

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0704

Reversed & Remanded

PROCEDURAL HISTORY: On April 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for an isolated instance of poor judgment and not misconduct (decision # 152506). The employer filed a timely request for hearing. On June 2, 2016, ALJ Menegat conducted a hearing, and on June 6, 2016, issued Hearing Decision 16-UI-61136, affirming the Department's decision. On June 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-61136 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 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 the Department's administrative decision, after finding that the employer discharged claimant because she refused to sign a warning for attendance problems and yelled at the employer's owner, but had no previous warnings for similar behavior, the authorized representative concluded the employer discharged claimant for an isolated instance of poor judgment which is not misconduct under ORS 657.176(2)(a). Decision #152506. The ALJ agreed, reasoning that while claimant's reaction to the employer's discipline may have been sufficient reason for the employer to discharge claimant, it was excusable as an isolated instance of poor judgment under Oregon unemployment law. Hearing Decision 16-UI-61136 at 3.

However, the employer's owner presented evidence that on February 26, 2016, approximately a week before the final incident, claimant was scheduled to begin work at 8:30 a.m. and did not report for work or notify the employer she would be absent and that when the owner called her and questioned why she was not at work, she responded "you know I can't get there." The owner then asked her why, if she could not work, she had not notified the employer of that fact when her work hours had been on the schedule for two weeks. Audio Record ~ 11:45 to 13:15. The ALJ did not ask and the record does not show why claimant was not able to report for work as scheduled that day or notify the employer in advance that she would be absent. Nor did the ALJ inquire about the employer's expectations regarding claimant notifying the employer when claimant knew she would be absent or late for work. Finally, the ALJ did not inquire about the reasons for claimant's alleged tardiness in reporting for work several times during the month of February 2016.

Here, there was insufficient inquiry by the ALJ regarding whether claimant's exercise of poor judgment on March 4, 2016 was isolated, as the ALJ found, rather than a repeated act or part of a pattern of other willful or wantonly negligent behavior which would not be excusable under OAR 471-030-0038(1)(d)(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 claimant's conduct on March 4 was in fact an isolated instance of poor judgment, Hearing Decision 16-UI-61136 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-61136 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-61136 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 1, 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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