

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0211

Hearing Decision 16-UI-52618 Affirmed – Late Claim Denied
Hearing Decision 16-UI-52647 Reversed and Remanded

PROCEDURAL HISTORY: On October 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and cancelling claimant’s wage credits (decision # 151821). On December 4, 2015, the Department served notice of an administrative decision (decision # 93143) concluding that claimant did not timely file a claim for unemployment benefits for the week of November 8 through 14, 2015 (week 45-15) and was ineligible to receive benefits for that week. Claimant filed timely requests for hearing. On February 5, 2016, ALJ Shoemake conducted hearings, and on February 9, 2016, issued the following hearing decisions: Hearing Decision 16-UI-52618 affirmed decision # 93143 (the late claim decision) and Hearing Decision 16-UI-52647 affirmed decision # 151821 (the discharge and wage cancellation decision). On February 24, 2016, claimant filed applications for review of both hearing decisions and with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-52618 and 16-UI-52647. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0210 and 2016-EAB-0211).

EVIDENTIARY MATTER: At the hearing, the ALJ stated that she had marked documents submitted by claimant as Exhibit 3. On this record, however, this exhibit was not marked. We have marked Exhibit 3 based on the ALJ’s description. Exhibit 3 consists of the following documents: employer’s “Progressive Counseling and Termination Policy” (4 pages); copies of transaction receipts and coupons (3 pages); a handwritten statement (1 page); employee work schedule for the period 8/9/15 to 8/15/15 (1 page); claimant’s pay stub for the period 8/16/15 through 8/22/15; and an October 16, 2015 letter from the employer to claimant.

The ALJ did not admit Exhibit 3 because she asserted that claimant had not submitted these documents to the parties, and because the ALJ determined that claimant could provide information contained in Exhibit 3 through her testimony. Hearing Decision 16-UI-52647 at 1. Claimant stated that she provided Exhibit 3 to the employer and the Department by fax transmission, but was unable to submit documentation of these fax transmission. Audio Recording of Hearing on Decision # 151821 at 21:09;

Transcript at 549. We find that the documents are relevant to the issues of claimant's discharge and cancellation of wage credits. Because we are remanding this case, claimant will have the opportunity to resubmit the documents that comprise Exhibit 3 to the Department and the employer prior to the hearing, and offer the documents as an exhibit at the hearing on remand.

FINDINGS OF FACT: (1) Payless Shoe Source, Inc. employed claimant as an assistant manager from April 29, 2014 until August 14, 2015.

(2) Sometime prior to August 2015, the employer checked records for the store where claimant worked and concluded that the percentage of coupons used in claimant's store was above average for stores in the market. The employer began an investigation into the transactions processed at claimant's store.

(3) Based on its investigation, the employer concluded that claimant had processed numerous transactions that violated its code of conduct. On August 13, 2015, the employer's regional loss prevention manager met with claimant and presented her with evidence of transactions the employer believed were improper. At this meeting, claimant prepared a written statement in which she admitted that some of the transactions she had processed may have violated the employer's policies, but asserted that it was "not my intention to gain profits" from these transactions and that she had "no intention to resell or profit from" items she may have improperly purchased. Claimant stated that she purchased these items not "to have because I'm a compulsive shopper." Exhibit 1.

(4) On August 14, 2015, the employer discharged claimant for making transactions that violated its code of conduct.

CONCLUSIONS AND REASONS: In regard to Hearing Decision 16-UI- 52618, the decision concluding that claimant failed to file a timely claim for unemployment benefits for the week of November 8 through 14, 2015 (week 45-15), EAB reviewed the entire hearing record. On *de novo* review and ORS 657.275(2), Hearing Decision 16-UI-52618 is **adopted**.

Hearing Decision 16-UI-52647, the hearing decision concerning claimant's discharge and cancellation of wage credits, is **reversed**, and the matter **remanded** the matter to the Office of Administrative Hearings for further development of the record on this issue.

Discharge

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). Acts that violate the law 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).

In Hearing Decision 16-UI- 52647, the ALJ concluded that the employer discharged claimant for “theft by fraudulent refunds.” Hearing Decision 16-UI-52647 at 2. The evidentiary record fails to support this conclusion, however, because the ALJ did not conduct an inquiry into the facts adequate to determine what transactions in which claimant engaged that violated the employer’s policies. The record consists of copies of numerous transaction records offered into evidence by the employer, and testimony by the employer’s witnesses that does not sufficiently explain these transactions. On remand the ALJ must ask the employer’s witnesses to identify what transactions claimant processed that violated the employer’s policies or code of conduct, the date on which each of these transactions occurred, and which employer policy each transaction violated.

On remand, the ALJ must also question the claimant about each of the allegedly inappropriate transactions identified by the employer’s witnesses. The ALJ must ask claimant what items she bought from the employer; what she paid for each item; whether she used a discount or coupon for the purchase; what she did the items she purchased, *e.g.*, did she resell the item for a profit; whether she returned any items she purchased, and if so, did she do so in a manner that financially benefitted her. The ALJ must ask claimant about her assertion that she is a “compulsive shopper,” inquiring why claimant believes she has this disorder, how long she has had this disorder, whether a medical professional has diagnosed claimant with this disorder, and how this disorder affects claimant’s behavior. Finally, the ALJ must also ask claimant what she was thinking at the time she engaged in these transactions, and ask if claimant thought that these transactions violated the employer’s policies.

Cancellation of Wage Credits

If an individual was discharged for misconduct because of the commission of theft, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if certain requirements are met, which include presentation of a written admission of theft signed by the individual to the Department. ORS 657.176(3).¹ A person commits theft when, with intent to deprive another of property or to appropriate property to the person or a third person,² the person takes, appropriates, obtains or withholds such property from an owner thereof. ORS 164.015.

In Hearing Decision 16-UI-52647, the ALJ concluded that claimant’s benefit rights based on the wage credits earned prior to the date of her discharge were subject to cancellation under ORS 657.176(3) because claimant “signed a written admission to misusing her discount and coupons and making

¹ For purposes of satisfying ORS 657.176(3), any person, party or entity may present the Department with the written admission. OAR 471-030-0054 (August 1, 2004).

² “Property” means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract. ORS 164.005(5). “Deprive another of property” means to withhold property of another or cause property of another to be withheld from that person permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person; or dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property. ORS 164.005(2).

fraudulent refunds.” Hearing Decision 16-UI-52647 at 4. The record fails to demonstrate that claimant intended to deprive the employer of its property by engaging in transactions that the employer alleges are inappropriate. In her written statement, which the ALJ found constituted the “written admission of theft” under ORS 657.176(3), claimant asserted that “it was not my intention to gain profits” by purchasing items for family members with her discount, and that she had “no intention to re-sell or profit” from items she purchased from the employer. Exhibit 2, Claimant’s 8/13/15 handwritten statement. In addition, claimant testified at hearing that she never “intended to profit” from any of the transactions the employer alleged were inappropriate. The record therefore fails to demonstrate that claimant committed theft because it fails to show that she acted with the intent of depriving the employer of its property.

In conclusion, absent further inquiry into the conduct that resulted in claimant’s discharge, we cannot determine whether the employer discharged claimant for misconduct under ORS 657.176(2)(a) and OAR 471-030-0038(3)(a). 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, Hearing Decision 16-UI-52647 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-52647 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 16-UI-52618 is affirmed. Hearing Decision 16-UI-52647 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 14, 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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