

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1264

Reversed & Remanded

PROCEDURAL HISTORY: On October 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 103917). Claimant filed a timely request for hearing. On November 3, 2016, ALJ Wyatt conducted a hearing, and on November 7, 2016, issued Hearing Decision 16-UI-70663, affirming the administrative decision. On November 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tyco Integrated Security employed claimant as a junior account executive until August 11, 2016. As a condition of his employment as a junior account executive, the employer required that claimant maintain a valid driver's license.

(2) On June 30, 2016, claimant was arrested for Driving Under the Influence of Intoxicants (DUII) after consuming alcohol at a local restaurant.

(3) Claimant took a leave of absence from his job until July 19, 2016. On that date, claimant asked the employer for a 90 day unpaid leave of absence to resolve legal matters related to his arrest. The employer denied his request, but placed him on unpaid suspension for an indefinite period.

(4) On August 9, 2016, claimant's license was suspended. The employer's human resources department contacted claimant and told him that because he had no valid driver's license, he would be discharged if he did not resign. On August 11, 2016, claimant quit his job.

CONCLUSION AND REASONS: Hearing Decision 16-UI-52710 must be reversed, and this matter remanded.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). “Good cause” for leaving work does not include a “willful or wantonly negligent failure” to maintain a license necessary to the performance of an occupation, as long as the failure is “reasonably attributable to the individual,”¹ or a resignation to avoid “a discharge for misconduct or potential discharge for misconduct.”²

In Hearing Decision 16-UI-70663, the ALJ concluded that claimant left work without good cause under OAR 471-030-0038(5)(b)(E) because his decision to quit resulted from his “willful and wantonly negligent failure” to maintain a driver’s license, a license that was necessary to the performance of his occupation as a sales executive. Hearing Decision 16-UI-52710 at 2. We disagree. The requirement that claimant maintain a driver’s license was one imposed by the employer as a condition of employment specific to the *position* of junior account executive. Audio Recording at 7:21. There is no evidence in the record to demonstrate that a driver’s license is necessary to the performance of the general *occupation* of junior account executive. Because the record shows that claimant quit his job to avoid a discharge, it is necessary to analyze his decision under the standard set forth in OAR 471-030-0038(5)(b)(F) to determine whether his discharge would have been for misconduct. The ALJ failed to develop a record sufficient to make such a determination, however.

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. Because the record contains no evidence regarding the circumstances that led to claimant’s arrest for DUII on June 30, it is impossible to determine whether claimant’s actions on that date were willful or wantonly negligent. On remand, the ALJ must ask claimant why he chose to consume alcohol on June 30, how much alcohol he consumed, whether he knew his ability to drive was affected by the alcohol he had consumed, why he decided to drive after consuming alcohol, and whether he was aware of the consequences that might result from his decision to drive. In addition, the ALJ must ask any other questions necessary to determine claimant’s state of mind on the date he was arrested for DUII. Without a full inquiry into the facts that led to claimant’s arrest, the record is insufficient to determine if claimant’s behavior constituted a willful or wantonly negligent disregard of the employer’s interests, and to determine if claimant resigned to avoid a discharge for misconduct.

ORS 657.270(3) requires that the ALJ give all parties a reasonable opportunity for a fair hearing. That obligation requires that the ALJ 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. ORS 657.270(3); *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 the employer discharged claimant for misconduct, Hearing Decision 16-UI-70663 is reversed and this matter remanded for additional evidence.

¹ OAR 471-030-0038(5)(b)(E).

² OAR 471-030-0038(5)(b)(F).

DECISION: Hearing Decision 16-UI-70663 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: December 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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