

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0132

Reversed & Remanded

PROCEDURAL HISTORY: On November 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 95534). The employer filed a timely request for hearing. On January 15, 2016, ALJ Murphey conducted a hearing, and on January 19, 2016 issued Hearing Decision 16-UI-51243, concluding claimant's discharge was for misconduct. On February 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-51243 must 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. 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).

The ALJ concluded that the employer discharged claimant.¹ We agree. Although claimant told the employer "That's it. I'm done!" claimant demonstrated his willingness to continue working by promptly returning to work, and the employer allowed him to do so. The employment relationship did not end

¹ Hearing Decision 16-UI-51243 at 3.

until later the same day when the employer instructed claimant to return to the office, told him to return the keys to the business and clocked him out. Because claimant was willing to continue working for the employer at the time of those events, and the employer would not let him do so, the work separation was a discharge.²

The ALJ also concluded that claimant's discharge was for misconduct, however, but the record was not developed sufficiently to determine whether claimant engaged in misconduct, and, therefore, fails to support that, or any, determination on the misconduct issue.³ 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).

Although the ALJ developed the parties' narrative about what occurred on claimant's final day of work, the employer did not say, and the ALJ did not inquire, about what specific conduct made the employer decide to discharge claimant when she did or whether claimant engaged in the conduct with a willful or wantonly negligent mental state.⁴ In order to determine whether claimant's discharge was for misconduct, the ALJ must ask the employer about the specific final incident that triggered the employer to decide to discharge claimant. The ALJ must then ask the employer and claimant not just to describe what happened, but also what (if any) employer policy or expectation claimant is alleged to have violated because of his conduct in the final incident, how claimant knew or should have known the policy or expectation, how the violation occurred, what claimant was thinking at the time, whether or not he thought his conduct was acceptable, and, if he did not, why he engaged in the conduct anyway. If the ALJ determines that claimant's conduct in the final incident was willful or wantonly negligent, then the ALJ must also conduct a similar inquiry into any relevant prior incidents of alleged misconduct – including an inquiry into claimant's mental state and judgment at the time the incident(s) occurred – to allow a determination of whether the conduct in the final incident was isolated or a repeated act or pattern of other willful or wantonly negligent conduct, or whether the conduct exceeded mere poor judgment. Without a full inquiry, the record is insufficient to support any conclusion on the misconduct issue. Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for misconduct, Hearing Decision 16-UI-51243 is reversed, and this matter is remanded for development of the record.

² See OAR 471-030-0038(2).

³ Hearing Decision 16-UI-51243 at 3-4.

⁴ The ALJ stated during the hearing that, because the employer alleged claimant had quit, he could not ask her why she had fired claimant. Transcript at 50. However, the employer admitted that she discharged claimant, too, and although she had many problems with claimant and his work performance, she did not specify why she made that decision when she did, and the ALJ did not inquire. The ALJ erred in failing to inquire about the employer's reasons for discharging claimant.

DECISION: Hearing Decision 16-UI-51243 is set aside, and this matter remanded for further proceedings consistent with this order.⁵

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

DATE of Service: February 26, 2016

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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⁵ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-51243 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.