EO: 200
BYE: 201818

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

722
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0827

Reversed & Remanded

PROCEDURAL HISTORY: On May 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 93242). Claimant filed a timely request for hearing. On June 26, 2017, ALJ Sgroi conducted a hearing, and on July 3, 2017, issued Hearing Decision 17-UI-87115, concluding that the employer discharged claimant, but not for misconduct. On July 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

EVIDENTIARY MATTER: At the June 26, 2017 hearing, the ALJ admitted documents submitted by the employer into the record as Exhibit 1. On this record, however, the exhibit admitted was not marked. Accordingly, we have marked Exhibit 1 based on the ALJ's description. Audio recording at 6:51 to 10:21. Exhibit 1 consists of: a cover sheet, a 3/3/17 "Employee warning notice," a 4/26/17 "Employee warning notice," copies of 4/26/17 emails forwarded by N.E. to A.G., copies of 4/26/17 emails from claimant to A.G. and from A.G. to claimant, an "Office Gossip" notice, and copies of small handwritten notes. We also note that in Hearing Decision 17-UI-87115, the ALJ incorrectly stated that Exhibit 1 was admitted into the record without objection. Hearing Decision 17-UI-87115 at 1. The hearing record shows, however, that claimant objected to the admission of Exhibit 1 and that the ALJ admitted the exhibit into the record over claimant's objection. Audio recording at 11:34.

FINDINGS OF FACT: (1) Corvallis Pain Management employed claimant as a medical biller from December 19, 2016 until May 5, 2017.

(2) The employer expected that employees would not speak critically about their coworkers to other employees. Claimant knew about and understood this employer expectation.

(3) On March 3, 2017, the employer's office manager reprimanded claimant in writing for violating the employer's policy by her "attitude" because the office manager had received an anonymous complaint that claimant had been "talking 'down'" about the employer's assistant manager, stating that she did not

respect the assistant office manager as a supervisor because the assistant office manager was not qualified to perform her job. Exhibit 1, 3/3/17 "Employee warning notice."

(4) On April 26, 2017, the office manager reprimanded claimant in writing for violating the employer's policy by her "attitude." The reprimand did not specify any facts upon which the reprimand was based, but directed claimant to watch a video about workplace gossip, and stated that "next time you feel the need to talk about another employee come to the manager and do not talk about it with other employees." The reprimand warned claimant that she would incur a three day suspension "should [the] incident occur again." Exhibit 1, 4/26/17 "Employee warning notice."

(5) On May 4, 2017, two employees told the office manager that claimant had been "talking poorly of another coworker." Transcript at 5. On May 6, 2017, the employer discharged claimant for violating its policy against gossip by speaking critically of a coworker to other employees.

CONCLUSION AND REASONS: Hearing Decision 17-UI-87115 is reversed and this matter remanded for further development of the record.

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-87115, the ALJ concluded that the employer discharged claimant, but not for misconduct. The ALJ found that the "proximate cause" of claimant's discharge was her May 4, 2017 private conversation with a doctor, who was the owner of the clinic where claimant worked. During this conversation, the doctor questioned claimant about a coworker, and she honestly responded to his questions. Hearing Decision 17-UI-87115 at 3. The ALJ found that this conversation did not "constitute a violation of the employer's gossip policy as alleged at hearing," and concluded that the employer failed to meet its burden to demonstrate that it discharged claimant for misconduct. *Id.* We disagree with the ALJ's findings concerning the facts and the conclusion she reached.

Contrary to the ALJ's finding, the record shows that the employer discharged claimant because on May 4, 2017, the office manager received two anonymous reports that claimant had violated the employer's gossip policy by speaking to employees about another employee, B[1], and discussing B's "drinking habit

[1] B is a pseudonym.

and inability to work." Transcript at 7; Exhibit 1, 6/14/17 handwritten notes. The ALJ failed to establish a record sufficient to determine whether claimant engaged in behavior that constituted a willful or wantonly negligent violation of the employer's policies, however.

In regard to the employer's policy prohibiting workplace gossip, the office manager testified that prior to April 1, 2017, the employer had a "soft policy" prohibiting workplace gossip, but that is subsequently became necessary to create a written "hard policy" regarding gossip, which was created on April 1, 2017. Transcript at 11. The ALJ failed to inquire into the specific provisions of the employer's "hard" and "soft" gossip policies and how employees were informed about them. On remand, the ALJ must ask what was the employer's "soft" gossip policy prior to April 1, 2017, how gossip was defined in this policy, and how and when employees were told about this policy. The ALJ must ask what was the written "hard" policy regarding gossip created on April 1, whether this policy was the "Office Gossip" policy contained in Exhibit 1, and how and when employees were notified of this policy.

In regard to the April 26, 2017 reprimand claimant received about her "attitude," the ALJ must ask the employer's witness what claimant allegedly did that violated the employer's policy concerning "attitude." The ALJ must then provide claimant an opportunity to respond to the employer's testimony.

In regard to the two anonymous complaints about claimant's remarks about B to other employees, claimant testified that she only discussed B's conduct with the doctor who owned the business on May 4, and did so in response to the doctor's questions. On remand, the ALJ must ask the employer's witness what the anonymous complainers reported that claimant said to them about B, whether the doctor was one of two people who complained anonymously about claimant's remarks about B, and if so, whether this conversation with the doctor constituted "gossip" in violation of the employer's policy. The record shows that on June 14, 2017, the office manager placed notes in claimant's file concerning the two anonymous complaints about claimant. The ALJ should ask the office manager on what date the two employees said that claimant talked to them about B and her alcohol use, *i.e.*, whether these conversations allegedly occurred on May 4 or some other date, and also ask how the office manager was able to remember the date and content of the employees' reports, given that she apparently did not make notes about the reports until over a month after she received them.

The ALJ must give claimant an opportunity to respond to the employer's evidence presented at the hearing on remand. To do so, the ALJ must ask claimant if she talked to anyone other than the doctor about B and B's alcohol use on or about May 4, or talked to anyone about B and her alcohol use on or about whatever date the remarks were allegedly made.

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-87115 is reversed, and this matter is remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-87115 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.

DECISION: Hearing Decision 17-UI-87115 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: August 7, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.