

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0545

Reversed & Remanded

PROCEDURAL HISTORY: On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision #150554). Claimant filed a timely request for hearing. On April 28, 2015, ALJ S. Lee conducted a hearing, and on May 6, 2015, issued Hearing Decision 15-UI-38024, reversing the administrative decision and concluding that the employer discharged claimant for misconduct. On May 9, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSION AND REASONS: Hearing Decision 15-UI-38024 is reversed and this matter is remanded to the Office of Administrative Hearings for further development of the record.

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, 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 15-UI-38024, the ALJ concluded that the employer discharged claimant because of claimant's unprofessional behavior on February 4, 2015. On that date, a representative of the

employer's human resource department told claimant that the amount of her monthly payroll deduction would be increased. (The employer had overpaid claimant \$7,872 in salary, and claimant had agreed to repay this amount through monthly deductions from her salary). Claimant engaged in a heated discussion with the human resources representative about the increase, during which she used foul language.

The ALJ concluded that claimant's behavior on February 4 violated the employer's policy and expectation regarding appropriate employee conduct, and then considered whether her behavior was excused from misconduct as an isolated instance of poor judgment. The ALJ concluded that claimant's behavior did not constitute an isolated instance of poor judgment under OAR 471-030-0038(1)(d)¹ because claimant had previously engaged in wantonly negligent behavior in regard to her salary overpayment. The overpayment occurred when claimant took parental leave in August 2014. Prior to going on leave, claimant submitted timesheets on which she claimed paid time off (PTO) for the entire six weeks she would be on leave. Claimant had not accrued sufficient PTO to cover the six week period, however; she erroneously assumed that the employer would stop paying her once her PTO was exhausted. The employer mistakenly paid claimant for the entire six weeks she was on parental leave. As a result, claimant was overpaid \$7,872, the overpayment that was the subject of claimant's heated discussion with the human resources representative on February 4, 2015. Hearing Decision 15-UI-38024 at 4. The ALJ concluded that "claimant was at least wantonly negligent in completing her timesheets as she did and failing to notify the employer of the issue with her receiving payment for hours she had not accrued." Hearing Decision 15-UI-38024 at 7.

The record is insufficient to determine whether claimant's conduct in regard to the salary overpayment was willful or wantonly negligent behavior, however. The ALJ failed to adequately inquire about claimant's mental state at the time she submitted the time sheets for her parental leave and received the excess salary payments. As a result, we cannot determine if claimant consciously violated the employer's expectations that she accurately prepare her timesheets and notify the employer about any discrepancies in her salary.

Claimant testified that although she knew she did not have sufficient PTO to cover her six week leave, she was "informed by my supervisor, yes, that I was to go through and put down for PTO time all the days that I would be gone." Transcript at 7-8. On remand, the ALJ should ask claimant how the employer informed employees of the amount of PTO accrued, whether claimant checked this information prior to filling out her time sheets, and if so, how much PTO did claimant determine she had available for her use. In addition, the ALJ should ask claimant who instructed her to claim PTO for the entire period of her parental leave, what specifically she was told about claiming filling out her time sheets prior to her leave, and when she was given these instructions.

In regard to the overpayment, the ALJ should ask when claimant discovered the salary overpayment, how she discovered it, and how many pay periods she was overpaid. At the hearing, claimant testified that because her paychecks were automatically deposited in her bank account, she failed to notice that \$7,872 in salary to which she was not entitled had been deposited in her account. Transcript at 14. Claimant also testified that she did not look at her bank account during her six weeks of parental leave,

¹ Under OAR 471-030-0038(1)(d)(A), an act is an "isolated instance of poor judgment" if it is "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior."

and that she spent the excess salary she received, and, as a result, agreed to repay the employer through a payroll deduction plan when she returned to work. Transcript at 8 and 14. On remand, the ALJ should ask claimant why she failed to check her bank account while she was on leave, and whether she has overdraft protection for or some type of credit line attached to her bank account that would make it less likely she would need to monitor her account.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires that the ALJ 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 to determine if claimant's conduct regarding her timesheets and salary overpayment constituted willful or wantonly negligent behavior, we cannot determine if the February 4, 2015 incident that resulted in claimant's discharge was an isolated instance of poor judgment. Hearing Decision 15-UI-38024 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 15-UI-38024 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 29, 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.

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