

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0239

Reversed & Remanded

PROCEDURAL HISTORY: On January 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 153927). Claimant filed a timely request for hearing. On February 10, 2015, ALJ Seideman conducted a hearing, and issued Hearing Decision 16-UI-52710, affirming the administrative decision. On February 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

CONCLUSION AND REASONS: Hearing Decision 16-UI-52710 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. The willful or wantonly negligent failure to maintain a license necessary to the performance of the occupation involved is misconduct, "so long as such failure is reasonably attributable to the individual." OAR 471-030-0038(3)(c).

In Hearing Decision 16-UI-52710, the ALJ concluded that the employer discharged claimant for misconduct, based on the November 28, 2015 suspension of her driver's license due to her conviction for driving under the influence of alcohol (DUII). The ALJ noted that claimant's position with the employer as an account executive required that she maintain a driver's license and concluded:

Claimant's consumption of the alcohol was a wantonly negligent disregard of the employer's standards and constituted misconduct. This then resulted in her failure to maintain her driver's license, which were grounds for termination of employment. Hearing Decision 16-UI-52710 at 5.

To the extent that the ALJ based his conclusion that claimant engaged in misconduct by failing to maintain a license necessary to her occupation under OAR 471-030-0039(3)(c), he erred. The requirement that claimant maintain a driver's license was one imposed by the employer as a condition of employment specific to the *position* of account executive. Audio Recording at 9:44. There is no evidence in the record to demonstrate that a driver's license is necessary to the performance of the general *occupation* of account executive.

To the extent that the ALJ based his conclusion that claimant engaged in misconduct by consuming alcohol in "a wantonly negligent disregard of the employer's standard," the record fails to support this determination. Contrary to the ALJ's conclusion, claimant asserted that her arrest and conviction for DUII resulted from an unpredictable and uncontrollable relapse of alcoholism, a disease from which she suffers and for which she has sought treatment. Because the record contains no evidence regarding the circumstances that resulted in claimant's arrest for DUII, it is impossible to determine the validity of either the ALJ's conclusion or claimant's argument. On remand, the ALJ must ask claimant why she chose to consume alcohol on the night she was arrested, how much alcohol she consumed, why she decided to drive after consuming alcohol, and whether she was aware of the consequences that might result from her decision to drive. The ALJ must also ask any other questions necessary to determine claimant's state of mind on the date she was arrested for DUII. Without a full inquiry into the facts that led to claimant's arrest, the record is insufficient to determine if claimant's behavior constituted a willful or wantonly negligent disregard of the employer's interests.

ORS 657.270(3) requires that the ALJ give all parties a reasonable opportunity for a fair hearing. That obligation requires that the ALJ 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. ORS 657.270(3); *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-52710 is reversed, and this matter is remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-51604 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-52710 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 16, 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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