

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0990

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121446). Claimant filed a timely request for hearing. On August 17, 2016, ALJ Seideman conducted a hearing at which the employer failed to appear, and on August 23, 2016 issued Hearing Decision 16-UI-66152, affirming the Department's decision. On August 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Marion County employed claimant from April 5, 2010 to June 15, 2016 as a certified alcohol drug counselor.

(2) Claimant was required to possess a valid Certified Alcohol Drug Counselor (CADC) certification to perform her job for the employer. Claimant obtained a CADC certification before she began working for the employer.

(3) Claimant has had a substance use disorder since she was 15 years old. Until 2014, claimant had been alcohol and drug free for 20 years. In 2014, claimant's primary care doctor prescribed claimant opiates to treat pain. Claimant had no prior experience using opiates. Claimant followed the terms of a pain contract with her doctor while using opiates for one year, including providing "pill counts" and urine samples upon request. In October 2015, claimant's doctor moved and claimant's new primary care physician refused to continue prescribing claimant pain medication. At that time, claimant experienced withdrawal symptoms and a "strong desire for opiates to alleviate [her] symptoms." As a result, claimant relapsed and misused opiates. Exhibit 4.

(4) Claimant self-reported her relapse to her program supervisor, resumed her recovery and discontinued the use of opiates. Because claimant misused opiates, the Addiction Counselor Certification Board of Oregon suspended claimant's CADC certificate on May 1, 2016.

(5) On June 15, 2016, the employer discharged claimant because she no longer possessed a valid CADC certification.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, but not for misconduct.

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 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 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). 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).

In Hearing Decision 16-UI-66152, the ALJ concluded the employer discharged claimant for misconduct. The ALJ applied OAR 471-030-0038(3)(c) and reasoned that claimant was willful or wantonly negligent in failing to maintain her CADC certification because she "had many years of experience and knew that her conduct could result in the suspension of [her certification]," and "relapsed and caused the problem to occur."¹

We agree with the ALJ's implicit determination that OAR 471-030-0038(3)(c) applies to claimant's discharge. A CADC certification was necessary for claimant to perform the work of a certified alcohol drug counselor. However, EAB disagrees with the ALJ's analysis regarding whether claimant's failure to maintain her certification was due to claimant's willful or wantonly negligent behavior. Claimant argued in her written argument, and the record shows, that claimant's misuse of opiates occurred during a relapse, which was a symptom of her substance use disorder. Claimant's doctors initiated claimant's use of opiates, a class of drugs claimant had no experience using in the past. Claimant followed the terms of her pain contract with her doctor. The record does not show that claimant engaged in conscious conduct that she knew or should have known would probably cause her to relapse, or that she was indifferent to the consequences of her actions that lead to the relapse or her misuse of opiates. Claimant's act of self-reporting and reengaging in recovery similarly show she was not indifferent to the consequences of her actions. Without evidence of conscious conduct that claimant knew would probably result in her relapse and the consequent loss of her CADC certification, or indifference to the consequences of her actions, the record does not show claimant's conduct was willful, or that it rose to the level of wanton negligence as defined under OAR 471-030-0038(1)(c).

¹ Hearing Decision 16-UI-66152 at 4.

Absent such a showing, the record fails to establish the employer discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 16-UI-66152 is set aside, as outlined above.

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

DATE of Service: September 22, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.