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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0749

Reversed & Remanded

PROCEDURAL HISTORY: On April 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110040). The employer filed a timely request for hearing. On June 13, 2017, ALJ Meerdink conducted a hearing at which claimant failed to appear, and issued Hearing Decision 17-UI-85544, affirming the Department's decision. On June 21, 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.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-85544 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for another hearing on whether the employer discharged claimant for misconduct.

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-85544, the ALJ found that the employer discharged claimant, but not for misconduct after claimant failed to call the employer or report to work on February 20, 2017.[1] The ALJ found that the employer failed to establish it discharged claimant for misconduct because, although claimant had multiple prior instances of tardiness, the record did not show claimant's failure to call or report to work on February 20 was willful or wantonly negligent.[2]

We agree that, as is stands, the record fails to establish that claimant's discharge was for misconduct. When the ALJ asked the employer's manager if claimant provided the employer with an excuse for her no show, no call on February 20, the witness responded, "Not to my knowledge." Audio 4:02 to 4:11. However, claimant responded in writing on her prior warnings, and the manager was not asked if claimant received a written termination, and if so, if claimant responded in writing to the termination. Exhibit 1 at 2-7. Moreover, the manager was not asked what she knew about claimant's responses on the prior warnings regarding those prior incidents. The Department's administrative decision stated that claimant failed to report to work on February 20 because she misread her schedule. Decision # 110040. Although the findings in the administrative decision are not evidence, the finding suggested a reason for claimant's no show, no call in a record that otherwise provides none. Given that the manager testified she did not know if claimant gave a reason, and the ALJ's obligation is to inquire and develop a full record regardless of whether the claimant attended the hearing, we conclude that the ALJ was obligated to ask the employer's witness if she knew whether claimant explained that she misread her schedule on February 20. The ALJ should ask how the schedule was posted for its employees. Moreover, because claimant was discharged when she returned to work on February 22, 2017, the ALJ should inquire about the content of any discourse between claimant and the employer that day. If claimant participates in the hearing on remand, the ALJ should inquire of her regarding the reason she missed work on February 20, and what precautions she took to avoid attendance violations.

Absent such inquiries, we cannot determine whether claimant consciously behaved in a manner that she knew or should have known probably violated the standards of behavior which an employer has the right to expect of an employee. We therefore cannot determine whether the employer discharged claimant for willful or wantonly negligent behavior, and not a good faith error or an isolated instance of poor judgment.

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, Hearing Decision 17-UI-85544 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-85544 is set aside, and this matter remanded for further proceedings consistent with this order.

[1] Hearing Decision 17-UI-85544 at 2.

[2] *Id.*

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

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-85544 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

DATE of Service: July 18, 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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