

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1211

Reversed & Remanded

PROCEDURAL HISTORY: On September 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150431). Claimant filed a timely request for hearing. On October 11, 2017, ALJ Murdock conducted a hearing, and on October 13, 2017 issued Hearing Decision 17-UI-94574, concluding that claimant's discharge was not for misconduct. On October 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ameri-Tool Industries, Inc. employed claimant, last as shipping and receiving clerk, from March 1986 to August 28, 2017.

(2) The employer expected employees to request time off work by filling out paperwork, having it signed and approved by an immediate supervisor, and then submitting the paperwork to human resources. Claimant complied with that expectation on numerous occasions since February 2017. On multiple occasions when claimant's supervisor was absent, claimant asked the human resources manager for permission to leave work early, and the human resources manager said no.

(3) In April 2017, the employer issued claimant a final written warning for poor job performance. The employer warned claimant that he would be discharged for further issues. Claimant signed the warning on April 20, 2017 and understood his job was in jeopardy.

(4) Thereafter, claimant made shipping and receiving errors, including extra parts in customers' orders without invoicing them and invoicing customers for parts that were not shipped to them. He also mislabeled shipments, resulting in confusion for the employer's customers. The employer's president counseled claimant to make sure he had the counts and labels correct before shipping items, but did not discharge him for those errors because he wanted to work with claimant to improve.

(5) On August 25, 2017, claimant wanted to leave work early to enroll his foster child in school. His immediate supervisor was on vacation that day. In the morning, he asked a supervisor on duty if he could leave early if he got all of his work done. Claimant thought the supervisor said he "didn't see a problem with that." Transcript at 20. The supervisor did not instruct claimant to complete human

resources paperwork; claimant did not go to the office that morning to ask the president or human resources manager for permission to leave early or to obtain the paperwork for the supervisor to sign.

(6) While working on August 25, 2017, claimant filled an order for an electronics business and included an extra box of parts. At lunchtime claimant went to the front office about getting paperwork to leave early but found that no one was there. Claimant talked to a supervisor who said that the human resources manager and president had gone to a luncheon meeting. Claimant did not fill out any paperwork, have anyone sign it, or turn it in to human resources.

(7) The same day, claimant stopped working at 2:00 p.m., before his shift ended. He told the supervisor he was “taking off now,” and the supervisor said “okay” and “[h]ave a nice weekend.” Transcript at 20-21. At the time claimant left he had not finished his work.

(8) About 30 minutes after claimant left, the employer’s president observed that claimant was absent from work. The president investigated, learned that claimant had not completed the human resources paperwork or been authorized to leave work early. Because claimant had not finished his work, the president and other employees had to complete the shipments that claimant had not finished.

(9) On August 28, 2017, the employer received a complaint from a customer that claimant had shipped them an extra box of a particular part without any paperwork. The same day, the employer discharged claimant for leaving work early on August 25, 2017 and shipping a customer an extra box of a part.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-94574 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. Isolated instances of poor judgment are not misconduct.

The ALJ concluded that claimant’s discharge was not for misconduct, finding that although claimant had in the past completed paperwork to become authorized to take time off work, he was not aware that he needed to complete paperwork in the final incident and had never been warned for that particular offense in the past. The ALJ concluded that “[a]n individual cannot have willfully or wantonly violated a standard of which he was not aware,” and summarily stated that “[a]t worst,” claimant’s conduct was an isolated instance of poor judgment or good faith error. Hearing Decision 17-UI-94574 at 3. We disagree that claimant was not aware he needed to complete paperwork in the final instance, and conclude the record must be further developed before we can determine whether or not claimant’s conduct was excusable as an isolated instance of poor judgment.

Claimant was a 31-year employee who had regularly either filled out paperwork and had it signed by a supervisor authorizing him to take time off work, or had asked the human resources manager for permission to leave work early and been told no. He said that even though he “suppose[d] there probably was” times he had requested on paper to leave early he “just can’t remember at this time.”

Transcript at 26. It is not plausible given those circumstances that claimant did not understand he needed to complete paperwork authorizing him to leave early before leaving. Claimant suggested that he did not complete the required paperwork on August 25th because the president and human resources manager were away from the office around lunchtime. However, claimant knew that morning that he was going to want to take time off work and was not planning to leave until 2:00 p.m. The fact that the president and human resources manager might have left around lunchtime did not prevent him from speaking with them about his desire for time off, nor did it prevent him from filling out the paperwork and having the supervisor sign it, and leaving it on the appropriate desk or in the appropriate inbox.

Claimant also alleged he didn't fill out the paperwork because his supervisor usually asked him to complete the paperwork but "[t]he supervisor in charge on the floor he didn't request that I fill one out." *Id.* That testimony contradicts his testimony that when his supervisor was absent, as in the final attendance incident, "the paperwork's always posted outside the front office" so he would "grab a form and to fill it out and turn it in." *Id.* The fact that a supervisor in the final attendance incident did not tell claimant to fill out paperwork did not relieve him of the responsibility for following the policy requiring him to do so. *Id.* It is also notable that when claimant spoke with that supervisor he stated "[i]f I get all my work done may I – may I leave early?" However, when claimant left work at 2:00 p.m. that day he had not finished his work, and the president and other employees had to do the work for him.

For those reasons, it is more likely than not that claimant understood he was required to fill out paperwork in the final incident, have it signed by a supervisor, and then turn it in before he would be authorized to leave work early. Given that claimant had repeatedly asked to leave work early when his supervisor was absent, the employer's president thought claimant had an attendance problem, the employer's human resources manager had repeatedly refused claimant's requests to leave early under similar circumstances, and claimant's work was not done at the time he left work that day, it appears more likely than not that claimant knowingly and intentionally failed to fill out the paperwork because he suspected his request would be rejected by the president and human resources manager. Claimant's violation of the employer's expectation that he fill out paperwork and obtain authorization before leaving work early was, therefore, a willful violation of the employer's expectations.

Although claimant willful violated the employer's expectations, his conduct might be excused from constituting misconduct if it was an isolated instance of poor judgment. An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent willful or wantonly negligent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct, providing that it not exceed mere poor judgment. *See* OAR 471-030-0038(1)(d). Conduct exceeds mere poor judgment if it is unlawful, tantamount to unlawful conduct, causes an irreparable breach of trust in the employment relationship, or otherwise makes a continuing employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's failure to comply with the employer's time-off request procedure was not unlawful or tantamount to unlawful conduct, and, objectively considered, one willful failure to properly use time-off request paperwork in the context of a 31-year employment relationship did not cause an irreparable breach of trust between claimant and the employer or make a continuing relationship impossible. Claimant's conduct did not exceed mere poor judgment.

With respect to whether or not claimant's conduct was isolated, however, the record developed at the hearing does not support a conclusion one way or the other, and additional evidence is required. On remand, the ALJ should inquire with the employer about the dates and details of any prior failures to use

the employer's time-off request paperwork, attendance policy violations, or failures to properly perform his duties as a shipping and receiving clerk within the approximately six month period preceding claimant's discharge. The ALJ should ask the employer to explain how it informed claimant of its expectations prior to those incidents, and whether claimant had, prior to the incidents, demonstrated an ability to conform to the expectations or otherwise demonstrated that he understood them. The ALJ should ask the employer whether or not claimant received any coachings or warnings about the issues involved, and how claimant responded. The ALJ should also ask claimant to respond to the employer's allegations. To any extent the record the ALJ develops might establish that claimant did, in fact, violate any employer expectations, the ALJ should ask claimant why he acted as he did in those instances, whether he thought he was violating or complying with the employer's expectations, and why he held that belief. We also note that during the October 11, 2017 hearing the parties were in dispute about the process by which claimant shipped items to customers, his access to the invoices for those shipments, and his responsibility for labeling shipments to customers. On remand, the ALJ should inquire further with the parties as to those details, to support a determination of whether or to what extent claimant was, or was not, personally responsible for any of the shipping errors the employer identified at that hearing.

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 an isolated instance of poor judgment or for misconduct, Hearing Decision 17-UI-94574 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-94574 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-94574 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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