

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0487

Reversed & Remanded

PROCEDURAL HISTORY: On March 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75011). Claimant filed a timely request for hearing. On April 19, 2016, ALJ Seideman conducted a hearing, and on April 26, 2016, issued Hearing Decision 16-UI-58152, affirming the Department's decision. On April 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-58152 is reversed, and this matter remanded to OAH for development of the record.

The issue in this case is whether claimant should be denied unemployment insurance benefits under the provisions ORS 657.176(2)(a), which requires disqualification from 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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). For an instance of poor judgment to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, some acts, even if isolated, such as acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make

a continued employment relationship impossible 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-58152, the ALJ found that on February 9, 2016, claimant used foul language toward a supervisor and walked off the job in response to the supervisor's request that he "properly sign in and out on break" before concluding the employer discharged claimant for misconduct. The ALJ explained that "[c]laimant's acts were a willful disregard of what any employer has the right to expect" and that the final incident could not be excused as an isolated instance of poor judgment because "it was serious enough that it made a continued employment relationship impossible." Hearing Decision 16-UI-58152 at 2-3.

However, while we agree that claimant was at least wantonly negligent in the final incident, the record fails to establish that his conduct is not excusable as an isolated instance of poor judgment. Although the employer's witness testified that it discharged claimant for both foul language and walking off the job, the employer's "Termination/Resignation Form" indicated claimant was discharged for failing to provide "fair, courteous, or respectful member service." *Compare* Audio Record ~ 9:00 to 9:30; Exhibit 2. Although the employer's "Termination Request" form indicated that both foul language and walking off the job led to claimant's suspension, the statements the employer apparently considered in arriving at its determination to discharge claimant were not attached to the form, as indicated. Exhibit 3. The ALJ did not ask, and the record fails to show, what was contained in those statements and why the employer apparently concluded after its investigation of the final incident, whatever that constituted in the employer's eyes and which apparently included a consideration of the missing statements, that it "was serious enough that it made a continued employment relationship impossible." Accordingly, we cannot determine whether the employer discharged claimant for failing to provide "fair, courteous, or respectful member service", for leaving the premises before the end of his shift, or for a combination of both, let alone whether claimant's conduct, when viewed objectively, constituted such an irreparable breach of trust that it made a continued employment relationship impossible.

Moreover, although the employer stated at hearing and the ALJ found as fact that on January 14, 2016, the employer gave claimant a formal warning for "falsifying records" by initialing on an employer log that he had performed card reader checks one to three hours before actually doing so, the ALJ did not ask, and the record fails to show, what, if any, consideration the employer gave to that incident in making its discharge decision. Although claimant admitted that conduct at hearing, he asserted that he did not believe he violated the employer's policy by engaging in it on January 14, explaining, he "wasn't trained any other way to do it." Audio Record ~ 24:15 to 24:45. The ALJ did not follow up with either claimant or the employer by inquiring about the training in question, or whether claimant ever acknowledged to the employer when trained or on January 14 that he was aware of the employer's expectations on that issue. The ALJ did not ask whether claimant made multiple entries on the employer log at the same time on prior occasions, and, if not, why he did so on January 14th. Absent an inquiry into whether claimant's conduct with respect to the January 14th incident was willful or wantonly negligent, we cannot determine whether claimant's conduct on February 9 was just an isolated incident of poor judgment or part of a pattern of other willful or wantonly negligent behavior that included claimant's conduct on January 14.

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-58152 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-58152 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-58152 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: June 2, 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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