EO: 200
BYE: 201636

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

753
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1488

Reversed & Remanded

PROCEDURAL HISTORY: On October 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83325). Claimant filed a timely request for hearing. On December 7, 2015, ALJ Buckley conducted a hearing and issued Hearing Decision 15-UI-48920, reversing the Department's decision. On December 15, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

Both claimant and the employer submitted written arguments which contained information and documents not offered into evidence at the hearing. In light of EAB's decision on review, the ALJ should, as appropriate, admit the parties' documents into evidence to the extent they are relevant and material to the issues on which EAB has remanded this matter.

FINDINGS OF FACT: (1) Terraspatial Technologies employed claimant as a product manager from October 28, 2012 until September 1, 2015.

(2) The employer expected claimant to reply to its reasonable inquiries. Claimant understood the employer's expectation as a matter of common sense.

(3) Claimant reported to the employer's president. During claimant's employment, claimant and the president had some interactions and exchanged some emails in which claimant "vented" various frustrations to him about work. Transcript at 26, 27. Among other things, claimant was concerned about the employer's continued financial viability and its marketing efforts. Transcript at 8, 20.

(4) On Friday, August 29, 2015, the employer's president sent an email to claimant in which the president expressed concern about recent events and interactions with claimant as well as appreciation for claimant's hard work and the value that he provided to the company. The email acknowledged that

the president was aware of some of claimant's frustrations, identified them, expressed the president's continued commitment to the success of the company and set out the sort of progress the president believed the company needed to make to remain viable. The email went on to state:

> At this point, I see two possible paths going forward: The first is you being fully onboard. The second involves you transitioning out of the company. You need to decide whether or not to be here. This is your decision. If you do [want to remain with the company], I need your full commitment, a development schedule and for you to communicate with me respectfully. If not, then let's work together on a transition plan. ****** Please get back to me by the close of business on Monday [August 31, 2015]**. If you decide to stay, let's schedule a face to face discussion where we will work together to outline your job description so we are clear as to what your responsibilities are.

Transcript at 32-33 (emphasis added).

(5) On August 29, 2015, after he received the president's email, claimant replied to it. In his reply, claimant wrote:

> [T]hat's what I need time for next week, right? I see your self-confidence, but that isn't a plan. Self-confidence doesn't help when you stop making payroll, Microsoft shuts off our cloud, and the bank locks the doors. **** I don't need your assurances; I need a plan, and so do you, and so does everyone who relies on [the company], not intentions, not promises, not words, not progress, not wishful thinking, a plan. I'm starting to think you have a mental problems processing information coherently. **** You lied to me, to my face, and on paper about these things. *** You so far have demonstrated that this is not a viable business and we will be out of business within months. So what are you offering me? Personal guarantees and self-confidence?. You have not made any sales. Zero. And you have looked me in the eye, outright lied, and then you have shown no remorse about doing so. **** What weight do you think your word has when you behave like that? When you say anything, I'm sure it's self-serving and I doubt that it's true. **** **I'm not going to have a response for you on Monday**. Next week is for this serious review of my position. If you have anything concrete to share, please email me, the sooner the better.

Transcript at 21-22 (emphasis added). Sometime on August 29, 2015, although claimant was scheduled to work on Monday, August 31, 2015 and throughout that week, claimant announced to the employer's president that he was going to take off the week of August 31, 2015 through September 4, 2015. Claimant did not ask for the employer's permission and did not receive it. However, the president did not forbid claimant from taking that time off.

(6) By the close of business on August 31, 2015, claimant had not responded to the president's request that he tell the president whether he had decided to stay with the employer. On September 1, 2015, the employer discharged claimant for failing to answer the president's question about his intentions by August 31, 2015. Sometime later, the employer sent an email to claimant informing him that he had been discharged.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-48920 is reversed and this matter is remanded for further proceedings consistent with this order.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-48920, the ALJ concluded that the employer failed to demonstrate that claimant's failure to respond to the president's email by August 31, 2015 was a willful or wantonly negligent violation of the employer's standards. The ALJ based this conclusion on the finding that claimant "did not understand that his job was in jeopardy if he did not respond [to the email] by August 31, 2015" and the further finding that claimant "did respond to the employer's letter [the email] and told the employer that he needed further time to respond to the specific questions." Hearing Decision 15-UI-48920 at 3. We disagree that claimant's failure to reply to the question the president asked about his future intentions by August 31, 2015 was not a willful or wantonly negligent violation of the employer's standards. However, further development of the record is required to determine whether claimant's violation was excused from constituting misconduct either as an isolated instance of poor judgment or a good faith error.

The president's August 29, 2015 email was a clear, unambiguous and unmistakable direction to claimant that he needed to reply by August 31, 2015 about whether he was or was not going to stay with the employer. Transcript at 32-33. As a matter of common sense, claimant knew the employer expected him to comply by the deadline the president had set. By the content of the email leading up to setting the deadline for claimant's reply, it was or should have been obvious to claimant that the president was serious about the August 31, 2015 deadline. On this record, claimant's refusal to reply about his intentions by the August 31, 2015 deadline and, instead going away for a week was, most likely, a willful violation of the employer's expectations unless exigent circumstances prevented him from replying.

The content of claimant's August 29, 2015 reply to the president's email and the other evidence in the record does not support the ALJ's statement that claimant responded to the president's August 29, 2015 email and told the president that he needed further time to respond to the questions the president raised in that email. Hearing Decision 15-UI-48920 at 3. While claimant contended at hearing that he did not reply to the email, as requested, for those reasons, he never testified that he raised those reasons with the president at any time after he received the president's email, and such a purported justification was not raised in his only reply to the president's August 29, 2015 email. Transcript at 20-21. In addition, claimant's contentions about the president's email are not supported by its content, which did not ask for answers to any questions other than about claimant's future intentions. Transcript at 31-33. Although the president's email did mention that he expected claimant to prepare a development schedule, no deadline was given for its preparation as was given for claimant's reply about his future employment plans, and from the further content of the email, which proposed a future face-to-face discussion if

claimant decided to stay, it was not reasonably construed as a direction that claimant prepare the development schedule by August 31, 2015. In addition, if claimant truly thought that he was prevented from replying to the president's email by August 31, 2015 because of the development schedule, he would have been expected to so inform the president, rather than ignoring the email and leaving for a week. Indeed, the content of claimant's reply to the president's email strongly implies that he was deliberately refusing to reply to the president. Transcript at 20-21. On these facts, because he did not reply to the only question in the email by the deadline clearly set out in it with no exigent circumstances impeding him from replying, claimant willfully violated the employer's expectations. Even if it is assumed claimant thought that he needed to (but could not) prepare the development schedule by August 31, 2015, it was a wantonly negligent violation of the employer's expectations when claimant did not notify the president of his inability to prepare the schedule by August 31, 2015. In either case, claimant's behavior by not responding in some fashion to the president's email by August 31, 2015 was misconduct unless it falls within the exculpatory provisions of OAR 471-030-0038(3)(b).[1]

Although both parties testified that the employer had not issued any formal past disciplinary warnings to claimant that does not end the inquiry about whether claimant had engaged in any past behaviors that, under the circumstances, were willful or wantonly negligent violations of the employer's reasonable standards. Transcript at 8, 25. The determination whether claimant had or had not previously violated the employer's expectations is necessary to finding whether claimant's willfully noncompliant behavior on August 31, 2015 is excused from constituting misconduct under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. *See* OAR 471-030-0038(1)(d)(A). The further determination whether claimant's behavior on August 31, 2015 was the sort of behavior that caused an irreparable breach of trust in the employment relationship is necessary if claimant had not previously engaged in any prior acts of willful or wantonly negligent behavior to ascertain whether that behavior exceeded mere poor judgment and cannot be excused as an isolated act of poor judgment. OAR 471-030-0038(1)(d)(C).

At hearing, the employer's president testified that claimant in the past had several "temper tantrums" at work and had been previously insulting and disrespectful to him. Transcript at 5, 8, 17. In its written argument, the employer described incidents in which claimant exhibited a "bad attitude," and submitted several emails that, in the employer's opinion, "reflect[ed] the reason for his termination," apparently including, at least in part, claimant's past refusals to answer the president's direct questions about various ongoing projects. Employer's Written Argument at 1, 3-19. Claimant also attempted to address an incident from March 2015 in which the employer allegedly contended to the Department that claimant had previously violated its expectations when, without explanation, he "disappeared" from work for two weeks. Claimant also sought to present evidence at hearing and in his written argument that rebutted the employer's contention. Transcript at 28; Claimant's Written Argument at 2-5. The ALJ should have, but did not, inquire into these incidents and communications, and any others that might be raised by the parties on remand about claimant's behavior prior to August 31, 2015 to

[1] While the ALJ appeared to reason that claimant's failure to reply to the president's email by August 31, 2015 could not have been misconduct if claimant did not understand his job was in jeopardy if he did not, that position is not supported by the definition of misconduct in OAR 471-030-0038(3). Hearing Decision 15-UI-48920 at 3. Disqualifying misconduct requires only that claimant engage in acts that amount to willful or wantonly negligent violation of an employer's interests, which assumes he was aware or reasonably aware of the employer's interests or standards. It does not require claimant's awareness or reasonable awareness that the employer might discharge him for his violation of its interests or standards.

determine whether those past acts were acts of willful or wantonly negligent behavior on claimant's part in violation of the employer's standards. In this respect, the ALJ should enter the parties' submissions into evidence and allow them to present testimony on them and any other incidents relevant to this issue.

At hearing, the ALJ inappropriately narrowed her focus to include only the employer's expectations as set out in the president's April 29, 2015 email. Transcript at 15-17, 19, 28-29, 31. However, the employer's written argument, and the additional documents it submitted raise colorable issues of claimant's alleged past insubordinate behavior, in the sense of willfully disregarding the directions, or direct requests of the president, willfully defying or challenging his authority to manage the employer's operations, being deliberately and intentionally disrespectful in communications with him without provocation and willfully undercutting his leadership. The ALJ should allow the employer to explain how claimant's behavior was insubordinate in specific incidents and specific communications (i.e., emails or other forms), and any other incidents of claimant's alleged insubordination. The ALJ should also inquire how claimant was made aware, or reasonably should have been aware, of an expectation to refrain from insubordination and the evidence that supports his awareness or reasonable awareness. Claimant should have the opportunity to provide relevant rebuttal evidence and to explain why he thought his behavior and communications to the employer were acceptable under the circumstances, and on what he based that conclusion. The ALJ should conduct a similar inquiry into claimant's alleged absence and incommunicado status during March 2015, including the nature of the employer's expectation, how claimant was aware of the expectation, and what precisely happened and the steps of each party, if any, to maintain contact with the other party. Finally, if the evidence does not support that claimant willfully or with wanton negligence failed to comply with the employer's standards before August 31, 2015, the ALJ should conduct a sufficient inquiry to determine whether claimant's behavior on August 31, 2015 caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible.

Absent these inquiries, EAB cannot determine whether claimant's behavior on August 31, 2015 was misconduct or whether it was excused as an isolated instance of poor judgement under OAR 471-030-0038(3)(b). 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 was discharged for misconduct, Hearing Decision 15-UI-48920 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 15-UI-48920 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>January 21, 2016</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-48920 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.