

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1243

Reversed & Remanded

PROCEDURAL HISTORY: On August 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 134426). On August 22, 2016, decision # 134426 became final without claimant having requested a hearing. On August 24, 2016, claimant filed a late request for hearing. On August 29, 2016, ALJ Kangas issued Hearing Decision 16-UI-66523, dismissing claimant's request for hearing subject to his right to renew the request by responding to an appellant questionnaire by September 12, 2016. On September 20, 2016, claimant filed a late response to the appellant questionnaire and an explanation as to why his response was late. The Office of Administrative Hearings (OAH) considered claimant's response, on September 28, 2016 canceled Hearing Decision 16-UI-66523, and on October 4, 2016 scheduled a hearing for October 17, 2016. On October 17, 2016, ALJ Vincent conducted a hearing, and on October 20, 2016 issued Hearing Decision 16-UI-69601, allowing claimant's late request for hearing, and concluding the employer discharged claimant for misconduct. On November 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

No party applied for review of that portion of Hearing Decision 16-UI-69601 allowing claimant's late request for hearing on decision # 134426. EAB therefore limited its review to whether claimant is disqualified from receiving benefits based on his work separation from the employer.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-69601 is reversed, and this matter remanded to OAH for additional proceedings.

An individual is disqualified from the receipt of benefits if the individual has been discharged for misconduct connected with work, or voluntarily left work without good cause. ORS 657.176(2). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b) (August 3, 2011). If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). "Work" means "the

continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

OAR 471-030-0038(3)(a) 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, that are tantamount to unlawful conduct, 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).

“Good cause” for voluntarily leaving work is a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time. Where the gravity of the situation experienced by the individual results from his or her own deliberate actions, to determine whether good cause exists, the actions of the individual in creating the grave situation must be examined in accordance with the provisions of OAR 471-030-0038(4). Leaving work without good cause includes, but is not limited to, resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F).

In Hearing Decision 16-UI-69601, the ALJ found as fact that the employer discharged claimant on April 30, 2016 for failing to report for work from April 27 through 30, 2016 due to incarceration for driving while his license was suspended.¹ The ALJ then concluded that because claimant willfully committed the crime of driving while his license was suspended, his incarceration was occasioned by his knowing and willful acts, and he therefore committed willful misconduct.² However, we disagree with the ALJ that the record shows the employer discharged claimant on April 30, 2016 for failing to report for work due to his incarceration. At hearing, claimant testified that he was incarcerated for 10 days,³ and we therefore infer that was released during the first week of May 2016. The employer's witness testified that the employer did not terminate claimant's employment until May 23, 2016, after claimant continued

¹ Hearing Decision 16-UI-69601 at 2.

² *Id.* at 3.

³ Audio Record at 20:10.

to be absent from work and failed to respond to the employer's "certified letters and regular mail" containing paperwork for requesting a leave of absence and "other forms of paperwork to try to protect [claimant's] job." Audio Record at 22:30-25:20. Claimant testified that the only paperwork he received from the employer was a notice to come in and pick up his final paycheck, and specifically denied receiving any leave of absence paperwork. Audio Record at 26:20-26:45.

The witness' testimony raised the issue of whether claimant abandoned his job, and therefore quit work, prior to May 23, 2016. However, the ALJ did not conduct a full inquiry into the facts necessary for consideration of whether claimant quit work and if so, whether he did so with good cause, including whether claimant contacted the employer after he was released from incarceration and, if not, why not, and whether it was because he assumed he had been discharged, or wanted to avoid being discharged. The ALJ also should have asked the employer's witness when it mailed claimant the leave of absence paperwork, what other forms of paperwork it mailed claimant to try to protect his job and when it mailed such paperwork, to what address it mailed the paperwork, whether the certified letters were delivered successfully or returned as undeliverable, or whether paperwork sent regular mail was returned. The ALJ then should have questioned claimant more thoroughly regarding his assertion that the only paperwork he received from the employer was a notice to come in and pick up his final paycheck. The ALJ also should have asked the employer's witness whether the employer likely would have allowed claimant to return to work for the employer after his incarceration if claimant had contacted the employer and expressed an interest in returning, completed the leave of absence paperwork, and/or completed the other paperwork intended to help protect claimant's job.

Assuming the record showed that claimant quit work to avoid what would otherwise have been a discharge or potential discharge for his absences while incarcerated, or that the employer discharged claimant for those absences on May 23, 2016, that ALJ did not conduct a full inquiry into the facts necessary to determine whether the discharge was, or would have been, for misconduct. At hearing claimant testified that he had done everything required to reinstate his license but could not afford to do so, that he was driving only to and from work, and that he was incarcerated only because his driving record mistakenly indicated that his license was suspended for felony DUII, and not misdemeanor DUII. Audio Record at 13:30-18:30. The ALJ should have asked claimant how much it would have cost to reinstate his license, and to explain in detail why he could not afford that amount. The ALJ also should have asked claimant why he did not find an alternative means of commuting to and from work, such as public transportation, carpooling with other employees, or having friends or family drive him to work. The ALJ also should have asked claimant whether he had been aware of the error on his driving record prior to his incarceration, whether he had sincerely believed when driving to and from work that he would not be incarcerated if cited for driving while his license was suspended, and the basis for that belief, and his assertion that he was incarcerated only because of the error on his driving record.

Assuming the record showed that the employer discharged claimant on May 23, 2016, but not for his absences while incarcerated, the ALJ should have asked the employer's witness the reason or claimant's discharge, including whether it was because he failed to contact the employer after his incarceration, continued to be absent from work, failed to respond to the employer's mailings, or for other reasons. After determining the reason for claimant's discharge, the ALJ should have conducted a full inquiry into the facts necessary to determine whether his 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 the ALJ failed to develop the record necessary for a determination of whether claimant is disqualified from receiving benefits based on his work separation from the employer, Hearing Decision 16-UI-69601 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-69601 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: December 5, 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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