

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0178

Reversed & Remanded

PROCEDURAL HISTORY: On December 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 16-UI-51924). Claimant filed a timely request for hearing. On January 28, 2016, ALJ Seideman conducted a hearing at which the employer failed to appear, and issued Hearing Decision 16-UI-51924, affirming the Department's decision. On February 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-51924 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

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. 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 16-UI-51924, the ALJ found that claimant was charged with driving under the influence of intoxicants (DUII), and that the employer discharged her because the State of Oregon no longer authorized claimant to work as a nurse in the employer's assisted living facility after claimant failed a background check and was denied permission to work as a nurse while her criminal case was

pending.¹ Based on those findings, the ALJ concluded that he did not have the authority to “alter” the state’s decisions regarding claimant’s background check and authority to work as a nurse, and summarily concluded that claimant’s discharge was for misconduct.²

We agree with the ALJ’s findings, but disagree with the ALJ’s conclusion that the failed background check and subsequent denial by the state of her request to continue working was sufficient to establish claimant’s conduct was willful or wantonly negligent. To conclude that claimant’s discharge was for misconduct, the preponderance of the evidence must show that claimant consciously engaged in conduct she knew or should have known would probably result in her DUII charge, that she acted with indifference to the consequences of her actions, and that her failure to pass the background check and receive permission to continue working was reasonably attributable to her willful or wantonly negligent conduct. The ALJ conducted no inquiry into claimant’s consumption of alcohol and other conduct that resulted in the DUII charge. For example, the ALJ did not ask claimant if she consumed alcohol or another intoxicant before driving a vehicle, how much she consumed, how long she waited after consuming the intoxicant before driving, whether her blood alcohol content (BAC) was tested, and if so, what her BAC was at the time of the arrest, whether she felt impaired at the time she chose to drive, why she drove if she was feeling impaired, or for other details regarding the DUII arrest. Without evidence about the circumstances that led to the DUII charge and subsequent loss of credentials necessary to the performance of her occupation, there is insufficient information to conclude that the conduct that resulted in the DUII charge was attributable to claimant as a willful or wantonly negligent act.

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 16-UI-51924 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-51924 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: March 7, 2016

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. 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.

¹ Hearing Decision 16-UI-51924 at 2-3.

² *Id.* at 3.

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