

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1116

Reversed & Remanded

PROCEDURAL HISTORY: On August 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 140125). Claimant filed a timely request for hearing. On September 14, 2015, ALJ McGorin conducted a hearing, and on September 15, 2015, issued Hearing Decision 15-UI-44344, reversing the administrative decision and concluding that the employer discharged claimant, but not for misconduct. On September 22, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The employer's written argument included additional information regarding the reasons for claimant's discharge that was not offered into evidence at the hearing. The employer's owner explained she was unable to provide this information at the hearing because on the date of the hearing, she was in Portland dealing with an emergency involving her husband. EAB may consider new evidence under OAR 471-041-0090 (October 29, 2006) if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Because we are reversing and remanding this matter for further development of the record, the employer will have an opportunity to offer additional evidence at the hearing. It is therefore unnecessary to determine whether EAB should consider the employer's new evidence in accordance with OAR 471-041-0090. We note, however, that if the employer wishes to have additional evidence considered by the ALJ at the hearing on remand, it must submit this evidence to the Office of Administrative Hearings and send a copy of the evidence to claimant in time for both to receive the evidence prior to the remand hearing.

CONCLUSION AND REASONS: Hearing Decision 15-UI-44344 is reversed and this matter is remanded for further development of the record.

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 her discharge from her position as a caregiver in the employer's care home for the elderly. 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). Under ORS 657.270, the ALJ is required to give all parties a reasonable opportunity for a fair hearing. Where, as here, the parties are unrepresented, 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). The record in this case must be remanded because the ALJ did not develop a record that demonstrated a full and fair inquiry into the relevant facts.

The ALJ's conduct during the hearing prevented development of an adequate record. Twice during the hearing, the ALJ told the parties that the time allotted for the hearing was limited: she admonished the employer's witness that "we have a very short period of time for this hearing" (Transcript at 10) and then again warned this witness that "we have a very limited amount of time for this hearing." Transcript at 12. Several times, the ALJ interrupted a witness or talked over a witness. Transcript at 11; 14-17; 24 and 37-38. When the employer's witness asked the ALJ if she could read a May 27, 2015 letter regarding claimant's conduct, the ALJ refused to allow the witness do so, stating "I just need you to tell me in a sentence what the behavior was that led to the –a –a discipline on May 27, 2015." Transcript at 21. At the conclusion of the hearing, when the ALJ asked the employer's witness if she had any additional information to provide, the witness attempted to testify about a pay reduction that the employer had imposed on claimant. The ALJ interrupted the witness, telling her "there's no evidence that there was any insubordination, and – in connection with that, or no persuasive evidence. So it doesn't matter at this point." Transcript at 39. An inquiry is neither full nor fair when the ALJ limits the time available for the hearing, prevents a witness from presenting relevant testimony and evidence, and states a factual finding prematurely reached before the evidentiary record has closed and the record has been fully considered.

The ALJ also failed to conduct an adequate inquiry into the circumstances of claimant's work separation. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. The record shows that the employer discharged claimant because it believed she had engaged in misconduct by refusing to fax a prescription to the pharmacy on July 2, 2015. The ALJ concluded that the employer failed to meet its burden to demonstrate that claimant refused to fax the prescription because claimant "convincingly testified" that she did not refuse to fax the prescription, and the "[e]mployer did not persuasively counter claimant's testimony." Hearing Decision 15-UI-44344 at 5. Because the ALJ failed to explain the facts in the record upon which she based these conclusions, they are not supported by substantial evidence in the record as required by OAR 471-040-0030(2) (August 1, 2004)¹.

¹ OAR 471-040-0030(2) provides that the ALJ's decision will be based on evidence in the hearing record and that "any findings by [ALJ] shall be based upon reliable, probative, and substantial evidence." (August 1, 2004).

On remand, the ALJ must inquire into the circumstances of the alleged refusal to fax a prescription on July 2, asking what time the alleged refusal occurred, what was said during the conversation about the alleged request and refusal, whether claimant's assigned job duties included faxing prescription requests, whether claimant knew she was expected to perform this duty and how she knew about this expectation. Both claimant and her supervisor testified that they took notes about the July 2 incident. Claimant asserted that her notes showed that she had no contact with her supervisor until 2:45 p.m., when her supervisor came into the main area of the house and talked with claimant. Transcript at 25. The ALJ must ask claimant what time she reported for her shift on July 2, when her shift ended, when she prepared notes about the July 2 incident, why she did so, and why she recorded information about her supervisor's behavior on that date. The ALJ must also ask the supervisor what job duties the supervisor performed on July 2, what contact she had with claimant on that date, and what time claimant allegedly refused to fax the prescription.

The ALJ also failed to adequately inquire about any conduct in which claimant engaged prior to July 2 that may have been willful or wantonly negligent. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). If the ALJ determines on remand that claimant's behavior on July 2 was willful and wantonly negligent, evidence regarding any prior inappropriate conduct by claimant will be relevant to determine whether the July 2 incident was an isolated instance of poor judgment.

Claimant's supervisor attempted to testify about a number of occasions prior to July 2, 2015 when claimant had engaged in behavior which the supervisor characterized as insubordinate. Transcript at 18, 23, 37-38. As the following exchange demonstrates, the ALJ refused to permit the supervisor to testify completely about these incidents because the ALJ concluded that they did not involve insubordinate conduct:

Q Okay. What - what - what was the specific behavior that led to - to being disciplined for insubordination on May 27th? What was the behavior?

A The behavior was leaving one of my clients in their chair, feces on their (UNINTELLIGIBLE) -

Q Okay. That - that - that - that's not insubordination. That maybe something different, but was there any insubordinate behavior that led to the May 27th discipline?

A Being overwhelmed with her caregiver duties. There was insubordination.

Q Okay. I'm gonna give you one more chance -

A How do you know, maybe I'm (UNINTELLIGIBLE) -

Q If - if there was any insubordinate behavior that led to the discipline on May 27th, otherwise we're - we're gonna move on here.

A Okay. I guess you can just move on. I mean, you know, I'm trying to expand a little bit. I - I mean she was disciplined for the outlook, the performance, and the attitude that she has towards the job. Transcript at 22.

On remand, the ALJ must ask about behavior in which the claimant engaged prior to July 2 for which the employer disciplined her, or behavior which the employer otherwise concluded was inappropriate. The ALJ's inquiry must be directed to determining whether any of these incidents involved conduct that was willful or wantonly negligent in accordance with OAR 471-030-

0038(1)(c) and (3)(a). We note that insubordination, which is commonly defined as an employee's refusal to comply with a supervisor's order, may be one type of willful or wantonly negligent behavior; it is not, however, the only type of such behavior.²

The ALJ's refusal to allow the employer's witness to testify fully about incidents regarding claimant's allegedly inappropriate behavior prior to July 2, 2015 suggests that the ALJ may have concluded that these matters may have little evidentiary value. To avoid any perception of bias or impropriety by either party, EAB recommends that the ALJ consider recusing herself from further participation in this matter and that the Office of Administrative Hearings assign a different ALJ to conduct the hearing on remand.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-44344 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 15-UI-44344 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 22, 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 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 Merriam-Webster online dictionary defines "insubordinate" as "not obeying authority; refusing to follow orders." <http://www.merriam-webster.com>.