

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1356**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On July 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95549). On August 15, 2016, decision # 95549 became final without claimant having requested a hearing. On October 11, 2016, claimant filed a late request for hearing. On October 17, 2016, ALJ Kangas issued Hearing Decision 16-UI-69344, dismissing claimant's request for hearing subject to her right to renew the request by responding to an appellant questionnaire by October 31, 2016. On October 20, 2016, claimant filed a response to the appellant questionnaire and provided an explanation why her request for hearing was late. The Office of Administrative Hearings (OAH) considered claimant's response, on October 26, 2016 canceled Hearing Decision 16-UI-69344, and on November 8, 2016 scheduled a hearing for November 22, 2016. On November 22, 2016, ALJ Vincent conducted a hearing, and on November 30, 2016 issued Hearing Decision 16-UI-71958, allowing claimant's late request for hearing, and concluding the employer discharged claimant for misconduct.

On December 5, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). No party applied for review of that portion of Hearing Decision 16-UI-71958 allowing claimant's late request for hearing on decision # 95549. EAB therefore limited its review to whether claimant is disqualified from receiving benefits based on her work separation from the employer.

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-71958 is reversed, and this matter remanded to 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). For an act to be isolated, the exercise of poor judgment must be 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). Acts that violate the law, that are tantamount to unlawful conduct, that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). 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-71958, the ALJ found as fact that the employer discharged claimant on June 27, 2016 for violating the employer's workplace violence policy by stating to a coworker B, "I will take you out and kick your ass in the parking lot" after B made a statement to claimant during a meeting held to address a verbal disagreement claimant previously had with B. Hearing Decision 16-UI-71958 at 2, 4. The ALJ concluded that claimant's behavior was at minimum a wantonly negligent violation of the standards of behavior that an employer has the right to expect of an employee, and that it could not be excused as an isolated instance of poor judgment, reasoning as follows:

Claimant engaged in wantonly negligent conduct by participating in a verbal altercation and physical altercation with his supervisor... Claimant understood the employer's prohibition against workplace violence, yet threatened a co-worker in the presence of a supervisor. As a result of claimant's participation in these events, the employer could not trust claimant to maintain professional workplace relationships with co-workers, and could not trust claimant to disengage from potential arguments and altercations instead of participating in or advancing them...

Hearing Decision 16-UI-71958 at 4. Claimant did not dispute that she made the statement in question or at least said something close to it to coworker B and so we agree that her statement on June 27 was at least wantonly negligent. Audio Record ~ 27:00 to 30:00. However, claimant did not engage in a physical altercation as the ALJ reasoned and claimant asserted that her outburst was provoked by coworker B's behavior prior to the meeting. Audio Record ~ 27:00 to 33:00. The record does not contain sufficient details regarding that prior behavior or the disagreement between claimant and coworker B and lacks any details regarding coworker B's statement to claimant just prior to claimant's outburst. The ALJ did not conduct a full inquiry regarding those issues. The ALJ should have asked claimant what compelled her to make the outburst in question when she did and how, if at all, the employer had responded to her prior complaints about coworker B leading up to the meeting. The ALJ also should have asked the employer's witness why, if the employer considered claimant such a threat that it had no choice but to end her employment, it allowed claimant to work at least a day after the outburst before doing so, particularly considering her apology for her role in the disagreement prior to the meeting and her attempted apology for her outburst after the meeting. Finally, the ALJ should have asked the employer's assistant manager why she had been "hopeful" the employer's management would not dismiss claimant up to the point that decision was made. Audio Record ~ 37:00 to 38:00.

The remaining issue is whether claimant's behavior was truly isolated. At hearing, the employer indicated that claimant's behavior had not been a repeated act; that claimant had not engaged in *similar* behavior on any prior occasion. Audio Record ~ 24:00 to 25:00. However, the ALJ did not conduct an

inquiry sufficient to determine whether claimant's conduct was part of a pattern of *other* willful or wantonly negligent behavior that was not in any way related the employer's workplace violence policy. Absent such an inquiry, we cannot determine whether claimant's behavior was isolated within the meaning of OAR 471-030-0038(1)(d)(A) and whether the employer discharged claimant for misconduct.

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 ensure that the record developed at the hearing demonstrates a full and fair inquiry into the facts necessary for consideration of whether the employer discharged claimant for misconduct, rather than an isolated instance of poor judgment, Hearing Decision 16-UI-71958 is reversed, and this matter remanded to OAH for additional proceedings.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-71958 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

**DECISION:** Hearing Decision 16-UI-71958 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: January 18, 2017**

**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.

**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.