

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0286

Reversed & Remanded

PROCEDURAL HISTORY: On January 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80932). Claimant filed a timely request for hearing. On March 3, 2015, ALJ S. Lee conducted a hearing, and on March 5, 2015 issued Hearing Decision 15-UI-34594, affirming the Department's decision. On March 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-34594 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. 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, good faith errors, and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-34594, the ALJ concluded that the employer discharged claimant for a willful failure notify the employer before the start of her shift that she was unable to report for work as

scheduled.¹ The ALJ then summarily concluded that, “[b]ased on the evidence at the hearing,” claimant’s conduct was not “isolated” and could not have resulted from a good faith error.²

We agree that the record shows the employer discharged claimant for a willful violation of the employer’s expectation that she notify the employer before the start of her shift if unable to report for work as scheduled. We also agree that the record shows claimant’s conduct cannot be excused as a good faith error. However, we disagree with the ALJ’s assertion that the record shows claimant’s conduct was not an isolated instance of poor judgment.

A decision to willfully violate an employer’s reasonable standard of behavior is poor judgment, as is a conscious decision to take action that results in a wantonly negligent violation. OAR 471-030-0038(1)(d)(C). 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). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant’s failure to notify the employer before the start of her shift that she was not going to report for work as scheduled did not exceed mere poor judgment under OAR 471-030-0038(1)(d)(D). We therefore focus on the ALJ’s determination that it was not isolated.

As found by the ALJ, the record shows that on one prior occasion, claimant was unable to report for work as scheduled, attempted to notify the employer before the start of her shift, but found no one at work to answer her call.³ The record therefore fails to show that claimant made a decision to willfully violate the employers’ expectations, or a conscious decision to take an action that resulted in a wantonly negligent violation. Claimant therefore did not exercise poor judgment on that prior occasion.

As also found by the ALJ, claimant was late for work on prior occasions.⁴ However, the ALJ failed to conduct a full inquiry into the facts necessary to determine whether, on any of those prior occasions, claimant made a decision to willfully violate the employers’ expectations, or a conscious decision to take action that resulted in a wantonly negligent violation. Absent such an inquiry, we cannot determine whether claimant exercised poor judgment on any of those prior occasions, and therefore cannot determine whether claimant’s exercise of poor judgment during the final incident was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

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

¹ Hearing Decision 15-UI-34594 at 4.

² *Id.*

³ *Id.* at 2.

⁴ *Id.*

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 15-UI-34594 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-34594 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: May 1, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.