

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1666

Reversed & Remanded

PROCEDURAL HISTORY: On September 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122127). Claimant filed a timely request for hearing. On October 16, 2014, ALJ Seideman conducted a hearing, and on October 16, 2014 issued Hearing Decision 14-UI-27017, affirming the Department's decision. On October 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-27017 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for another hearing.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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) (August 3, 2011). Otherwise, OAR 471-030-0038(3)(a) 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. 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). With respect to OAR 471-030-0038(3)(a), isolated instances of poor judgment and good faith errors 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, acts that are tantamount to unlawful conduct, acts 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 Hearing Decision 14-UI-27017, the ALJ explicitly found that the employer employed claimant as a service technician, and that claimant's "occupation" involved driving trucks, which required a commercial driver license (CDL).¹ The ALJ implicitly found that the employer discharged claimant because his CDL was suspended after he was cited for driving under the influence of an intoxicant (DUII).² The ALJ therefore applied OAR 471-030-0038(3)(c) to claimant's work separation, and concluded that the employer discharged claimant for misconduct because the suspension of his CDL "made him unable to perform the duties and functions of his employment," and the DUII "citation was reasonably attributable to claimant."³

However, the ALJ failed to conduct a full inquiry into the facts necessary for consideration of whether maintaining a CDL was necessary to the performance of claimant's *occupation* as a service technician, or merely a condition of employment as a service technician with the employer. Nor did the ALJ conduct a full inquiry into the facts necessary for consideration of whether the employer discharged claimant for failing to maintain his CDL, or for being cited for DUII, regardless of whether his license was suspended. Absent such inquiries, we cannot determine whether OAR 471-030-0038(3)(c) or OAR 471-030-0038(3)(a) applies to claimant's work separation.

The ALJ also failed to conduct a full inquiry into the facts necessary for consideration of whether claimant's citation for DUII was a wantonly negligent violation of the employer's reasonable expectations, or that his failure to maintain his CDL was wantonly negligent and reasonably attributable to him. For example, the ALJ did not ask claimant if he consumed alcohol or another intoxicant before driving his vehicle, how much he consumed, how long he waited before driving, whether he took a breathalyzer test for alcohol and if so, what his blood alcohol content (BAC) was at the time of the citation, or for other details regarding the DUII citation. Absent such inquiries, we cannot determine whether, with indifference to the consequences of his actions, claimant consciously engaged in conduct he knew or should have known would probably result in the DUII citation or the suspension of his CDL, or whether the suspension was reasonably attributable him. Assuming that OAR 471-030-0038(3)(a) applies to claimant's work separation, a full inquiry into the facts necessary for consideration of whether claimant's conduct can be excused as an isolated instance of poor judgment or a good faith error also will be required.

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 claimant's discharge was for misconduct, Hearing Decision 14-UI-27017 is reversed, and this matter is remanded for development of the record.

¹ Hearing Decision 14-UI-27017 at 1.

² *Id.* at 1-2.

³ *Id.* at 2.

DECISION: Hearing Decision 14-UI-27017 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: December 10, 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.

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