

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0976

Reversed & Remanded

PROCEDURAL HISTORY: On May 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 103750). On June 15, 2017, decision # 103750 became final without the Department having received claimant's request for hearing. On June 20, 2017, claimant filed a request for hearing. On April 20, 2017, ALJ Kangas issued Hearing Decision 17-UI-86433, dismissing claimant's late request for hearing on decision # 103750 subject to claimant's right to renew the hearing request by responding to an appellant questionnaire no later than July 7, 2017.

On July 7, 2017, the Office of Administrative Hearings (OAH) received claimant's response to the questionnaire. On July 11, 2017, OAH issued a letter order stating that Hearing Decision 17-UI-86433 was vacated and that OAH would schedule a hearing to address the timeliness of claimant's original hearing request and, if appropriate, the merits of decision # 103750.

On July 17, 2017, OAH served notice of a hearing set for July 31, 2017. On July 31, 2017, ALJ Sgroi conducted a hearing, and on August 4, 2017 issued Hearing Decision 17-UI-89724, allowing claimant's request for hearing and affirming decision # 103750. On August 14, 2017, claimant filed an application for review of Hearing Decision 17-UI-89724 with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant's request for hearing was not filed in a timely manner but that claimant has shown good cause to extend the time for filing are **adopted**. However, the portion of Hearing Decision 17-UI-89724 in which the ALJ affirmed decision # 103750 and disqualified claimant from benefits is reversed, and this matter is 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. 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. The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c). 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).

In Hearing Decision 17-UI-89724, the ALJ found that claimant disclosed criminal charges pending against her and that the resultant failure to maintain the background clearance necessary to perform her work was misconduct, reasoning that the denied background check was reasonably attributable to claimant because claimant did not deny she was guilty of the criminal charges pending against her that caused her inability to renew her criminal background clearance.¹

We disagree with the ALJ's conclusion that the failed background check and claimant's failure to deny the pending charges at hearing was sufficient to establish claimant's conduct was willful or wantonly negligent. At the time of the criminal background check, claimant had charges pending against her from 2015 for delivery of cocaine and conspiracy to deliver cocaine in an amount exceeding five kilograms. To conclude that claimant's discharge was for misconduct, the preponderance of the evidence must show that claimant consciously engaged in conduct she knew or should have known would probably result in the criminal charges, that she acted with indifference to the consequences of her actions, and that her failure to pass the background check and receive permission to continue working was reasonably attributable to her willful or wantonly negligent conduct.

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). The limited testimony elicited by the ALJ from claimant regarding the pending charges was that she had not plead guilty to the charges or entered into a plea agreement and that she did have cocaine in her possession. The ALJ reminded claimant that she had the right to not answer questions. Although claimant had the right to exercise her right against self-incrimination and not respond to questions that might implicate her in criminal activity, claimant's right does not allow the ALJ to dispense with the duty to ensure a full and fair inquiry into the facts necessary for consideration of the issue of whether claimant's discharge was for misconduct.

Claimant's admission that she had cocaine in her possession implies that her loss of license might be willful or wantonly negligent and attributable to claimant. However, after the ALJ reminds claimant that she may invoke her right under the Fifth Amendment not to answer the ALJ's questions because claimant's responses may incriminate her, the ALJ must ask claimant if she has other information that would suggest that her possession of cocaine and the resulting criminal charges and loss of license were not willful or wantonly negligent or were not attributable to claimant's own conduct. The ALJ must ask

¹ Hearing Decision 17-UI-89724 at 3.

claimant questions to elicit information about the circumstances that resulted in her arrest and whether claimant consciously engaged in conduct she knew or should have known would probably result in the pending criminal charges. For example, did claimant know she was in possession of cocaine? Did claimant have the cocaine in her physical possession or was it found in a common area? If the cocaine was in a common area, did claimant know it was there? Did claimant knowingly or intentionally give the cocaine to another individual? What was claimant's participation in the incidents that lead to the pending charges? Were there other individuals charged with claimant? What was claimant's role in the incidents that lead to her arrest compared to the other individuals?

Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for misconduct, Hearing Decision 17-UI-89724 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-89724 is affirmed to the extent that it allowed claimant's request for hearing; to the extent it affirmed decision # 103750, however, Hearing Decision 17-UI-89724 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 8, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-89724 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.

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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