

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1236

Reversed & Remanded

PROCEDURAL HISTORY: On September 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114233). Claimant filed a timely request for hearing. On October 10, 2016, ALJ Vincent conducted a hearing, and on October 18, 2016 issued Hearing Decision 16-UI-69409, affirming the Department's decision. On November 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-69409 is reversed, and this matter remanded for development of the record.

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. 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, 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).

In Hearing Decision 16-UI-69409, the ALJ found that claimant intentionally provided false information about his criminal history in order to increase his chances of getting hired. The ALJ concluded claimant was dishonest despite claimant's testimony that he honestly disclosed information about his criminal conviction to the employer during the application process, as well as evidence suggesting that some of claimant's new-hire paperwork was lost, that he might have conversed with the employer about his conviction prior to being hired, that he might have applied for the job with a temporary agency rather than directly with the employer, and, while he might have provided an inaccurate answer on paper, he did not do so intentionally or with the intent of concealing his criminal record. Under different circumstances, the ALJ's implied determination that claimant was not credible might be supportable. Here, however, the record is too flawed.

Early in claimant's testimony the ALJ became concerned that there might be a communication barrier. The ALJ inquired of claimant as follows:

- Q Mr. – Mr. Joseph I want to make sure that you can understand me correctly. Is English your first language?
- A Second.
- Q Second language. What's your native language?
- A Creole and I do speak English and understand English, too.
- Q Okay. Are you comfortable speaking in English with me or would you feel more comfortable with an interpreter so that you could speak in your native language?
- A Well, I'm comfortable with English.
- Q Okay. If you're comfortable, I'll – I'll go ahead. I just wanted to make sure that you're fully understanding. Okay? If at any time you think that you cannot understand sufficiently I want you to tell me or tell your attorney immediately and we will arrange for an interpreter for you.
- A Okay.

Transcript at 23. Despite assurances from claimant that he understood and was comfortable proceeding in English, however, during the course of 16 pages of claimant's testimony transcribed from the audio recording of the hearing, 89 of the words and phrases claimant used were incapable of being comprehended either by the transcriptionist or by all members of the Employment Appeals Board when reviewing the audio recording of the hearing. For example, one portion of claimant's testimony appears as follows in the transcript, and was not capable of being comprehended when the audio was reviewed:

- A Yeah. (Unintelligible) nothing for (unintelligible) like for (unintelligible).

Transcript at 36. Another passage was as follows:

- A No. No. My department is – I was some – there was about me being (unintelligible) and that was the (unintelligible) because I'm being (unintelligible). And which is a (unintelligible) position that this (unintelligible) – this wasn't only because they hire too many people and (unintelligible) if they stayed. (Unintelligible). And the manager was like the only one who was – was sticking with the job. That was all. (Unintelligible) have to (unintelligible).

Unintelligible). And after that – and after – so (unintelligible). And they want to (unintelligible) black (unintelligible). And they want to talk to (unintelligible), the (unintelligible). It's like to be (unintelligible). Nothing (unintelligible) and to – to (unintelligible) with the (unintelligible). So no one (unintelligible).

So – so, I mean, (unintelligible) with the job.

Transcript at 35. Under the circumstances, we cannot conclude that claimant's answers were capable of being comprehended by the hearing participants, and do not support a finding as to claimant's credibility.

OAR 471-040-0007(4)(a) and (b) and OAR 471-040-0007(7)(a), read together, provide in pertinent part, that if during a contested case proceeding it becomes apparent that an interpreter is necessary for a full and fair inquiry, the ALJ “shall” appoint a certified or qualified interpreter “to interpret the proceedings . . . or to assist the administrative law judge in performing the duties of an administrative law judge.” The duties of an ALJ include giving all parties a reasonable opportunity for a fair hearing, and require that the ALJ conduct a full and fair inquiry into the facts. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Such an inquiry is only possible if claimant is able to fully understand the proceedings *and* the record of those proceedings is capable of being meaningfully reviewed. Once the ALJ identified that he was uncertain whether claimant was both able to understand *and* be understood when answering questions, the ALJ was obligated to provide claimant with an interpreter or otherwise ensure that a clear record of testimony was made. Because the ALJ erred in that respect, this matter must be remanded for a new hearing to determine whether or not claimant's discharge was for misconduct. Given the linguistic difficulties incident to this record, we direct that a Creole interpreter be appointed to assist claimant in being understood.

DECISION: Hearing Decision 16-UI-69409 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: November 18, 2016

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-69409 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.