

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0101

Reversed & Remanded

PROCEDURAL HISTORY: On November 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 80736). Claimant filed a timely request for hearing. On January 3, 2017, ALJ Rakestraw conducted a hearing, and on January 4, 2017, issued Hearing Decision 17-UI-74049, concluding that the employer discharged claimant, not for misconduct. On January 17, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) From April 8, 2015 until September 16, 2016, 23rd Avenue Properties employed claimant as a maintenance technician. Claimant's job duties included repairing and maintaining the employer's 13 properties. Claimant's normal work hours were 9 a.m. to 5 p.m., Monday through Friday, but he was expected to be available to respond to evening and weekend emergencies.

(2) Prior to September 13, 2016, the employer had difficulties contacting claimant during his usual work hours, and became concerned that claimant was reporting to work late and leaving work early, without notifying his supervisor. The employer also became concerned that claimant was having a relationship with a tenant of one of the employer's properties.

(3) On September 13, 2016, the employer's property manager met with claimant and discussed his work performance. The property manager told claimant she was going to consult with other staff members and would "get back" to claimant in regard to his job status. Transcript at 10.

(4) On September 16, 2016, the property manager and the contractor met with claimant. The property manager told claimant that the employer's owner "had decided it was best for us to part ways" and asked claimant for the phone and keys the employer had provided him. The property manager did not tell claimant the reasons for his discharge. Transcript at 25. The employer discharged claimant because it believed he had lied about his work hours, had made inappropriate use of the employer's telephone and computer, had stolen property from the employer by selling or trying to sell materials the employer had discarded, and had a relationship with one of the employer's tenants.

CONCLUSION AND REASONS: Hearing Decision 16-UI-74049 is affirmed to the extent that it concluded that the employer discharged claimant. To the extent that Hearing Decision 16-UI-74049 concluded that the discharge was not for misconduct, that portion of the decision is reversed, and the matter remanded for further development of the record.

Work separation: 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) (August 3, 2011). 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). Although claimant and the property disagreed about what they discussed at their September 13, 2016 meeting, the property manager clearly indicated that the employer was unwilling to allow claimant to continue working after their September 16, 2016 meeting. We therefore affirm the ALJ's conclusion that the preponderance of evidence shows that the employer discharged claimant.

Reasons for discharge: 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) 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness, the property manager and claimant's supervisor, mentioned numerous problems with claimant's performance on the job. When asked to summarize the reasons for claimant's discharge, however, she testified that claimant was discharged for lying about his work hours, for stealing the employer's property by selling or trying to sell materials the employer had discarded, for having a relationship with a tenant, and for making inappropriate use of the employer's computer and telephone. The record was not sufficiently developed to allow us to determine whether claimant engaged in these actions, and whether they constituted misconduct, however.

In regard to the claimant's work hours, the property manager testified that on several occasions, claimant arrived late to work or left work early, and failed to accurately record his hours. Transcript at 13-14. The property manager also testified that at some point, the employer had claimant begin filling out "a daily journal so he was forced to be accountable daily and record in the journals everything that

he did.” Transcript at 32. On remand, the ALJ must ask when the employer directed claimant to use a daily journal, what he was expected to record in this journal, how often and who checked the journal entries, how and when the employer determined differences between recorded work hours and the hours claimant actually worked, approximately how many times such differences were noted, whether claimant was asked about these differences, and what explanation(s) claimant provided if he was. The property manager testified about one particularly significant incident that occurred on July 4, 2016, when she was unable to locate claimant until sometime after 2 p.m. Transcript at 14. Claimant, however, testified that on July 4, he “went straight to his assigned job so there was no way for any of them to know whether or not I was working.” Transcript at 27. The ALJ must ask claimant what time he reported for work on July 4, where he reported for work, and why the employer was unable to reach him by phone until 2 p.m.

Concerning claimant’s relationship with a tenant, the property manager testified that “[i]t was 4th of July weekend and he had what I was told relations with a tenant in one of the properties.” Transcript at 14. On remand, the ALJ must inquire what the property manager was told about claimant’s “relations with a tenant,” who provided her with this information, whether the matter was discussed with claimant, and, if so, what claimant told her about the matter. If such a relationship is established, the ALJ must ask claimant if he knew that the relationship was contrary to the employer’s expectations.

Regarding claimant’s inappropriate use of the employer’s phone and computer, the ALJ must inquire who investigated claimant’s phone and computer use, when this investigation was made, and what material was discovered that the employer found was inappropriate. The ALJ must conduct a similar inquiry into the charge that claimant stole the employer’s property by selling or attempting to sell materials the employer had discarded; the ALJ should asking who discovered these sales or attempted sales, and how and when they were discovered.

Finally, we note that the property manager testified that claimant was twice placed on “probation.” Transcript at 7. On remand, the ALJ should inquire when claimant was placed on “probation,” what were the terms of and the warnings given as part of this “probation,” and whether claimant successfully completed the terms of his “probation.”

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 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-71794 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-74049 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: February 14, 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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