

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0518

Reversed & Remanded

PROCEDURAL HISTORY: On March 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 151006). The employer filed a timely request for hearing. On April 18, 2016, ALJ Seideman conducted a hearing at which claimant failed to appear, and issued Hearing Decision 16-UI-57458, concluding the employer discharged claimant for misconduct. On May 5, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

In his application for review, claimant asked EAB to “reopen the case,” asserting that he was unable to appear at the hearing due to illness. Claimant’s request is construed as a request for EAB to consider new information under OAR 471-041-0090(2) (October 29, 2006), which states that EAB may consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. Because we reverse Hearing Decision 16-UI-57458 and remand this matter to the Office of Administrative Hearings (OAH) for another hearing on other grounds, however, claimant will have an opportunity to offer his information into evidence at the hearing on remand. We therefore need not, and do not, determine whether EAB may consider the information under OAR 471-041-0090(2).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-57458 is reversed, and this matter remanded to OAH for another hearing on whether the employer discharged claimant for misconduct.

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). Isolated instances of poor judgment and good faith errors 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). Acts that 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). However, a conscious decision not to comply with an unreasonable employer expectation is not misconduct. OAR 471-030-0038(1)(d)(C).

In Hearing Decision 16-UI-57458, the ALJ found that during the course of claimant's employment, he had "attendance problems," was "at times" "argumentative and insubordinate," and failed to adequately perform some of his job duties.¹ The ALJ further determined that the employer ultimately discharged claimant for being "insubordinate" during two meetings when responding to his supervisor's criticisms regarding his job performance and attendance.² The ALJ concluded that claimant's "acts" during the meetings were a "willful" disregard of the employer's interest, and not "isolated incidents" because there were "many over a period of time," and that claimant's "attitude" made a continued employment relationship impossible.³ The ALJ did not address whether claimant's conduct could be excused as a good faith error.

As it stands, however, the record fails to establish that claimant's discharge was for misconduct. At hearing, claimant's supervisor testified that when she criticized claimant's job performance during the first meeting, claimant became "visibly upset" and "red in the face," and rejected her "constructive criticism" by interrupting and "talking over" her, "making excuses" and "blaming others" for the performance concerns she was addressing. Audio Record at 8:00-8:40, 11:00-11:30. Claimant's supervisor testified that during the second meeting, claimant had "quite a bit to say" when she criticized his job performance, asserting that his coworkers "loved him" or that "it was somebody else's doing," again "blaming others," and not "showing ownership" for his own performance. Audio Record at 12:45-13:15, 15:30-16:10.

However, claimant's supervisor was not asked what she said to claimant during the first meeting that caused him to become upset, including what she was saying to him when he allegedly interrupted her, and what claimant said to his supervisor when he allegedly talked over her, made excuses and blamed others. Nor was claimant's supervisor asked what she said to claimant during the second meeting that caused him to assert that his coworkers loved him or that it was somebody else's doing, or what claimant said to his supervisor when he allegedly blamed others and failed to show ownership for his own performance. Nor was claimant's supervisor asked how the employer expected claimant to behave

¹ Hearing Decision 16-UI-57458 at 1.

² *Id.* at 2-3.

³ *Id.* at 3.

during the meetings, such as whether he was prohibited from disagreeing with his supervisor's criticisms, blaming others he sincerely believed were at fault, and otherwise defending his job performance. Nor was claimant's supervisor asked whether the employer communicated its expectations in that regard to claimant before the meetings, or warned him during the meetings that his behavior violated the employer's expectations. Absent such inquiries, we cannot determine whether, claimant consciously behaved in a manner that he knew or should have known probably violated the standards of behavior which an employer has the right to expect of an employee. We therefore cannot determine whether the employer discharged claimant for willful or wantonly negligent behavior, and not a good faith error, let alone whether claimant's conduct, viewed objectively, created an irreparable breach of trust in the employment relationship that made a continued relationship impossible.

Finally, with respect to the ALJ's conclusion that claimant had exercised poor judgment on many prior occasions, the ALJ failed to conduct an inquiry into claimant's alleged history of attendance problems, argumentative and insubordinate behavior, and failure to adequately perform some of his job duties. Absent such an inquiry, we cannot determine whether claimant's allegedly insubordinate behavior during the meetings was a repeated act or part of a pattern of other willful or wantonly negligent behavior.

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-57458 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-57458 is set aside, and this matter remanded for further proceedings consistent with this order.⁴

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

DATE of Service: May 18, 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.

⁴ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision Hearing Decision 16-UI-57458 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.