

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1208

Reversed & Remanded

PROCEDURAL HISTORY: On July 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 144345). The employer filed a timely request for hearing. On September 13, 2017 and October 5, 2017, ALJ Wyatt conducted a hearing at which claimant failed to appear, and on October 13, 2017 issued Hearing Decision 17-UI-94519, affirming the Department's decision. On October 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-94519 is reversed and this matter remanded for additional proceedings.

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. However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The ALJ found as fact that claimant's supervisor assigned him to work in unit #253 as "his priority," but claimant chose to help another employee work in unit # 233 instead of following that instruction. Hearing Decision 17-UI-94519 at 2. The ALJ nevertheless concluded that claimant's discharge was not for misconduct, reasoning that although claimant was, since January 2017, on a final written warning for, among other things, failure to follow instructions, his failure to follow instructions on March 26 and March 27, 2017 was ordinary negligence because the record lacked evidence that "claimant acted with the intention of committing a violation" or "at least . . . was conscious of violating the employer's

reasonable expectations at the time of the actions.” Hearing Decision 17-UI-94519 at 3. We agree with the ALJ’s findings of fact and hereby adopt them by reference; we disagree, however, with the conclusion the ALJ drew from them. The record, as illustrated by the ALJ’s findings, established that claimant received a clear instruction to work in a particular unit and chose to disregard that instruction under circumstances where, after having received a final written warning for failing to follow instructions, he knew or should have known that failing to follow instructions again would probably result in a violation of the standards of behavior the employer had the right to expect of him. Claimant’s conduct on March 26 and March 27 was, therefore, willful or wantonly negligent.

Although the final incident involved willful or wantonly negligent conduct by claimant, the record as developed at the hearing does not show whether or not claimant’s conduct was excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent occurrence of willful or wantonly negligent conduct rather than a repeated act or pattern of other willfully or wantonly negligent behavior. OAR 471-030-0038(1)(d). In order to determine whether claimant’s March 26 and March 27 conduct was or was not isolated, the ALJ must inquire into any prior violations of the employer’s expectations the employer alleged occurred within the approximately six-month period preceding the final incident. Although it appears on this record that the ALJ inquired into one such incident, the employer alleged additional incidents occurred, and the ALJ must on remand ensure that the employer has the opportunity to develop the record as to claimant’s conduct in those incidents. Should claimant appear at the hearing on remand, claimant should be allowed the opportunity to testify and respond to the employer’s allegations.

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 an isolated instance of poor judgment, Hearing Decision 17-UI-94519 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-94519 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 17, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-94519 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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