

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0974**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On June 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83208). Claimant filed a timely request for hearing. On August 16, 2016, ALJ Seideman conducted a hearing and issued Hearing Decision 16-UI-65744, affirming the Department's decision. On August 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-65744 is reversed and this matter is remanded for further proceedings.

In Hearing Decision 16-UI-65744, the ALJ found as fact that claimant had received several verbal warnings throughout her employment and a written warning on April 27, 2016 and, from those warnings, concluded that "claimant committed several acts over a period of time which were a willful or wantonly negligent disregard of what any employer has a right to expect, and constituted misconduct." 16-UI-65744 at 3. However, the mere fact that claimant received warnings does not establish that claimant engaged in the behavior described in the warnings or even, if she did, does not establish that her behavior was a willful or wantonly negligent violation of the employer's standards.

On remand, the ALJ should inquire of the employer about the final incident of alleged misconduct that caused the employer to decide to discharge her on May 31, 2016. It is customary to focus on the final incident that led to claimant's discharge to determine whether claimant engaged in misconduct, and not all alleged violations of the employer's standards.<sup>1</sup> With respect to this final incident, the ALJ should

<sup>1</sup> See *Appeals Board Decision*, 13-AB-0341, March 28, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Appeals Board Decision* 13-AB-0029, February 14, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Appeals Board Decision* 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

inquire into the specifics of what employer policy, expectation or instruction that claimant is alleged to have violated and how claimant was aware or reasonably should have been aware of it. The ALJ should further develop the evidence on claimant's particular behavior that constituted the final incident, the date of that behavior, and whether under the circumstances that behavior was a willful or wantonly negligent violation or whether claimant was unaware she was violating the employer's standards at the time of that final incident. The ALJ should also inquire of claimant if she engaged in the behavior that the employer alleges her to have engaged in, why she acted as she did, and any explanations, if any, she has for her behavior. Finally, the ALJ should ask the employer why it decided to discharge claimant for her behavior during the final incident rather than issue a warning or impose a disciplinary sanction less severe than discharge.

With respect to whether claimant engaged in misconduct, the ALJ should further explore the alleged verbal and written warnings that the employer issued to claimant sufficient to allow a determination of whether claimant's alleged behavior during the final incident is excusable under OAR 471-030-0038(3)(b), either as an isolated instance of poor judgment or a good faith error. As with the final incident, the ALJ should elicit information about the specific behavior(s) for which claimant was warned, the date(s) of the behavior, the date(s) on which claimant received the warning(s), whether claimant was aware she was violating the employer's standards by engaging in the behavior(s) for which she was warned, what, if anything, claimant stated when she received the warning(s), whether claimant admits or denies engaging in the behavior(s) for which she was warned, why she acted as she did, and what specifically the employer stated to claimant when she received the warning. Rather than the generalized inquiry made during the first hearing, the ALJ should during the remand hearing focus on the particulars of claimant's alleged violations of the employer's standards. Absent such particularized inquiries, EAB cannot determine whether claimant was discharged for misconduct.

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 misconduct, Hearing Decision 16-UI-65744 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 16-UI-65744 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** September 19, 2016

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-65744 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](http://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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