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BYE: 201729

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1126

Reversed & Remanded

PROCEDURAL HISTORY: On August 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151813). Claimant filed a timely request for hearing. On September 27, 2016, ALJ Triana conducted a hearing, and on September 29, 2016 issued Hearing Decision 16-UI-68321, affirming the Department's decision. On October 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-68321 should be reversed and this matter remanded.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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, good faith errors, absences due to illness or other physical or mental disabilities or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, in the hearing and termination paperwork the employer alleged several reasons for its decision to discharge claimant, including making a personal phone call during work hours on July 11, 2016, failing to complete all assigned duties on July 8, 2016 and July 11, 2016, bypassing a supervisor on July 1, 2016, and taking an extra break on July 11, 2016. The allegedly personal call was made in response to an employer-generated email to, ultimately, participate in a health screening using work time, with the employer's permission. As such, claimant reasonably and in good faith believed she was not making a "personal" call of the sort the employer prohibited. Although claimant admittedly failed to complete an assigned duty on July 8, 2016, the employer failed to show that her failure to complete the work was the result of a willful or wantonly negligent dereliction of duty on claimant's part, and the evidence is at least equally balanced as to whether claimant completed the work on July 11, 2016. As such, the employer has not proven that claimant's failure to complete her work on either day constituted misconduct. Nor has the employer established that claimant willfully or with wanton negligence bypassed her supervisor, given that the event, as described, was the inadvertent result of using a feedback resource provided to her by the employer. The record as currently developed establishes that, to the extent the employer discharged claimant for those reasons – the personal call, not completing her duties, and bypassing her supervisor – the discharge was not for misconduct.

The employer also discharged claimant, however, for her alleged violation of the employer's time and attendance expectations 149 times, despite having been issued a final warning, including an instance on July 11th when she was alleged to have taken an extra 15 minute break. In Hearing Decision 16-UI-68321, the ALJ focused exclusively on claimant's time and attendance, and concluded that claimant's discharge was for misconduct. The ALJ reasoned that claimant understood she was only allowed two 15-minute breaks and a lunch break, and whether claimant took an extra 15-minute break or extended an authorized break by 7 minutes, "[t]his would violate the employer's reasonable expectations and, as such, be misconduct." Hearing Decision 16-UI-68321 at 3. The ALJ concluded that claimant's conduct was not excusable as an isolated instance of poor judgment because "claimant had taken extra breaks on multiple prior occasions," and because "common sense" and "her prior written corrective action" mean that she "could not have held a good faith belief that the employer would condone her taking additional breaks without permission." Hearing Decision 16-UI-68321 at 4.

However, for claimant's July 11th "extra break" to be considered "misconduct" for purposes of disqualifying her from receiving unemployment insurance benefits, it must either have been a willful violation of the employer's policy or must have been done with a conscious indifference to the consequences of her actions, it must not have been the result of illness, and it must have been an isolated instance of poor judgment.[1] Because the record does not show that claimant was aware of taking the July 11th extra break time at the time she did it, or that she did so intentionally or out of conscious indifference to the employer's expectation that she not do so, and the record does not show the extent to which claimant's previous time and attendance issues were willful or wantonly negligent or occurred because of an excusable illness, the record fails to show that the July 11th incident constituted

[1] Good faith errors and violations due to a lack of skills or experience would also excuse the July 11th incident from constituting misconduct (*see* OAR 471-030-0038(3)(b)), but the record demonstrates that claimant did not have a sincere belief that she was entitled to extra break time or that her use of extra break time would be condoned, nor is there any evidence suggesting that claimant's job skills or over 10 years of employment with the employer were a factor in the July 11th incident.

misconduct. For those reasons, we disagree that the record supports those conclusions and conclude that additional information is required to reach a decision in this matter.

With respect to the final incident, the employer reported that claimant took a third, unauthorized break on July 11th. Claimant testified, however, that she did not take an extra break, but only added 7 unauthorized minutes to an existing break. On remand, the ALJ should inquire with the parties as to what occurred with respect to claimant's time and attendance on July 11th. The ALJ asked claimant why she took extra break time on July 11th, but, when claimant indicated she did not know the reason she took extra time, the ALJ did not ask any additional questions. The ALJ should ask the employer whether anyone saw claimant taking extra break time, if claimant made anyone aware of a reason for taking extra break time or whether claimant, or whether the employer had any ideas about the reason based on any surrounding circumstances.

Although claimant testified that she did not know why she took extra break time on July 11th, claimant testified generally that the cause of her attendance problems were mistakes, IBS and cancer. The ALJ should ask whether claimant was experiencing health problems on July 11th. The ALJ should ask claimant what she meant by "mistakes," what the mistakes entailed, why she made them, and how she tried to avoid making mistakes. The ALJ should ask claimant what portion of the 149 time and attendance issues that occurred between February 12, 2016 and July 11, 2016 occurred because of her medical problems and what portion occurred because of her mistakes. The ALJ should ask the employer whether they were aware of how claimant's health affected her time and attendance, and whether they made adjustments when claimant's time and attendance issues occurred because of her health.

Claimant had a history of time and attendance issues, including receiving a final written warning in February that included time and attendance issues. The ALJ must ask the employer about those prior instances, such as the dates and times they occurred, their frequency, whether the employer observed a pattern of behavior that suggested whether or not claimant was acting with intent or conscious disregard of her schedule (*e.g.* leaving early on Fridays, arriving late on Mondays, taking long lunches on a particular day of the week, having time and attendance problems immediately before or after claimant took time off work for medical procedures or because of her health, etc.).

Claimant testified at the hearing that she had tried to improve her attendance after the February 2016 warning. Nevertheless, according to Exhibit 1, between February 12, 2016 and July 11, 2016, claimant continued to log in late (16 instances), took long breaks (109 instances) and took additional breaks (24 instances). Given unrefuted evidence that her issues continued, the ALJ must ask claimant specifically how she tried to improve her time and attendance after the warning, what steps she took to log in on time, what steps she took to make sure she returned from her authorized breaks on time, and the reasons why she continued to take additional unauthorized breaks despite having been warned not to do so.[2] The ALJ must ask claimant why, given the warning she had received, claimant continued to log in late, take long breaks, and take extra breaks.

The ALJ should ask the employer whether it kept track of claimant's time and attendance on an ongoing basis, and whether and how the employer notified claimant between the February 11th warning and the

[2] Notably, claimant testified that she had stopped clocking out to take extra restroom breaks by February 2016. Transcript at 27. Logically, it follows that the reason for additional breaks between February and July 2016 was not claimant's need to use the restroom between authorized breaks, but the record fails to show what was the actual reason.

July 11th final incident that her time and attendance were still problematic. The ALJ should ask claimant whether she was aware that she was continuing to log in late and take long and extra breaks, and whether she was aware that her conduct was still violating the employer's time and attendance policies and expectations.

Finally, claimant said she did not know her job was in jeopardy after the February 2016 warning. The warning document stated, however, that it was a "final written counseling," the employer's expectation of claimant's ongoing performance was "zero occurrences of extra breaks or logging off the phone for extended times beyond breaks and lunches" and "zero violations in relation to time and attendance . . . for 30 days," and the document stated in two places that failure to improve or correct the situation "may" or "could" result in "termination of employment." Exhibit 1. The ALJ must therefore question claimant about the contents of the warning document, ask her to reconcile her claim that she did not know her job was in jeopardy with the specific warning on the document that her job was in jeopardy which, regardless of whether she agreed with the content, claimant signed and received. The ALJ should ask, if claimant still testifies she did not understand her job was in jeopardy, what more would it have taken for claimant to understand. The ALJ should also ask whether, having received a "final written" warning that included time an attendance warnings, why claimant did not make a better effort to keep track of her time and attendance, and notify the employer when she had a time and attendance issue caused by her health. The ALJ should also ask the employer and claimant any additional follow up questions the ALJ deems necessary based on her development of the record.

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 discharge was for misconduct, Hearing Decision 16-UI-68321 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-68321 is set aside, and this matter remanded for further proceedings consistent with this order.[3]

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

DATE of Service: <u>October 20, 2016</u>

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.

[3] The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-68321 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.

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