

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0556**

*Hearing Decision 16-UI-57944 Affirmed – Request to Reopen Denied*  
*Hearing Decision 16-UI-56890 Reversed and Remanded*

**PROCEDURAL HISTORY:** On February 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105920). Claimant filed a timely request for hearing. On March 30, 2016, ALJ Murdock conducted a hearing, at which claimant and the employer appeared, and on April 8, 2016 issued Hearing Decision 16-UI-56890, concluding the employer discharged claimant, but not for misconduct. On April 13, 2016, the employer filed a request to reopen the March 30, 2016 hearing. On April 22, 2016, ALJ Kangas issued Hearing Decision 16-UI-57944, denying the employer's request to reopen the hearing. On May 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB construed the employer's application for review as an application for review of Hearing Decision 16-UI-57944, which denied the employer's request to reopen the March 30, 2016 hearing, and if that decision is affirmed, an application for review of Hearing Decision 16-UI-56890, which concluded that claimant's discharge was not for misconduct.<sup>1</sup> Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-57944 and 16-UI-56890. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0556 and 2016-EAB-0611). EAB reviewed the entire hearing record and the employer's written argument when reaching these decisions.

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-57944, which denied the employer's request to reopen the March 30, 2016 hearing, is affirmed. However, Hearing Decision 16-UI-56890, which concluded that claimant's discharge was not for misconduct, is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further proceedings.

<sup>1</sup> See accord OAR 471-040-0040(6) (February 10, 2012).

**Hearing Decision 16-UI-57944.** ORS 657.270(5)(a) provides that following issuance of a written decision by an ALJ, any party may file a request to reopen the hearing. However, the ALJ may reopen the hearing only if, among other requirements, the party that is requesting the reopening failed to appear at the hearing. ORS 657.270(5)(c)(A); OAR 471-040-0040(1)(a) (February 10, 2012). Here, the employer appeared at the March 30, 2016 hearing. The employer's request to reopen the hearing therefore is denied, and we proceed to review Hearing Decision 16-UI-56890, which concluded that claimant's discharge was not for misconduct.

**Hearing Decision 16-UI-56890.** In written argument, the employer requested that EAB consider, under OAR 471-041-0090(2) (October 29, 2006), new information regarding whether claimant's discharge was for misconduct. OAR 471-041-0090(2) allows EAB to consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. However, because we reverse Hearing Decision 16-UI-56890 and remand this matter to OAH for another hearing for other reasons set forth below, the employer will have an opportunity to offer its information into evidence at the hearing on remand. We therefore need not, and do not, decide whether EAB may consider the employer's new information under OAR 471-041-0090(2).

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 act 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 violate the law, acts that are tantamount to unlawful conduct, 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).

In Hearing Decision 16-UI-56890, the ALJ found that the employer discharged claimant at a January 4, 2016 meeting for "failing to use paid-time-off [PTO] or unpaid time for her vacation and sick days."<sup>2</sup> Acknowledging that the employer "had concerns with claimant's interactions with employees" and began the January 4 meeting by discussing those concerns, the ALJ found that claimant would have only

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<sup>2</sup> Hearing Decision 16-UI-56890 at 1.

received a written warning for those issues, were it not for the time record issue an owner discovered earlier that day.<sup>3</sup> The ALJ further found that although the employer had a written policy stating that salaried, exempt employees such as claimant were required to use accrued PTO or take unpaid time off for absences in excess of three hours per day, claimant was unaware of the employer's policy and expectations in that regard.<sup>4</sup> Based on those findings, the ALJ concluded the record failed to show claimant was discharged for a willful or wantonly negligent violation of the employer's expectations because the evidence as to whether claimant was aware of the employer's policy, and therefore knowingly violated the policy was, at best, equally balanced.<sup>5</sup>

We agree with the ALJ that claimant's alleged failure to use PTO or unpaid time off for her vacation and sick days was the proximate cause of her discharge. At hearing, the employer alleged that claimant failed to use PTO or unpaid time off when she went on vacation from July 15 through 17, August 20 and 21, September 4, November 24 and 25, December 21 through 23, 2015, or when she was out sick on September 18, October 2 and December 30, 2015. Audio Record at 15:00-15:50. Claimant testified that although she was not aware of the employer's PTO policy, she understood that when she was absent from work, "As long as I worked from home or away, that I would still get paid," and that, "If I wasn't in the office, as long as I worked, I still got paid." Audio Record at 22:00-22:45. Claimant also testified that she understood she was supposed to go unpaid on at least some days that she did not work for the employer, such as when she had surgery and "didn't work that day and didn't get paid." Audio Record at 23:45-24:15. Thus, although the record may not show claimant was aware of the specifics of the employer's PTO policy, claimant's own testimony indicates she had some understanding that she was required to use PTO or unpaid off on days she did not work, under some circumstances. However, the ALJ failed to conduct a sufficient inquiry into the facts necessary for consideration of that issue. For example, the ALJ did not ask claimant or the employer under what circumstances, if any, claimant had ever used PTO or unpaid time off for days on which she did not work. Nor did the ALJ ask the employer or claimant, who as of late May or early June 2015 was in charge of processing payroll,<sup>6</sup> under what circumstances, if any, she processed PTO or unpaid time off for days on which other salaried, exempt employees did not work. Nor did the ALJ ask claimant whether she was absent from work on the days alleged by the employer and, if so, the reasons she was absent, whether she used PTO or unpaid time off, and why or why not. Absent such inquiries into claimant's understanding of the employer's expectations, and her alleged failure to comply with those expectations on the days at issue, we cannot determine whether claimant violated the employer's expectations willfully or with wanton negligence, or whether her conduct can be excused as an isolated instance of poor judgment or good faith error. We therefore cannot determine whether claimant's discharge was for misconduct.

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

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> Audio Record at 12:20-12:40.

the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for misconduct, Hearing Decision Hearing Decision 16-UI-56890 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-57944 is affirmed. Hearing Decision 16-UI-56890 is reversed, and this matter remanded to OAH for additional proceedings consistent with this order.

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

**DATE of Service:** May 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](http://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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