

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0557

Reversed & Remanded

PROCEDURAL HISTORY: On March 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133213). Claimant filed a timely request for hearing. On April 29, 2015, ALJ Seideman conducted a hearing, and on May 5, 2015, issued Hearing Decision 15-UI-37922, affirming the Department's decision. On May 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the hearing record.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-37922 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional proceedings.

This matter comes before EAB to determine whether, on the facts developed at the hearing, claimant should be disqualified from receiving benefits based on his discharge from employment. 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). 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 that violate the law, that are tantamount to unlawful conduct, 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).

The employer asserted that it received a complaint from claimant's female coworker that claimant had made statements of a sexual nature to her and engaged in other conduct that made her uncomfortable, and that on July 3, 2014, he informed claimant he would investigate and directed him to not contact the coworker for any reason, which directive claimant violated. Transcript at 5-10. Claimant asserted that any statements he made were made three to four months earlier in response to the female's conduct toward him and otherwise denied his coworker's allegations. Transcript at 12-14. In Hearing Decision 15-UI-37922, after finding that claimant disobeyed the owner's directive on July 3 to not contact his female coworker, the ALJ concluded, without analysis, that claimant's conduct could not be excused as an isolated instance of poor judgment because of his prior sexually related statements and conduct:

The next question is whether they were an isolated instance of poor judgment. They were not. There were many over a period of time...

Hearing Decision 15-UI-37922 at 4. Assuming, *arguendo*, that claimant's conduct in contacting the complaining coworker on July 3 was at least wantonly negligent, the ALJ did not inquire and the record fails to show if the owner ever notified claimant of the policy regarding sexual harassment, had ever questioned the coworker about when claimant allegedly made sexual comments to her or had ever questioned her about claimant's assertion that any sexual comments or actions between them had been mutual and made in jest. This was particularly important because the allegations against claimant were based largely on written hearsay statements from the female coworker and another employee, each prepared after claimant was discharged and read into the record but never provided to claimant. Transcript at 18-27. Because the ALJ failed to conduct a thorough inquiry regarding the specified issues, the record is insufficient to determine whether claimant's conduct in contacting his coworker to encourage her to be truthful to the owner could or could not be excused as 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 ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of whether claimant's discharge was for misconduct, Hearing Decision 15-UI-37922 is reversed, and this matter is remanded to OAH for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-37922 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

DECISION: Hearing Decision 15-UI-37922 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: July 6, 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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