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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1799

Reversed & Remanded

PROCEDURAL HISTORY: On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114451). Claimant filed a timely request for hearing. On November 7, 2014, ALJ Vincent conducted a hearing, and on November 14, 2014 issued Hearing Decision 14-UI-28751, affirming the Department's decision. On November 19, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-28751 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

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.

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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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-28751, the ALJ found that the employer had a policy prohibiting employees from "making threats of violence," and discharged claimant for threatening another employer's truck driver with violence while on duty on July 16, 2014.[1] The ALJ found largely in accordance with a written statement claimant made during the employer's investigation that:

> On July 16, 2014 the claimant was working as a driving team with his wife. The claimant's wife was driving. She entered a truck stop and pulled to a fuel pump to refuel the truck. The claimant left the truck to go to the restroom. When he returned another driver approached him. The driver asked the claimant if the claimant's truck was at the fuel island. The claimant said it was. The driver then began telling the claimant that the claimant had no respect for other drivers. The claimant informed him that he had not put the truck at the fuel pump, but his wife was doing it to take out trash and wash windows. The other driver began yelling at the claimant. The claimant eventually walked away from the other driver, making "the finger" gesture at the other driver as he did so. The other driver came up to the claimant and asked the claimant if he wanted to have his finger broken off, and to "shove it." The claimant then became angry and told the other driver that he would get a gun. The other driver said the claimant could be arrested, and that the claimant could get his gun and he would get his. The two then parted ways.[2]

Based on those findings, the ALJ concluded that claimant's conduct was a willful or wantonly negligent violation of the employer's expectation that he refrain from threatening acts of violence, and that claimant's conduct cannot be excused as a good faith error.[3] The ALJ also summarily concluded that that claimant's conduct cannot be excused as an isolated instance of poor judgment because his conduct was "unlawful," and therefore exceeded poor judgment.[4]

First, we note that the record shows the employer's policy prohibited the use of threatening language, including threats of violence, "towards customers, supervisors or fellow employees," and not toward other employers' drivers. Exhibit 1 at 2. More importantly, the ALJ's findings are incomplete given claimant's testimony, in which he provided more detailed account of the incident with the other truck driver. Specifically, claimant testified that he was tired after having just completed a 12-hour shift, and initially apologized to the driver, who continued to yell at claimant before claimant eventually walked back to his truck, making the gesture toward the driver as he did so. Audio Record at 10:30-12:00. According to claimant, the driver circled around the other side of the truck, confronted claimant, and asked him how he would like his "finger broke off and shoved up [his] ass," and claimant responded by asking the driver how he would like claimant to "get in the truck and get a gun." Audio Record at

[1] Hearing Decision 14-UI-28751 at 2.

[2] *Id*. at 1-2.

[3] *Id*. at 2.

[4] *Id*.

12:00-12:45. Claimant testified he did not have a gun in his truck, and that when the driver told claimant he was going to his truck to get his gun, the two "parted ways" after claimant told the driver he would be gone before the driver returned. Audio Record at 12:45 to 13:00. Finally, claimant testified that told the employer he would apologize to the driver, regardless of whether he was discharged. Audio Record at 13:00 to 13:30.

Although claimant did not violate the employer's policy prohibiting the use of threatening language toward customer, supervisors or fellow employees, that employer had a right to expect claimant to refrain from using such language toward other employers' drivers while on duty. Claimant knew or should have known as a matter of common sense that his conduct on July 16 probably violated the employer's expectations, and his conscious decision to engage in such conduct demonstrated indifference to the consequences of his actions. Claimant did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, his conduct complied with the employer's expectations. We therefore agree with the ALJ that claimant's conduct on July 16 was a willful or wantonly negligent violation of the employer's reasonable expectations, which cannot be excused as a good faith error.

However, we disagree with the ALJ's conclusion that claimant's conduct was unlawful, and therefore exceeded mere poor judgment. The employer did not assert that claimants' conduct violated the law or was tantamount to unlawful conduct, and the ALJ cited no authority so support his assertion that it did, or was. The relevant statute is ORS 163.190, which provides that a person commits the crime of menacing, a Class A misdemeanor, if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physically injury. In this case, claimant asked a rhetorical question implying he was going to get a gun if the driver followed through on his threat to physically assault and harm claimant, after the driver initiated the confrontation, continued to yell at claimant after claimant had apologized, and pursued claimant and continued the confrontation after claimant had walked away. The record fails to show claimant intentionally attempted to place the driver in fear of imminent serious physical injury, and not merely to deter the driver from physically assaulting and harming him. The record therefore fails to support the ALJ's conclusion that claimant's conduct was unlawful, or tantamount to unlawful conduct.

Nor do we find that claimant's conduct created an irreparable breach of trust in the employment relationship, given the aforementioned mitigating factors, and that claimant was tired after having just completed a 12-hour shift, had no intention of getting a gun, ended the confrontation by telling the driver he would be gone before the driver returned with a gun, and offered to apologize to the driver, regardless of whether he was discharged. Nor did the employer assert, or the record show, that claimant's conduct otherwise made a continued employment relationship impossible. The record therefore fails to establish that claimant's conduct exceeded mere poor judgment. The remaining issue is whether claimant's exercise of poor judgment on July 16, 2014 was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. However, the ALJ failed to conduct an inquiry into the facts necessary for consideration of that issue or, therefore, whether the employer discharged claimant for misconduct, or 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, or an isolated instance of poor judgment, Hearing Decision 14-UI-28751 is reversed, and this matter remanded for development of the record.

DECISION: Hearing Decision 14-UI-28751 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 29, 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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