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BYE: 201929

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1015

Reversed & Remanded

PROCEDURAL HISTORY: On August 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141353). Claimant filed a timely request for hearing. On September 7, 2018 and September 25, 2018, ALJ R. Frank conducted a hearing, and on October 3, 2018 issued Order No. 18-UI-117642, affirming the Department's decision. On October 23, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument. First, we did not observe that claimant certified in the written argument that she sent a copy of it to the employer, as required by OAR 471-041-0080(2)(a). Second, even if she did, the argument was largely irrelevant to the issue of claimant's failures to report to work or notify the employer of her absences on December 24, 2017, June 17, 2018, and July 22, 2018, which is the only issue before EAB at this time, and, to the extent the argument pertained to those absences, it was unduly duplicative of claimant's exhibit 1, which also contained mostly irrelevant information, and is already part of this hearing record.

CONCLUSIONS AND REASONS: Order No. 18-UI-117642 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) 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) (January 11, 2018) 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is generally a "single or infrequent occurrence" of poor judgment

"rather than a repeated act or pattern of other willful or wantonly negligent behavior." OAR 471-030-0038(1)(d)(A).[1]

The ALJ concluded that claimant's discharge was for misconduct. In so concluding, the ALJ found facts and concluded that claimant's July 22, 2018 failure to report to work or notify the employer of her absence "was a wantonly negligent disregard of the employer's interest." Order No. 18-UI-117642 at 4. We agree with the ALJ for the reasons set forth in Order No. 18-UI-117642. To the extent Order No. 18-UI-117642 so concluded, on *de novo* review and pursuant to ORS 657.275(2), the ALJ's findings and conclusions are **adopted**.

The ALJ also concluded, however, that claimant's July 22nd behavior was not excusable as an isolated instance of poor judgment. The basis of the ALJ's decision on that issue was that "claimant had previously violated policy." Order No. 18-UI-117642 at 4. We disagree with the ALJ's conclusion on that issue, and find that additional evidence is necessary to reach any decision on the isolated instance of poor judgment issue.

It is not enough for purposes of an isolated instance of poor judgment analysis to conclude that claimant previously violated policy, the record must also be sufficiently developed to support a finding that any such previous violations were willful or wantonly negligent. Here, the record shows that claimant violated policy on December 24th by failing to report to work or notify the employer she would be absent. When asked the reason that occurred, claimant testified that she made an honest mistake, she was new to the department, and, at the time of that incident, she did not know the department's scheduling procedures. It therefore appears more likely than not that claimant did not act willfully when she missed her December 24th shift without notice, nor does it appear that she acted with conscious indifference when she missed that shift. Claimant's December 24th failure to report to work or notify the employer she would be absent was, therefore, not wantonly negligent.

However, claimant also missed work on June 17, 2018. In that incident, she was scheduled to work at 1:00 a.m., but failed to report to work for that shift or notify the employer she would be absent. At the time of that incident, she had served a three-day suspension for missing a previous shift without notice, and therefore knew or should have known that doing so again would likely violate the employer's policies and expectations with regard to her attendance. However, the ALJ did not ask claimant or the employer any questions about why that absence occurred, or under what circumstances claimant missed that shift. In that absence of that sort of information, we cannot determine whether claimant acted out of conscious indifference to the consequences of her conduct when she missed her June 17th shift without notice. This matter must therefore be remanded for an inquiry into the circumstances of that incident.

On remand, the ALJ should ask the employer and claimant questions such as when the employer scheduled claimant to work, when the schedule was posted, whether claimant knew or should have known she was scheduled to work, whether there were any schedule changes, what reason claimant gave

[1] An isolated instance of poor judgment may exceed mere poor judgment by, among other things, creating an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). It does not appear on this record that a no-call, no-show instance was considered by this employer to create an irreparable breach of trust or make a continued employment relationship impossible, given that the employer allowed claimant to continue working after two prior incidents. We therefore conclude that claimant's July 22nd no-call, no-show exceeded mere poor judgment.

the employer for missing that shift, and, ultimately, what reason claimant had for failing to report to work on that date. The ALJ should ask any follow up questions necessary to determine whether or not claimant's June 17th failure to report to work or notify the employer of her absence was willful or wantonly negligent. Only when the record is developed as to that issue can we determine whether claimant's conduct was or was not an isolated instance of poor judgment.

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, Order No. 18-UI-117642 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-117642 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: November 19, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-117642 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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