

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1244

Reversed & Remanded

PROCEDURAL HISTORY: On September 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 63306). Claimant filed a timely request for hearing. On October 26, 2016, ALJ Wyatt conducted a hearing, and on October 28, 2016 issued Hearing Decision 16-UI-70180, concluding the employer discharged claimant, but not for misconduct. On November 7, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTERS: During the October 26, 2016 hearing, the ALJ failed to administer an oath or affirmation to three of the witnesses before taking each witness' testimony. The ALJ's omission was error. ORS 183.417(6).

The ALJ identified and admitted Exhibit 1 into the record, but failed to mark Exhibit 1. The ALJ should mark Exhibit 1 on remand.

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider the employer's argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-70180 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 are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 16-UI-70180, the ALJ found that on September 1, 2016, the employer's safety director called claimant and heard claimant's wife use foul language directed at him, and "also heard claimant use foul language" in response to the director's inquiry about why claimant allegedly had not recently called in to the employer's dispatch. Hearing Decision 16-UI-70180 at 1-2. During the hearing, the employer's safety director and chief financial officer (CFO) testified that they heard claimant use foul language toward the safety director during the September 1 telephone call. However, claimant and his wife testified that claimant did not use foul language during the call. Weighing the witnesses' assertions, the ALJ concluded that the evidence was "balanced" regarding whether claimant violated the employer's expectations that he refrain from engaging in disrespectful communication with the employer on September 1. Hearing Decision 16-UI-70180 at 1. However, EAB did not consider the testimony from the employer's CFO or claimant's wife because the ALJ did not administer the oath to those witnesses. On remand, the ALJ should either ask the CFO and claimant's wife to affirm their previously unsworn statements under oath or take those witnesses' testimony again under oath.¹ The testimony from the CFO and claimant's wife is necessary for a full and fair inquiry into the facts necessary to determine if claimant violated the employer's expectations on September 1, especially where, as here, the parties' witnesses provided conflicting testimony.

In addition, if the record shows claimant was at least wantonly negligent in the final incident, it is necessary to determine if claimant's conduct in the final incident was excusable as an isolated instance of poor judgment. Claimant had received two written warnings from the employer warning him to refrain from communicating disrespectfully with his coworkers, and the ALJ found as fact that claimant "cussed" at the employer's safety director on August 16, 2016. Exhibit 1, Hearing Decision 16-UI-70180 at 1. However, the ALJ did not ask claimant about his alleged conduct during the August 16, 2016 telephone call and the mere fact that claimant received warnings does not establish that claimant engaged in the behavior described in the warnings or that his behavior was a willful or wantonly negligent violation of the employer's standards.

The ALJ should further explore the written warnings and alleged verbal 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) 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 conduct for which the employer warned claimant, the dates of the conduct, whether claimant was aware he was violating the employer's standards by engaging in the conduct, what claimant stated when he received the warnings, whether claimant admits or denies engaging in the conduct for which he was warned, why he acted as he did, and what the employer stated to claimant when it gave him the warnings. Rather than the generalized inquiry made during the first hearing, the ALJ should focus on remand 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.

¹ The employer's recruiter also provided unsworn testimony at hearing, but that testimony was not relevant because he was unable to hear the specific words claimant used during the September 1, 2016 telephone call with the safety director.

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-70180 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-70180 is set aside, and this matter remanded for further proceedings consistent with this order.²

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

DATE of Service: November 29, 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.

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² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-70180 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.