

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0897**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 19, 2017 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 92224). The employer filed a timely request for hearing. On July 5, 2017, ALJ Seideman conducted a hearing, and on July 7, 2017 issued Hearing Decision 17-UI-87463, affirming the Department's decision. On July 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's handwritten note on its application for review when reaching this decision.

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-87463 is reversed and this matter is remanded for the assignment of a different ALJ and 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. Mere inefficiency resulting from a lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-87463, the ALJ concluded that the employer failed to show it discharged claimant for misconduct. The ALJ observed that this was “a very unusual case” involving allegations from the employer that claimant, the employer’s office manager, “mishandled many funds” and allegations from claimant that the employer “did the same and that she [claimant] tried to bail [the employer] out on several occasions[.]” Hearing Decision 17-UI-87463 at 3. The ALJ concluded that since it was “difficult to decide which story is more correct” and because “[a]t most this was a tie vote” the employer did not meet its burden to show that claimant engaged in willful or wantonly negligent behavior that disqualified her from receiving benefits. *Id.* However, the record as it currently exists is insufficiently developed to support the ALJ’s conclusion or to allow EAB to determine whether or not the employer discharged claimant for misconduct.

**Assignment of a Different ALJ on Remand.** As the hearing proceeded, it appeared that the employer had a multitude of dissatisfactions with the manner in which claimant kept the employer’s accounting records and how claimant handled the employer’s funds. Claimant generally disputed the employer’s allegations. However, it did not appear during the hearing that the ALJ attempted to focus the testimony of either party on the allegations that, if proved, would be sufficient to demonstrate that claimant had engaged in misconduct as opposed to demonstrating that claimant had been merely negligent in the performing the accounting and cash handling duties expected of her as an office manager or that she lacked the job skills or experience to perform them adequately, which, without more, would likely not be sufficient to demonstrate misconduct.

In this respect, the ALJ largely failed to direct his inquiry of either party to salient issues, and relied almost exclusively on very open-ended questions such as, for example, “Anything else you wish to say?” after the employer’s owner had testified very non-specifically over four transcript pages about his many dissatisfactions with claimant’s performance. Transcript at 10. Of the employer’s current office manager, whom the employer apparently intended would provide detailed and specific evidence about claimant’s alleged derelictions, the ALJ asked only one initial question after obtaining identifying information from her, which was “And what do you wish to say?,” after which she was permitted to respond, without interruption or direction from the ALJ, for eight transcript pages. Transcript at 16, 16-24. When the office manager appeared to have reached the self-directed conclusion of her testimony, rather than trying to elicit some specific detail about those aspects of her testimony that might have possibly proved claimant’s misconduct, the ALJ simply asked her, “Anything else?” to which she responded, “Oh, I could probably go on for hours, but I think that’s probably enough,” at which point her testimony ended. Transcript at 24. Of claimant, the ALJ obtained identifying information, and then asked only the single question, “Okay, now what do you wish to say about this?,” after which claimant testified without any further inquiry, guidance or direction from the ALJ for over fifteen transcript pages about matters that she thought were relevant to whether she was or was not disqualified from benefits. Transcript at 26, 26-41. In large part, claimant’s testimony was a confusing, wide-ranging rebuttal of the employer’s largely unfocused testimony and was not directed at all at those of the employer’s allegations that might conceivably have constituted misconduct.

In addition to failing to direct the testimony of the parties to issues relevant to whether claimant engaged in misconduct, the ALJ appeared inexplicably impatient with and hostile toward the employer’s owner, for example, repeatedly asking the owner why he did not ask claimant to explain why she made allegedly unauthorized purchases with the employer’s ATM card, after the owner had already testified that he did not discover that those purchases had been made until after claimant was discharged.

Transcript at 9. The manner in which the ALJ questioned the owner appeared to imply that the owner had been intentionally evasive in his testimony:

Q: So you didn't – you didn't quite understand my question I guess.

A: I'm sorry.

Q: Did she have an explanation as to why – as to what those charges were on the ATM card? Did she give you –

A: I didn't notice until after I fired her.

Q: Okay. Then did you find out at that point?

A: I have never talked to her since.

Q: Okay. So I guess your answer is no then, she did not have an explanation to those?

A: No.

Q: Okay. That was just my simple question. Okay.

A: I'm sorry. I misunderstood.

Transcript at 9.

In addition, as the ALJ reached the conclusion of the hearing, he appeared unwilling to spend the time required to sort out the parties' testimony and develop the record with the specific information needed to adequately support a disposition in a case such as this involving diffuse and broad-ranging allegations of accounting and financial mishandling. Instead, the ALJ continued to leave it to the parties, without guidance, to determine what information was or might be relevant or useful to his decision. The ALJ stated at that time:

Let me ask you this, for both of you, we're doing – I've got an idea we can go on all day. I have another hearing at 10:45. I'm concerned as to all the little bitty stuff. Is there anything major that hasn't already been discussed that we want to discuss? \*\*\*\*\* And again (simultaneous voices) we've talked about this a lot. I just don't want to get into – I don't judge by the hours of testimony. What I want to do is I'm getting to the facts and I think I've gotten the facts pretty much, so anything further you wish to say that hasn't been said?"

Transcript at 45, 46. Both parties understandably replied that they had nothing further to add, and the hearing concluded.

The ALJ's impatience during the hearing, his failure to exercise control and keep the testimony focused on issues relevant to whether claimant's behavior constituted misconduct and his unwillingness to develop the evidence in sufficient detail to support a particular case disposition suggest that it would not

be prudent or appropriate to have the initially assigned ALJ conduct the remand proceedings. On remand, this case should be assigned to a different ALJ for further development of the record.

**Inquiry on Remand.** On remand, it may be necessary for the assigned ALJ to largely conduct the hearing as if this were a matter of first impression. The assigned ALJ should make a specific inquiry into those of the employer's many dissatisfactions with claimant that could constitute misconduct as distinct from deficiencies in performance that were not attributable to willful or wantonly negligent behavior on claimant's part. Since the employer's owner testified at hearing that some of claimant's behaviors with which the employer took issue were not known to him until after claimant was discharged, the ALJ should determine by inquiry of the employer precisely the reason(s) why it discharged claimant when it did, and distinguish among claimant's alleged performance deficiencies that were known to it when it discharged claimant, those that it did not discover until after claimant's discharge and those that it might have suspected but had not confirmed as of the time of the discharge. Transcript at 9. As appropriate, the ALJ should develop the evidence as to the employer's specific expectations of claimant, how claimant was aware of those expectations, how, if at all, the employer communicated those expectations to claimant, if it ever warned claimant about her alleged performance deficiencies, how, if at all, claimant was specifically instructed to rectify these deficiencies, any specific performance objectives claimant was given, whether claimant complied with those objectives or instructions and the specific ways that claimant allegedly violated the employer's standards. The ALJ should develop the evidence as to claimant's alleged violations of the employer's expectations with as much detail and supporting information as reasonably necessary in order to prove whether or not those violations occurred as alleged, including any documentary evidence or records that the employer has that corroborate or tend to corroborate its allegations of claimant's willful or wantonly negligent violations of the employer's expectations.

Certain allegations the employer raised during the first hearing might, if the necessary foundation were demonstrated as detailed above, support its claims that claimant violated its expectations willfully or with wanton negligence. The allegations include that claimant made 100 or more unauthorized cash withdrawals on the employer's ATM card for non-business-related needs, that claimant made unauthorized purchases with the ATM card that were not for business purposes and/or were for her own personal purposes, including purchasing lottery tickets, candy, groceries and liquor, that claimant might have used the ATM card to make business purchases from retailers, but then, without authorization, took cash back for her personal use, that claimant without authorization or permission used the ATM card on several occasions to give herself pay advances (or draws) and/or might not have later deducted the amount of those advances from her paychecks, that claimant made online purchases for which the employer had no need and the items purchased were not used by the employer and that claimant set up an account with Thumb Tacks, a lead source concern, for which the employer paid for printing leads when the employer did not have a need for those leads and after the employer had instructed claimant to stop doing business with Thumb Tacks. Transcript at 7-8, 15, 18, 19, 20, 33, 43, 44; Exhibit 1 at 1, 2. In addition, the ALJ should also develop the evidence and obtain specific information with corroborating detail, as needed, on the employer's allegations that claimant set up a side business for herself at the employer's expense, did not adhere to management's directions in using QuickBooks, that claimant tried to hide certain purchases she made for herself using the employer's funds in the employer's accounting records so as to avoid detection, that claimant deleted all accounts payable from the employer's system, and that claimant violated the employer's trust in her use of the employer's cash. Transcript at 8, 20, 22; Exhibit 1 at 1, 2.

As appropriate and as the evidence develops, the ALJ should inquire into each of allegations set out above and elicit the information needed to determine if they show willful or wantonly negligent behavior on claimant's part. These areas of inquiry are not intended to be exhaustive and the ALJ should, if appropriate, expand the inquiry to include additional allegations as the evidence develops during the hearing on remand. Claimant should be allowed to respond to those of the employer's allegations that raise a colorable claim of a willful or wantonly negligent violation of the employer's expectations. Absent conducting these inquiries on remand, EAB cannot determine if claimant was or was not 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 or was not discharged for misconduct, Hearing Decision 17-UI-87463 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 17-UI-87463 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:** August 18, 2017

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-87463 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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