

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0888

Reversed & Remanded

PROCEDURAL HISTORY: On June 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105739). Claimant filed a timely request for hearing. On July 13, 2016, ALJ Kangas conducted a hearing, and on July 14, 2016 issued Hearing Decision 16-UI-63724, affirming the Department's decision. On August 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument which she did not certify she provided to the other parties as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider the written argument when reaching this decision and will not consider it if this matter returns to EAB. However, given EAB's disposition of this matter, claimant may seek to introduce information contained in the argument through exhibits offered or testimony presented during the hearing on remand.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-62724 is reversed and this matter is remained for further proceedings.

In Hearing Decision 16-UI-63724, the ALJ concluded the employer discharged claimant for misconduct. The ALJ found, based on the testimony of the employer's witness, that claimant was late to work 73 out of 91 work days between January 1, 2016 and May 18, 2016. The ALJ also found, based on claimant's admission that she was often tardy and her failure to offer a persuasive explanation justifying her tardiness, that claimant could have taken precautions to avoid the circumstances that resulted in her tardiness. The ALJ then concluded that "claimant's being tardy to work was a willful violation of the standard of behavior employer had a right to expect." Hearing Decision 16-UI-63724.

It was not appropriate for the ALJ to consider claimant's alleged tardiness and violations of the employer's punctuality standards occurring over a lengthy period of time (5 months) to determine whether claimant engaged in misconduct, particularly because claimant's past tardiness was known to the employer at approximately the time it occurred and claimant was not discharged at that time. In

discharges, it is customary to evaluate the specific occurrence or the specific violation of the employer's standards (e.g., claimant's alleged tardiness) that "triggered" or precipitated the employer's decision to discharge claimant to assess whether claimant engaged in misconduct.¹ Here, the ALJ should have inquired about which occurrence of the 93 alleged incidents of tardiness proximately caused the employer's decision to discharge claimant on May 18, 2016. Generally, although not always, this would be the final occurrence of tardiness preceding claimant's May 18, 2016 discharge. The ALJ should inquire about the date of this tardiness, how late claimant reported for work, claimant's explanation, if any, for being late, whether claimant took any precautions against being late that day, if so, why those precautions failed that day. The ALJ must ask about any other matters relevant to whether claimant's tardiness that day was the result of willful or wantonly negligent behavior².

As appropriate, the ALJ might also inquire about other occurrences of claimant's tardiness near in time to the discharge, including the dates on which these incidents of tardiness occurred, to explore claimant's state of mind on the date of the final incident of tardiness, including how late claimant was in reporting for work on those days, if the employer warned her after she was late, the substance of the warning and claimant's explanation, if any, for being late. For the final incident and as well as other incidents of claimant's tardiness, the ALJ should explore whether claimant agrees she was late on the specific dates the employer contends she was, claimant's reasons for being late on the specific days it is contended she was late, any precautions she took to avoid being late to work on those specific days and why they failed, and whether claimant knew she was running late before she reported for work and if she telephoned or took other steps to notify the employer she was going to be tardy. The ALJ should also develop the evidence on claimant's alleged incidents of tardiness before the tardiness that led to her discharge to allow a determination of whether those incidents were the result of willful or wantonly negligent behavior and whether, if claimant's tardiness during the final incident was willful or wantonly negligent, those prior occurrences of tardiness preclude excusing the final incident as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). With respect to being excused as a good faith error, the ALJ should further inquire of claimant if she thought the employer would not consider her final tardiness a violation of workplace standards and, if so on what, if anything, she based this belief and if not, why she continued to report late for work despite the number of tardies she was accruing.

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.

¹ See e.g., *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

² At hearing the employer alluded to records it had detailing the times claimant reported for work and how late she allegedly was from January 1, 2016 through May 18, 2016, the date she was discharged. Transcript at 8, 28-29. The employer might bring these records to the remand hearing or send them to claimant and the ALJ in advance of the hearing and offer them into evidence as hearing exhibits

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 was discharged for misconduct, Hearing Decision 16-UI-63724 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-63724 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: September 1, 2016

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-63724 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.

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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