

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0720

Reversed & Remanded

PROCEDURAL HISTORY: On February 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115825). Claimant filed a timely request for hearing. On April 22, 2014, ALJ Sime conducted a hearing, and on April 23, 2014, issued Hearing Decision 14-UI-15812, affirming the Department's decision. On April 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-15812 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

The employer, a whole foods distributor, employed claimant as an invoice puller and expected her to report for work as scheduled or notify it she would be absent or late no less than an hour before the start of her shift. On October 15 and December 12, 2013 claimant was absent from work for unknown reasons and received verbal and written warnings for violating the employer's attendance policy. On January 16, 2014, claimant was scheduled to be driven to work by a coworker with whom she carpooled. When the coworker failed to pick her up without any explanation, claimant notified the employer she would be late and later reported for work after obtaining a ride from an office employee. On January 17, 2014, claimant did not report for work as scheduled. "I woke up to my alarm going off but it was like on snooze." Audio Record ~17:20 to 17:30. After she awoke, she immediately called the employer, explained what had happened and offered to come to work late with a ride from her roommate. The warehouse manager told her to wait and later notified her that her employment was being terminated.

This matter comes before EAB to determine whether claimant should be disqualified from receiving unemployment insurance benefits based on her discharge from employment. ORS 657.176(2)(a) requires a disqualification from 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). An act is isolated if 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).

In Hearing Decision 14-UI-15812, the ALJ concluded the employer discharged claimant for misconduct, stating, without explanation, that claimant's January 17 failure to notify the employer she would be late prior to the start of her shift was "wantonly negligent" and that her January 17 conduct could not be excused as an isolated incidence of poor judgment because she was "late to work" on January 16 and "missed work without calling ahead" on October 15 and December 12. Hearing Decision 14-UI-15812 at 3. However, the ALJ failed to explain how, on January 17, claimant could have notified the employer an hour before her shift that she would be late due to oversleeping when she was not yet awake. In addition, the ALJ ignored the testimony of the employer's witness that claimant was discharged on January 17 for failing to report for work as scheduled rather than failing to notify the employer that she would be absent. Audio Record ~ 8:30 to 8:45. Moreover, the ALJ's finding that claimant "missed work without calling ahead" on October 15 and December 12 was not supported by the record.

Claimant testified that on January 17 she failed to report for work on time because she "woke up late" explaining "I woke up to my alarm going off but it was like on snooze." However, the ALJ failed to inquire why the alarm was "on snooze" and if claimant chose to sleep longer rather than get up and prepare to go to work when the alarm originally went off. Without this information, we are unable to determine if claimant's conduct demonstrated either a willful violation of or conscious indifference to the employer's expectation that she report for work as scheduled. The ALJ also failed to ask the employer's witness or claimant why claimant was absent on October 15 and December 16, and if or why she failed to provide timely notice of her absences on those days. Without this information, we are unable to determine if those alleged violation of the employer's attendance expectations were either willful or wantonly negligent, and if the claimant's January 17 conduct was an isolated instance of poor judgment.

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 the employer discharged claimant for misconduct, Hearing Decision 14-UI-15812 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-15812 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 14-UI-15812 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 12, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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.