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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1333

Reversed & Remanded

PROCEDURAL HISTORY: On June 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 121134). Claimant filed a timely request for hearing. On July 15, 2014, ALJ Seideman conducted a hearing, and on July 23, 2014, issued Hearing Decision 14-UI-22055, affirming the administrative decision. On August 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 2014-EAB-1333 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings consistent with this order.

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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

In Hearing Decision 14-UI-22055, the ALJ concluded that the employer discharged claimant for misconduct. In support of his conclusion, the ALJ stated that during the six months prior to the date of her discharge, claimant "had many problems in her performance. She was given several counseling and warnings and placed on actions plans." The ALJ noted the claimant received a final written warning on May 13, 2014; at a meeting concerning this warning, claimant "admitted that she was not sick with the

flu the prior two days, as she had represented. Then the next day,¹ she and the other team managers were given instructions to complete a project by 3 p.m., but claimant didn't, and she did not respond to the manager." The ALJ concluded that "[c]laimant's pattern of poor performance and poor behavior, as well as the misrepresentation regarding flu, were a willful disregard of the employer's standards, and constituted misconduct." The ALJ also concluded that claimant's failure to timely complete an assignment was not an isolated instance of poor judgment because "[t]here were many occurrences over a broad period of time."

The only incident on which the ALJ elicited claimant's testimony, however, was the claimant's failure to timely complete an assignment. Claimant testified that her failure to complete the assignment occurred because she "misunderstood" the supervisor's instructions and "misread" the email regarding the deadline by which she was expected to complete the project. (Audio ~ 22:45, 23:05). The ALJ never questioned claimant about the alleged false claim to illness that resulted in a May 13, 2014 final written warning, and never asked claimant about any of the prior incidents of poor performance. All of the information the ALJ obtained about these incidents was taken either from the exhibits, which were performance and disciplinary documents prepared by claimant's supervisors, or the testimony of claimant's supervisor. Because the ALJ did not question claimant about these matters, claimant had no opportunity to respond to the charge that she falsely claimed to be ill, and no opportunity to respond to the charge that her prior performance problems constituted a willful or wantonly negligent violation of the employer's expectations. Testimony regarding claimant's false claim of illness is necessary to assess the credibility of claimant's testimony about the final incident and to determine whether her failure to complete the project resulted from a good faith error or from a willful or wanton disregard of the employer's expectations. Testimony regarding claimant's prior performance problems is necessary to determine whether claimant's failure to timely complete an assignment was an isolated instance of poor judgment, or part of a series of actions involving 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 develop the record necessary for a determination of whether the employer discharged claimant for misconduct, Hearing Decision 14-UI-22055 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 14-UI-22055 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 15, 2014

¹ We note that the ALJ inaccurately stated the date on which claimant failed to timely complete an assignment. The record shows that claimant was directed to turn in employee performance documents, *i.e.*, "stack rankings," to her manager by 3 p.m. on May 13, 2014. Claimant gave the documents to her supervisor on May 14. (Exhibit 13).

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.

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