

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1187

Reversed & Remanded

PROCEDURAL HISTORY: On August 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71541). Claimant filed a timely request for hearing. On September 16, 2015, ALJ Messecar conducted a hearing, and on September 23, 2015 issued Hearing Decision 15-UI-44762, affirming the Department's decision. On October 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument with his application for review but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-44762 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional 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).

In Hearing Decision 15-UI-44762, the ALJ found that the employer discharged claimant for damaging fixtures while operating the employer's equipment on August 4, 5 and 6, 2015.¹ The ALJ concluded that claimant did not violate the employer's expectations willfully or with wanton negligence on August 4 or 5.² However, the ALJ concluded that claimant's conduct on August 6 was wantonly negligent because claimant continued to operate the employer's equipment despite knowing that it was not working properly, which could not be excused as a good faith error.³ Finally, the ALJ concluded that claimant's conduct could not be excused as an isolated instance of poor judgment because claimant damaged three fixtures on August 6 after having damaged property during his two prior shifts, and that based on the "repeated nature of the damage," claimant could not argue that his behavior was isolated.⁴

We agree with the ALJ's conclusion that claimant did not violate the employer's expectations willfully or with wanton negligence on August 4 or 5. We also agree with the ALJ's conclusion that claimant's conduct on August 6 was wantonly negligent and cannot be excused as a good faith error. However, we disagree with the ALJ's basis for concluding that claimant's conduct on August 6 cannot be excused as an isolated instance of poor judgment.

A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. OAR 471-030-0038(1)(d)(C). A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. *Id.* 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).

Although claimant damaged three fixtures on August 6, his only exercise of poor judgment was in continuing to operate the employer's equipment despite knowing that it was not working properly. Although claimant damaged property during his two prior shifts, he did not do so willfully or with wanton negligence, and therefore did not exercise poor judgment on those two prior occasions. Thus, as it stands, the record fails to show claimant's exercise of poor judgment on August 6 was a repeated act or pattern of other willful or wantonly negligent behavior, and not a single occurrence. Nor did the employer assert, or the record show, that claimant's conduct on August 6 violated the law, was tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship or otherwise made a continued relationship impossible. Thus, as it stands, the record fails to establish that the employer discharged claimant for misconduct, and not an isolated instance of poor judgment.

At hearing, however, the employer asserted that claimant violated its expectations on at other occasions prior to August 4, 2015. Transcript at 12, 19. However, the ALJ failed to conduct a full inquiry into

¹ Hearing Decision 15-UI-44762 at 1-3.

² *Id.* at 3.

³ *Id.*

⁴ *Id.*

facts necessary for consideration of whether those alleged violations were willful or wantonly negligent. *See* Transcript at 12, 19, 24. Absent such an inquiry, we cannot determine 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 15-UI-44762 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-44762 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 21, 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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