

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1454

Reversed & Remanded
Revocado y Devolutivo

PROCEDURAL HISTORY: On November 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113257). Claimant filed a timely request for hearing. On December 4, 2017, ALJ Griffin conducted a hearing, and on December 5, 2017 issued Hearing Decision 17-UI-98263, affirming the Department’s decision. On December 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-98263 should be reversed and this matter remanded.

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.

The ALJ found as fact that the employer “warned” claimant on a weekly basis to “speak more quietly or not to use vulgar language at a job site.” Hearing Decision 17-UI-98263 at 2. The ALJ also found that in the final incident claimant said “Fuck you” to a foreman in front of a customer despite those prior warnings, and was discharged as a result. *Id.* The ALJ concluded that claimant’s discharge was for misconduct because his use of foul language in the final incident, coupled with his failure to “moderate” “his language” “in terms of volume and quality” amounted to a willful violation of the employer’s expectations. Hearing Decision 17-UI-98263 at 3. We disagree that the record was sufficiently

developed to reach that conclusion, or any conclusion as to whether claimant should be disqualified from benefits because of this discharge.

On remand, the ALJ must inquire into the specifics of the final incident with both parties. In addition to asking the employer when the final incident occurred, who was present, and what each person present said, the ALJ must ask claimant to describe his version of those events as specifically as possible. The ALJ must ask the employer for the dates and a detailed description of each of the prior incidents in which claimant used foul language at work, used foul language in front of a customer, or otherwise used inappropriate words or tones to communicate. The ALJ should also ask the employer what claimant said and to whom he said it, and for a description of the words or tones he used in each instance. The ALJ should then ask claimant to describe his version of those same events as specifically as possible.

The employer alluded to having “warned” claimant about his language “multiple times” prior to the final incident. Transcript at 7. The ALJ should ask the employer about each of the warnings, when they occurred, why they occurred, what claimant was told each time, what claimant said to the employer each time he was warned, and what claimant was told about how to act in the future. The ALJ should ask claimant to respond to the employer’s testimony.

Claimant testified that an individual named “Mr. Gordon” did not “watch his language and that he is using that language in front of other workers and also in front of customers.” Transcript at 10. The ALJ must follow up with claimant to ask who Mr. Gordon is, what authority he had to set expectations in the workplace, what language Mr. Gordon used, when he used it, what he said, and whether he ever told claimant not to use the same type of language. The ALJ should also ask claimant if his coworkers regularly used foul language, and if he was aware of whether they were warned against using such language. The ALJ must then give the employer the opportunity to respond to claimant’s testimony.

In his testimony, claimant referred to having been told to “watch our language” but also said he “never lacked respect” for his foreman, coworkers or customers. The ALJ should ask claimant what he understood the employer meant when he was told to “watch his language” and whether he thought it was respectful or disrespectful to use foul language. If claimant admits to having used the phrase “Fuck you” or other foul language, the ALJ should ask claimant why he used foul language after being told to “watch his language.” The ALJ should also give the employer the opportunity to respond to claimant’s testimony.

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’s discharge was for misconduct, Hearing Decision 17-UI-98263 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-98263 is set aside, and this matter remanded for further proceedings consistent with this order. *Decisión de la Audiencia 17-UI-98263 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden.*¹

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

DATE of Service: January 24, 2018

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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.

¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-98263 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:** *La falta de cualquier partido de aparecer en la audiencia en la remisión no reinstalará el 17-UI-98263 de la decisión de la audiencia ni volverá esta materia a EAB. Solamente un uso oportuno para la revisión de la decisión subsecuente de la audiencia hará esta materia volver a EAB.*