

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1723

Reversed & Remanded

PROCEDURAL HISTORY: On August 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 162331). The employer filed a timely request for hearing. On October 6, 2014, ALJ Seideman conducted a hearing, and on October 9, 2014 issued Hearing Decision 14-UI-26732, affirming the Department's decision. On October 29, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant asked EAB to consider new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. However, because we reverse Hearing Decision 14-UI-26732 and remand this matter to OAH for another hearing on other grounds, claimant will have an opportunity to offer his new information into evidence at that time. Accordingly, we need not, and do not, decide whether EAB is allowed to consider the information under OAR 471-041-0090(2) (October 29, 2006).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-26732 is reversed, and this matter remanded to OAH for another hearing.

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, 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-26732, the ALJ found that the employer discharged claimant for unintentionally falling asleep while on break in the employee break room and sleeping for several hours after drinking a glass of wine and taking a prescription sleeping pill several hours before the start of her shift.¹ The ALJ summarily concluded that claimant did not do “anything which was a willful or wantonly negligent disregard of the employer’s interest,” or, alternatively, that “this was an isolated instance of poor judgment.”²

At hearing, however, claimant testified that she took her break early and left her communication radio, which she was required keep with her, on her cart outside the break room. Transcript at 17. The employer submitted unrefuted documentary evidence that claimant locked the door after entering the break room, admitted to the employee who awakened her that she had taken a nap, and had taken naps at work on prior occasions. Exhibits 3, 9. The employer also provided unrefuted evidence that claimant had a history of “chronic tardiness” and other attendance issues. Transcript at 8. The ALJ did not ask claimant why she took her break early, left her communication radio outside the break room and locked the door to the break room, or what she did after locking the door. Nor did the ALJ inquire why claimant told the employee who awakened her that she had taken a nap, and did not ask claimant about claimant’s prior instances of napping at work, or her history of chronic tardiness and other attendance issues. Absent such inquiries, we cannot determine whether, with indifference to the consequences of her actions, claimant consciously engaged in conduct she knew or should have known would probably result in her sleeping while on duty, and if so, whether her exercise of poor judgment was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. We therefore cannot determine whether claimant’s discharge was for misconduct, and not 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 claimant’s discharge was for misconduct, Hearing Decision 14-UI-26732 is reversed, and this matter is remanded for development of the record.

¹ Hearing Decision 14-UI-26732 at 1-3.

² *Id.*

DECISION: Hearing Decision 14-UI-26732 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: **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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