

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0243

Reversed & Remanded

PROCEDURAL HISTORY: On January 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 111931). The employer filed a timely request for hearing. On February 21, 2017, ALJ Murdock conducted a hearing, and on February 23, 2017, issued Hearing Decision 17-UI-77567, affirming the administrative decision. On February 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Little Caesar's employed claimant as a crew member from August 26, 2015 until December 10, 2016.

(2) The employer's policy required that employees show respect, courtesy and professionalism in their interactions with coworkers, customers and vendors. On the day the employer hired him, claimant signed an acknowledgement that had read and understood this policy.

(3) Sometime prior to December 10, 2016, claimant and two other employees, who were working in the kitchen area of the employer's business, used foul language. Claimant and the other employees did not believe that customers could hear them. A customer complained to the employer about the three employees' use of foul language.

(4) On December 10, 2016, the employer discharged claimant for using foul language in violation of its policy regarding respectful and courteous behavior in the workplace.

CONCLUSION AND REASONS: Hearing Decision 17-UI-77567 must be set aside, and this matter remanded for further 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) (August 3, 2011).

In Hearing Decision 17-UI-77567, the ALJ found that claimant's use of foul language was a wantonly negligent violation of the standards of behavior with which the employer expected him to comply. Because the ALJ also found that claimant "had not demonstrated a frequent and repeated pattern of such behavior," she concluded his conduct was an isolated instance of poor judgment and not misconduct. Hearing Decision 17-UI-77567 at 3. However, the ALJ failed to conduct an inquiry sufficient to determine whether claimant's use of foul language during the incident for which he was discharged was wantonly negligent and, if so, whether his conduct can be excused as an isolated instance of poor judgment.

On remand, the ALJ must ask claimant, who admitted the veracity of the customer's complaint, exactly what foul language he and the other two employees used, in what context the foul language was used, and whether claimant understood that the language he and the other employees were using violated the employer's policy regarding workplace behavior. The ALJ must also inquire about claimant's belief that customers could not hear him and the other employees by asking what was the physical layout of the employer's business, whether the kitchen where claimant and the other two employees were working was separate from the area accessible to customers, and how loudly were claimant and the other two employees speaking.

For claimant's conduct to be excused as an isolated instance of poor judgment, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Although the employer's witness testified that, prior to the incident that resulted in his discharge, claimant had never been disciplined or counseled about the use of foul language, the ALJ must ask claimant whether he had used foul language in the workplace in the past, whether he had overheard other employees using foul language, and whether other employees had been counseled or disciplined for their use of foul language. The ALJ also should conduct an inquiry into the facts necessary for consideration of whether claimant's conduct was part of a pattern of *other* willful or wantonly negligent behavior. The ALJ should ask any other questions necessary to develop a complete record.

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 to determine if the employer discharged claimant for misconduct, Hearing Decision 17-UI-77567 is reversed, and this matter is remanded for further development of the record.

DECISION: Hearing Decision 17-UI-77567 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 20, 2017

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.