

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1490**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85152). Claimant filed a timely request for hearing. On September 19, 2017, ALJ Wyatt conducted a hearing, and on September 22, 2017, issued Hearing Decision 17-UI-93065, affirming the Department's decision. On October 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On November 7, 2017, the EAB issued Appeals Board Decision 2017-EAB-1183, reversing Hearing Decision 17-UI-93065 and remanding the case to the Office of Administrative Hearings for additional evidence. On December 5, 2017, ALJ Wyatt conducted a remand hearing at which claimant failed to appear, and on December 7, 2017, issued Hearing Decision 17-UI-98492, again affirming decision # 85152. On December 26, 2017, claimant filed an application for review of Hearing Decision 17-UI-98492 with the EAB.

**FINDINGS OF FACT:** (1) Pentagon Federal Credit Union employed claimant as a member services representative from May 2012 to June 20, 2017.

(2) The employer expected claimant to report for work as scheduled or notify the employer if she was going to be late or absent. The employer's attendance policy also provided that an employee was subject to termination if the employee was a "no call, no show" for three consecutive shifts, which the employer considered "job abandonment." Audio Record (September 19, 2017 hearing) ~ 9:45 to 10:30. Claimant was aware of the employer's expectations and attendance policy.

(3) Claimant was scheduled to work on June 18, 19 and 20, 2017. However, at approximately 2:00 a.m. the morning of June 17, 2017, claimant was arrested for DUII, Reckless Driving and Reckless Endangerment after she was stopped by a Lane County Sheriff's Deputy who concluded that she had been operating her motor vehicle and transporting her minor children while intoxicated. Thereafter, claimant was taken into custody and remained incarcerated until June 22, 2017, during which time she was unable to contact the employer. Claimant's children were released to her relatives.

(4) From June 18 through June 20, 2017, the employer was unaware of why claimant had not reported for work or notified the employer that she would be absent. On June 20, 2017, the employer discharged claimant for those reasons as violations of its attendance policy.

(5) On June 23, 2017, the day after claimant was released from custody, claimant became aware that she had been discharged and contacted the employer to explain her absence and failure to communicate until that time. Her request to be reinstated was denied. Claimant eventually entered a diversion program to resolve the DUII charge and pled guilty to one count of reckless endangerment, resulting in the dismissal of remaining charges.

**CONCLUSIONS AND REASONS:** We agree with the Department and ALJ. The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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 employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant on June 20, 2017 for not reporting for work or notifying the employer that she would be absent on June 18, 19 and 20, 2017 in violation of its attendance policy. Claimant did not do either on each of those days because she was incarcerated at the Lane County Jail from the early morning hours of June 17 until her release on June 22, 2017, and was unable to call the employer. Claimant had been arrested for "DUII" and "reckless endangerment"<sup>1</sup> early on June 17 after being stopped for speeding with her children in her car and failing a breathalyzer test showing that her blood alcohol level exceeded the legal limit. Audio Record (September 19, 2017 hearing) ~ 24:15 to 25:30. At hearing, claimant testified she had consumed alcohol at her residence the night of June 16 with her boyfriend, after which her boyfriend threatened both her and her children, causing her to go outside and call the police from her van. Audio Record (September 19, 2017 hearing) ~ 21:30 to 25:30. According to claimant, after about an hour, the police had not yet responded, and her boyfriend came out of the residence and angrily approached her van. Claimant testified that she became frightened and decided that it was necessary to drive herself and her children to her grandparents' house approximately five miles away. Along the way, she was stopped by the police who subsequently arrested her for the stated charges. *Id.* She later entered a diversion program to resolve the DUII charge and pled guilty to

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<sup>1</sup> ORS 163.195 Recklessly endangering another person. (1) A person commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person. (2) Recklessly endangering another person is a Class A misdemeanor. [1971 c.743 §96].

one count of recklessly endangering another person, for which she was incarcerated until June 22, 2017, after which she contacted the employer and explained her circumstances.

In Hearing Decision 17-UI-98492 the ALJ concluded the employer discharged claimant for misconduct, reasoning that under *Weyerhaeuser Co. v. Employment Div.*<sup>2</sup> claimant was at least wantonly negligent because she willfully drove at an excessive speed after drinking, which ultimately led to her arrest, subsequent guilty plea and incarceration. Hearing Decision 17-UI-98492 at 3. He also concluded that by pleading guilty to reckless endangerment, the plea itself established, as a matter of law, that she was at least wantonly negligent in creating the situation that made it impossible for her to attend work.<sup>3</sup> *Id.* We agree.

Claimant admitted at hearing that she voluntarily consumed alcohol to excess at her residence the night of June 16 with her boyfriend, but that it was only after her boyfriend threatened both her and her children and the police failed to respond, did she decide that it was necessary to drive herself and her children to her grandparents' house approximately five miles away. We considered that testimony and questioned whether, under those circumstances, she demonstrated "indifference to the consequences of [her] actions", *i.e.* was wantonly negligent, in driving while intoxicated with her children in the car. Accordingly, we remanded the case to OAH for another hearing to obtain further evidence from claimant regarding why she pled guilty to the crime of recklessly endangering another under the circumstances she described. However, claimant failed to appear at the remand hearing, so no further evidence on that issue was obtained. In the absence of such evidence, we agree with the ALJ that, under *Weyerhaeuser*, claimant's plea of guilty establishes as a matter of law that claimant was at least wantonly negligent in causing her violations of the employer's attendance policy from June 18 through 20, 2017.

Claimant's failure to comply with the employer's attendance policy over those three days cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).<sup>4</sup> Although claimant's decision to drink to intoxication and then, afterward, drive with her children in the car, may have constituted an isolated act under OAR 471-030-0038(1)(d)(D), isolated acts that violate the law, are tantamount to unlawful conduct, 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). In pleading guilty to recklessly endangering another person, claimant demonstrated that her act of driving while intoxicated with a child

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<sup>2</sup> *Weyerhaeuser Co. v. Employment Div.*, 107 Or App 505 (1991) (When an employee's violation of an employer's attendance policy occurs because of incarceration, the relevant issue for the purpose of a misconduct analysis is whether claimant willfully or with wanton negligence created the situation that made it impossible for him or her to comply with the requirements of the attendance policy.)

<sup>3</sup> The Lane County Court that handled claimant's case was not legally permitted to accept claimant's guilty plea unless claimant voluntarily made the plea, and there was sufficient evidence to establish not only that claimant committed the crime, but that she did it willfully or consciously. *See accord* ORS 135.390 (requirements of a guilty plea); ORS 161.086(9) (defining the culpable mental state for commission of recklessly endangering another person).

<sup>4</sup> To constitute an "isolated instance of poor judgment," claimant's behavior must have been 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).

in the car violated ORS 163.195. Her conduct, therefore, was unlawful, exceeded mere poor judgment and cannot be excused under OAR 471-030-0038(3)(b).

Claimant's conduct also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show that she sincerely believed or had a factual basis for believing that the employer would condone her conduct on June 17, resulting in her failures to report for work or notify the employer that she would be absent. Nor did she contend that her failure to comply with the employer's attendance policy was the result of a good faith misunderstanding of the employer's expectations rather than due to the consequences of her wantonly negligent conduct which resulted in her incarceration.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 17-UI-98492 is affirmed.

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

**DATE of Service:** February 1, 2018

**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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