

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1282**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On September 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 122827). The employer filed a timely request for hearing. On October 12, 2015, ALJ Murdock conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46006, concluding the employer discharged claimant for misconduct. On October 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record, including a document submitted by claimant entitled “Notice of Separation”, which the ALJ marked and received into the record as Exhibit 1. Transcript at 7; Exhibit 1; Hearing Decision 15-UI-46006 at 1. EAB did not consider additional documents submitted by claimant, which the ALJ marked as Exhibit 2, but did not receive into the hearing record. Exhibit 2; Hearing Decision 15-UI-46006 at 1. EAB also considered claimant’s written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-46006 is reversed, and this matter received remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

OAR 471-030-0038(2)(a) (August 3, 2011) states that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). 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) defines misconduct 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. The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c). 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).

In Hearing Decision 15-UI-46006, the ALJ found that the employer terminated claimant's employment for failing to pass a criminal background check by the State of Oregon, which was necessary for claimant to continue working for the employer as a manager, after claimant was convicted of driving under the influence of intoxicants (DUII).<sup>1</sup> The ALJ further found that claimant's position included transporting the employer's clients, and that claimant understood that a DUII conviction could result in her disqualification from such employment by the State of Oregon.<sup>2</sup> Based on those findings, the ALJ concluded that the employer discharged claimant, and summarily concluded that claimant's discharge was for misconduct because "driving a vehicle while intoxicated was wantonly negligent and reasonably attributable her."<sup>3</sup>

We agree with the ALJ's findings, and her conclusion that the employer discharged claimant. However, the ALJ's conclusion that claimant's discharge was for misconduct requires a determination that she *consciously* engaged in conduct knew or should have known would probably result in her DUII conviction, that she acted with *indifference to the consequences of her actions*, and that her *failure to pass the criminal background check* was reasonably attributable to her. The ALJ conducted no inquiry into claimant's consumption of alcohol or other conduct resulting in her arrest and conviction of DUII, and failure to pass the criminal background check. Absent an inquiry into the facts necessary for consideration of whether claimant's failure to pass the criminal background check was wantonly negligent and reasonably attributable to her, the record fails to support the ALJ's conclusion that claimant's discharge was for misconduct. Nor can EAB determine whether claimant's failure to pass the criminal background check was wantonly negligent and reasonably attributable to her.

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 discharge was for misconduct, Hearing Decision 15-UI-46006 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 15-UI-46006 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

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<sup>1</sup> Hearing Decision 15-UI-46006 at 1-2.

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

<sup>3</sup> *Id.* at 4.

**DATE of Service: December 1, 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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