

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0010**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On November 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 90716). Claimant filed a timely request for hearing. On December 22, 2014, ALJ M. Davis conducted a hearing, and on December 24, 2014, issued Hearing Decision 14-UI-30929, affirming the administrative decision. On January 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSION AND REASONS:** Hearing Decision 14-UI-30929 should be reversed, and this matter remanded for additional proceedings consistent with this order.

This matter comes before EAB to determine whether, on the facts developed at the hearing, claimant should be disqualified from receiving unemployment benefits based on his discharge by the employer. In a discharge case, the employer has the burden to establish that claimant should be disqualified from benefits because the discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). ORS 657.270 requires that the ALJ give all parties a reasonable opportunity for a fair hearing, however. That obligation necessarily requires that the ALJ 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).

At the hearing, the employer alleged that it discharged the claimant for misconduct in which claimant engaged on October 15, 2014 – striking a coworker in the face. Claimant testified that he never struck the coworker. According to claimant, the coworker began screaming obscenities at claimant; claimant then held his hand up and told the coworker “that’s all.” Transcript at 10. The employer’s witness, however, testified that he saw claimant hit the coworker. Transcript at 14. The ALJ concluded that the testimony of the coworker was more persuasive than that of claimant and held that claimant engaged in misconduct when he “punched the coworker in the face.” Hearing Decision 14-UI-30929 at 5. The

record does not support the ALJ's conclusion, however, because the ALJ failed to make a thorough inquiry into the October 15 incident that resulted in claimant's discharge.

Claimant testified that the employees who witnessed the incident with his coworker were "far away" from where the incident occurred. Transcript at 11-12. The ALJ did not ask who were the employees that witnessed the incident, how far away they were from claimant and the coworker, and where the witnesses were located in relation to the claimant and the coworker.

The employer's witness testified that he was working in the same area as claimant, when claimant began yelling at a coworker. According to the witness, the coworker yelled back at claimant, the two men took "a fighting position," and claimant then hit the coworker in the face. Transcript at 14. The witness testified that the two men were approximately 7 -8 feet from him when they began yelling, and that they then moved to a position approximately 10 to 15 feet from him. The ALJ did not ask the witness to describe the "fighting position" the two men assumed, and did not ask where the witness was standing in relation to claimant and the coworker – if he was behind, in front of, or to the side of the two men. Nor did the ALJ ask if the witness saw the entire altercation and if so, approximately how long it lasted. Finally, the ALJ did not inquire if the witness saw claimant's hand strike the coworker's face, and if the witness observed any marks of the blow.

The witness testified that after the altercation, he yelled out the coworker's name and "he just walk away. And I think he kind of say something like just do it yourself or something. And then he just took his (unintelligible) and took off after that." Transcript at 15. The ALJ did not ask the witness to clarify who (claimant or the coworker) walked away and what the person took, and did not ask the witness where the person went, if the witness knew. Given the discrepancies between the claimant's account of the altercation, and that of the employer's only witness, a more complete inquiry into the details of the incident is necessary to determine whether the employer met its burden to prove misconduct. Accordingly, Hearing Decision 14-UI-30929 is reversed because it is unsupported by a complete record, and the matter remanded for development of the record.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-30929 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.

**DECISION:** Hearing Decision 14-UI-30929 is set aside, and this matter remanded for further proceedings consistent with this order. *Decisión de la Audiencia 14-UI-30929 esta anulado, y esta materia se remite para otros procedimientos constantes con esta orden.*

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service: February 23, 2015**

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for

“Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [court.oregon.gov](http://court.oregon.gov). En este sitio web, haga clic en “Help” para acceso a información en español.*

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