

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0040

Reversed & Remanded

PROCEDURAL HISTORY: On December 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 142117). The employer filed a timely request for hearing. On January 3, 2017, ALJ Murdock conducted a hearing at which claimant failed to appear, and on January 4, 2017 issued Hearing Decision 17-UI-74081, affirming the Department's decision. On January 10, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-74081 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for additional another hearing on whether the employer discharged claimant for misconduct, or an isolated instance of poor judgment.

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, unavoidable accidents, 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).

In Hearing Decision 17-UI-74081, the ALJ found that the employer discharged claimant for insubordinate behavior on October 25, 2016.¹ Based on her findings, the ALJ implicitly concluded that claimant's conduct on that day was a willful or wantonly negligent violation of the employer's reasonable expectations, and not a good faith error.² However, the ALJ ultimately concluded that claimant's conduct was no more than an isolated instance of poor judgment, and therefore not misconduct, because "the record does not establish that claimant behaved insubordinately on any frequent or ongoing bases or that his conduct was so egregious that a continued employment relationship was rendered impossible."³

We agree with that claimant's conduct on October 25 was a willful or wantonly negligent violation of the employer's reasonable expectations regarding workplace behavior, and not a good faith error. We also agree that claimant's conduct that day was not so egregious that it created an irreparable breach of trust of trust in the employment relationship or otherwise made a continued relationship impossible. However, we disagree with the ALJ's determination that claimant's exercise of poor judgment on October 25 was *isolated* because the record fails to show that claimant behaved insubordinately on prior occasions. OAR 471-030-0038(1)(d)(A) provides, in relevant part, that an instance of poor judgment is isolated only if it is a single or infrequent occurrence, and not part of a pattern of *other* willful or wantonly negligent behavior. Claimant therefore is disqualified from receiving benefits if his conduct on October 25 was part of a pattern of willful or wantonly negligent behavior, including behavior other than insubordination.

At hearing, the employer's owner testified that claimant violated the employer's expectations many times prior to October 25, 2016, including repeatedly reporting for work late, failing to report for work on two occasions in July 2016, and repeatedly making mistakes on food orders. Audio Record 8:30-10:30. However, the ALJ conducted no inquiry into the facts necessary for a determination of whether claimant's violations of the employer's attendance expectations were willful or wantonly negligent, and not good faith errors or absences due to illness or other physical or mental disabilities. Nor did the ALJ conduct an inquiry into the facts necessary for a determination of whether claimant's violations of the employer's performance expectations were willful or *wantonly* negligent, and not the result of ordinary negligence, good faith errors, or mere inefficiency resulting from lack of job skills or experience. Absent such inquiries, we cannot determine whether claimant's exercise of poor judgment on October 25 was isolated or part of a pattern of willful or wantonly negligent behavior.

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 the employer discharged claimant for misconduct, and not an isolated instance of poor judgment, Hearing Decision 17-UI-74081 is reversed, and this matter is remanded for development of the record.

¹ Hearing Decision 17-UI-74081 at 1, 3.

² *Id.* at 3.

³ *Id.*

DECISION: Hearing Decision 17-UI-74081 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: January 27, 2017

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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