

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1241

Reversed & Remanded

PROCEDURAL HISTORY: On August 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 75044). The employer filed a timely request for hearing. On September 28, 2015, ALJ Shoemake conducted a hearing, and on October 2, 2015 issued Hearing Decision 15-UI-45313, concluding claimant's discharge was for misconduct. On October 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-45313 should be reversed, and this matter remanded.

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.

In Hearing Decision 15-UI-45313, the ALJ concluded that claimant's failure to attend the July 12, 2015 mandatory meeting was an instance of willful misconduct.¹ We agree. Even if claimant misunderstood from her conversation with the assistant manager that she was authorized to leave the July 12th meeting early, her subsequent unauthorized decision to skip the meeting entirely was a willful violation of the employer's expectation that she attend at least part of the meeting. She did not reasonably hold a sincere belief that the employer authorized her to skip the meeting, so she did not act in good faith.

However, the ALJ also concluded that claimant's conduct could not be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) "because she had a prior warning in which she refused

¹ Hearing Decision 15-UI-45313 at 3.

to cooperate when given discipline for her conduct."² We disagree that the record supports the ALJ's conclusion, because the ALJ did not ask either party any questions about claimant's conduct that led the employer to issue the prior warning.

To establish whether claimant's July 12th conduct was isolated, the record must show whether or not it was "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior" that involves poor judgment and did not exceed mere poor judgment. OAR 471-030-0038(1)(a). Without evidence of claimant's mental state and judgment, however, the mere fact that claimant received prior warnings is not enough to prove that claimant had engaged in previous or other "willful or wantonly negligent behavior." In this case, the ALJ did not ask the parties about claimant's conduct in the prior incidents, or what her mental state was at the time of each of them. Without those details, or an inquiry into whether claimant's July 12th conduct exceeded mere poor judgment, the record fails to show whether or not claimant's July 12th conduct was isolated, or excusable.

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 claimant's discharge was for an isolated instance of poor judgment, Hearing Decision 15-UI-45313 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 15-UI-45313 is set aside, and this matter remanded for further proceedings consistent with this order.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-45313 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.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 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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² Hearing Decision 15-UI-45313 at 3.