

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0463

Reversed & Remanded

PROCEDURAL HISTORY: On March 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105902). Claimant filed a timely request for hearing. On April 10, 2017, ALJ Meerdink conducted a hearing and issued Hearing Decision 17-UI-80646, affirming the Department's decision. On April 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

This case is being remanded to OAH for a hearing to further develop the record. If a party has documents that it wishes to have considered at the hearing, it must provide copies of the documents to all parties at their addresses of record and to the ALJ at the Office of Administrative Hearings, PO Box 14020, Salem, OR 97309-4020 or FAX 503-947-1531 prior to the date of the scheduled hearing.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-80646 is reversed, and this matter remanded to OAH for additional proceedings.

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.

The employer discharged claimant for failing to comply with its attendance policy due to incarceration. Claimant was arrested for a probation violation from a 2011 case. In Hearing Decision 17-UI-80646, the ALJ found that claimant knew or should have known the terms of his probation "as a matter of law," and that a failure to follow the terms would result in a probation violation. Thus, because one of claimant's probation terms was to pay restitution, and claimant failed to pay all his restitution before his

probation period ended, the resulting incarceration and attendance violation was “attributable to him” and was misconduct.¹ We disagree that the record supports the ALJ’s decision.

The relevant inquiry is whether claimant willfully or with wanton negligence consciously engaged in conduct he knew or should have known would probably result in his incarceration and resultant inability to report to work. *See Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991). Here, claimant knew a condition of his probation was to pay his restitution according to a payment plan that he asserted ended in August 2016. Claimant testified that he complied with the payment plan by making the payments until August 2016, and that he had continued to make payments after August 2016. Audio Record at 20:28 to 21:15. He testified that, even though he was not behind in his payments, he did not pay his restitution in full within the probation period, which resulted in a probation violation, arrest and incarceration. Audio Record at 22:04 to 22:15. Claimant testified that he did not know about the warrant before he was arrested. Audio Record at 18:25 to 18:43. However, the record does not show if claimant knew or should have known his failure to pay the full restitution amount by August 2016 would probably result in a probation violation, warrant and arrest, or if he knew or should have known how to avoid a probation violation.

Claimant testified that he was incarcerated after work on January 12 until January 18, 2017, and first returned to work on January 20, 2017. Audio Record at 18:06 to 18:19. The ALJ should inquire as to why claimant did not return to work on January 19, 2017. The ALJ should inquire if claimant was required to maintain current contact information with the court as a condition of his probation, and if he did so. The ALJ should ask claimant if he received any notices or other communications from the court during 2016. The ALJ should inquire about the terms of claimant’s original sentence and probation, including the details of his restitution obligation, when his obligation to make payments began, how often he was to make payments, how much he was required to pay each payment date, if he had made all of his payments, how long the restitution payment plan was to be in effect, what would occur in August 2016 when claimant testified the payment plan ended, what would happen if he had not made all restitution payments by August 2016 and what his obligation was regarding the restitution after August 2016. The ALJ should inquire if claimant was required to contact the court regarding the payment plan, and/or his probation, by August 2016. The ALJ should inquire if claimant was required to pay his full restitution amount by a certain date, and if not, why not. The ALJ should inquire if the terms of his original sentence and probation specified a penalty for failing to make all the payments and/or for failing to pay the full amount of the restitution by August 2016. In addition, the ALJ should ask the following questions: Did claimant know the court would issue a warrant if he did not pay all of his restitution by August 2016? What did claimant mean when he testified that the payment plan ended in August 2016 and did he think it would end even if he had not paid the full amount of the restitution as of that time? Did the court instruct claimant what would occur when the five year probation period ended? Was claimant required to seek a modification or otherwise contact the court if the restitution was not paid by August 2016? Were there other probation violations at issue, or only the failure to pay the full restitution? In addition, the ALJ should inquire about the details of the orders issued as of result of claimant’s January 18 and February 14 court appearances, including whether the violation was dismissed or there was a judgment for a probation violation, and if there was a judgment for a violation, what the resulting sanctions were.

¹ Hearing Decision 17-UI-80646 at 3.

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 was discharged for misconduct, Hearing Decision 17-UI-80646 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-80646 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: May 11, 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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