter remanded for development of the record.

**DECISION:** Hearing Decision 15-UI-44376 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: October 22, 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,

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<sup>1</sup> Hearing Decision 15-UI-44376 at 3.

<sup>2</sup> *Id.* at 1, 3.

<sup>3</sup> Audio Record at 16:37 to 17:09.

<sup>4</sup> *Id.*

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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