

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1057

Reversed & Remanded

PROCEDURAL HISTORY: On July 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152150). Claimant filed a timely request for hearing. On August 21, 2017, ALJ Shoemake conducted a hearing, and on August 24, 2017 issued Hearing Decision 17-UI-91099, concluding the employer discharged claimant, but not for misconduct. On August 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB that contained information not offered during the hearing. Claimant also submitted a written argument that, in large part, responded to the employer's new information. The employer did not explain why it was unable to present the new information at the hearing or otherwise show that it was prevented from doing so by factors or circumstances beyond its reasonable control as required by OAR 471-041-0090 (October 29, 2006). For that reason, EAB did not consider the employer's new information or the information that claimant sought to present in response to the employer's argument. However, EAB notes that in light of its disposition of the matter, claimant and the employer may offer the new information that they sought to present by way of their respective written arguments at the hearing on remand and, at that time, the ALJ will decide if that information is relevant to the issues on remand and should be admitted into evidence.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-91099 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. However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). An act that, among other things, causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment

relationship impossible exceeds mere poor judgment and may not be excused as an isolated instance of poor judgment OAR 471-030-0038(1)(d)(D).

In Hearing Decision 17-UI-91099, although the ALJ concluded that claimant's refusal on July 3, 2017 to work an upcoming shift scheduled for July 22, 2017 was a wantonly negligent violation of the employer's expectation, the ALJ further concluded that claimant's refusal was excused from constituting misconduct because it was an isolated instance of poor judgment. Hearing Decision 17-UI-91099 at 3. In reaching the latter conclusion, the ALJ reasoned that claimant's refusal constituted an isolated violation of the employer's standards since she "had no prior incidents of refusing to work or any prior warnings [issued to her by the employer]." *Id.* However, a claimant's behavior is not considered isolated and may not be excused if it was a repeated act of willful or wantonly negligent behavior in violation of the employer's standards, whether or not it involved the same type of behavior that is sought to be excused or was the subject of a prior warning. *See* OAR 471-030-0038(1)(d)(A). On this record, the ALJ did not sufficiently develop the evidence to enable us to determine whether any of claimant's prior behaviors involved willful or wantonly negligent violations of any reasonable employer expectation that would cause claimant's exercise of poor judgment on July 3, 2017 to be part of a pattern of other willful or wantonly negligent behavior, and to therefore fall outside of that which might be excused as an isolated instance of poor judgment.

During the hearing, the employer's owner alluded to claimant's relatively frequent past behavior of failing to work the 38 hours per week required to receive employer-paid health insurance benefits, and her decision to accept a demotion to part-time as of September 2017 and give up the insurance benefits. Audio at ~ 12:40. The ALJ should have followed up the owner's testimony and inquired about how many hours per week claimant was expected to work leading up to the demotion, how she was aware that this number of work hours was expected of her and how many hours claimant actually and routinely worked. The ALJ also should have inquired about the employer's policy, if any, related to working full-time hours and seeking authorization for working fewer hours and how claimant was made aware of this policy. The ALJ should further have asked how the employer became aware that claimant was not working full-time hours and if claimant notified the employer in advance if she was not going to work full-time hours in any week, if the employer expected such notice or expected claimant to request permission to work less than full time hours, and if claimant ever sought such permission. The ALJ should further inquire about all verbal warnings, counselings or discussions between claimant and the employer about the hours she was actually working, what claimant was told as to the employer's expectations and what would happen if she failed to work the hours expected, and whether claimant subsequently complied with any verbal expectations that were communicated to her. The ALJ also should ask about the "probation" the employer placed claimant on for working less than full-time hours, whether claimant was given written or verbal notice of that probation and, if so, the substance of that notice, including the employer's policy that claimant allegedly violated, the facts underlying that violation, what was expected of claimant to meet the terms of the probation and whether claimant complied with the terms of the probation.. Audio at ~14:00. The ALJ should allow claimant an opportunity to respond to the employer's testimony. As appropriate the ALJ should follow up the testimony elicited from the employer and claimant on these matters sufficient to determine the employer's expectations, whether claimant was aware of them, if claimant complied with them and, if not, whether her non-compliance was the result of willful or wantonly negligent behavior.

At hearing, the employer's owner testified that claimant frequently missed work for "personal," "non-health-related" reasons, and did so at least a dozen times between January 1, 2017 and July 3, 2017. Audio at ~30:32. As above, the ALJ should develop the evidence as to the substance of the employer's work attendance policy, whether advance notice needed to be given of absences and how claimant was made aware of the policy. The ALJ should also ask the employer how many, if any, of claimant's alleged absences violated its attendance policy, the dates on which these alleged violations occurred, how the absences violated the attendance policy and the source(s) of the employer's information as to any violations. Also, as above, the ALJ should allow claimant an opportunity to respond to the employer's testimony. As appropriate, the ALJ should follow up the testimony elicited from claimant and the employer on this matter sufficient to determine the employer's expectations, whether claimant was aware of them, if claimant complied with them and, if not, whether her non-compliance was the result of willful or wantonly negligent behavior.

If in the course of either party's testimony other alleged instances of claimant's past willful or wantonly negligent behavior in violation of the employer's expectations are raised, the ALJ should inquire into them in the manner detailed above.

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-91099 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-91099 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: October 3, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-91099 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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