

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1137

Reversed & Remanded

PROCEDURAL HISTORY: On August 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 105846). The employer filed a timely request for hearing. On September 12, 2017, ALJ Seideman conducted a hearing, and on September 14, 2017 issued Hearing Decision 17-UI-92554, affirming the Department's decision. On September 22, 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. However, the employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-92554 is reversed, and this matter remanded for another hearing and hearing decision.

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 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-92554, the ALJ found that the employer discharged claimant for poor performance, and concluded that claimant's discharge was not for misconduct because claimant was "trying his hardest" to meet the employer's performance expectations but was "overwhelmed" by his workload, and that there was no showing of any willful or wantonly negligent disregard of the employer's interest.¹ We agree with the ALJ that the record shows the employer discharged claimant, in part, for failing to meet its performance expectations. We also agree that the employer failed to establish that claimant willfully failed to meet those expectations or that he consciously engaged in conduct he knew or should have known would probably result in his failure to do so. Thus, to the extent the employer discharged claimant for failing to meet its performance expectations, we agree that the employer failed to establish that the discharge was for misconduct, and not mere inefficiency resulting from a lack of job skills.

At hearing, however, the employer's owner testified that the employer also discharged claimant, in part, because he "covered up and deliberately misrepresented" his failure to meet the employer's performance expectations, including his failure to "reconcile bank statements, file tax forms and documents" for the employer's clients. Transcript at 4. According to the owner, claimant had "routine and regular check-ins as to the work flow, the workload," and "how it was all going," during which claimant failed to state that he was failing to perform those duties. Transcript at 6. The owner also referred to a "pattern" of claimant "covering up" his failure to perform and ignoring basic tasks for months without "telling me about it," and even testified that the "straw that broke the camel's back" was claimant falsely telling him that he had filed an Oregon tax withholding reconciliation form. Transcript at 7-8, 12. However, the ALJ failed to follow up and conducted virtually no inquiry into the facts necessary for a determination of whether claimant's alleged cover-up and misrepresentations regarding his failure perform his required duties, including filing the tax withholding reconciliation form, constituted misconduct. Hearing Decision Hearing Decision 17-UI-92554 therefore is reversed, and this matter remanded for another hearing and hearing decision.

On remand, the ALJ should begin by inquiring into what extent, and under what circumstances, the employer expected claimant to disclose when he was behind in performing his required duties, how those expectations were communicated to claimant, and claimant's understanding of those expectations. At hearing, the owner testified that the employer eventually discovered "all the things that were not done that we were led to believe were done" after it hired a CPA to assist claimant, later brought back its previous accounting manager, and finally got its tax accountant "involved." Transcript at 6-7, 13-14. The ALJ should ask the employer's witnesses to specify all incidents in which claimant was allegedly dishonest, lied, covered up or deliberately misrepresented his failure to perform his required duties, including the dates on which the alleged incidents occurred. The ALJ also should ask the employer's witnesses what claimant allegedly said or did not say, or did or did not do, during each incident that violated the employer's expectations. With respect to each incident, the ALJ should ask the employer's witnesses when the employer learned of claimant's alleged dishonesty, cover up or misrepresentation. The ALJ should allow claimant an opportunity to respond to the employer's allegations, and otherwise conduct a full and fair inquiry into the facts necessary for a determination of whether claimant's conduct during each incident was willful or wantonly negligent, and whether his discharge was for misconduct, and not an isolated instance of poor judgment or a good faith error.

¹ Hearing Decision 17-UI-92554 at 2-3.

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's discharge was for misconduct, Hearing Decision Hearing Decision 17-UI-92554 is reversed, and this matter is remanded for another hearing and hearing decision.

DECISION: Hearing Decision 17-UI-92554 is set aside, and this matter remanded for further proceedings consistent with this order.²

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

DATE of Service: October 23, 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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² The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision Hearing Decision 17-UI-92554 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.