

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0164

Reversed & Remanded

PROCEDURAL HISTORY: On December 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115530). Claimant filed a timely request for hearing. On January 23, 2018, ALJ S. Lee conducted a hearing, and on January 26, 2018 issued Hearing Decision 18-UI-101884, affirming the Department's decision. On February 15, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she sought to have EAB consider new information that she did not offer during the hearing. Given EAB's disposition of this matter, claimant may offer this new information at the remand hearing, at which time the ALJ will determine whether that information is relevant and material to the issues on which EAB has remanded this matter, including if that information is probative of whether claimant had a willful or wantonly negligent state of mind at the time she allegedly engaged in the behaviors for which the employer discharged her or which otherwise violated the employer's standards. To ensure that those documents may be considered at the remand hearing, claimant should comply with the instructions set out in the notice scheduling the remand hearing about providing those documents to the ALJ and other parties in advance of the hearing.

CONCLUSIONS AND REASONS: Hearing Decision 18-UI-101884 is reversed and this matter is remanded for further development of the record.

At hearing, the employer contended that it discharged claimant due to her unprofessional, rude and discourteous behavior during telephone calls with customers. Transcript at 5, 6. When an employer has discharged a claimant, ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if that discharge was 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.

In Hearing Decision 18-UI-101884, the ALJ concluded that the employer demonstrated claimant had engaged in misconduct for which it discharged her. The ALJ based this conclusion on the employer having shown that claimant understood the employer's expectations, that claimant had been "inappropriate with customers on various occasions throughout her employment" and that the employer had spoken to claimant "multiple times about being professional and appropriate during her calls with customers." Hearing Decision 18-UI-101884 at 4. However, the record is insufficient to support those findings and conclusions.

While the employer's witness generally contended that claimant had behaved rudely, disrespectfully and condescendingly toward customers during calls and claimant's "tone" of voice was not "professional" in those calls, the ALJ accepted the employer's conclusory statements and did not inquire about the specific words that claimant used during the phone conversations at issue or exactly what it was about claimant's tone of voice that was objectionable to such an extent that it constituted a willful or wantonly negligent violation of the employer's standards. Transcript at 6, 7. The coaching reviews and other documents that the employer offered into evidence as Exhibit 1, which addressed several of claimant's phone interactions with customers, while demonstrating that the employer was displeased with how claimant expressed herself during the calls, did not describe what claimant said or did with sufficient specificity to allow us to conclude whether or not claimant's behavior was objectively rude and so unreasonably disproportionate that it constituted a willful or wantonly negligent violation of the employer's standards as the manner in which a customer should be treated. Exhibit 1 at 9-13; *see also* Exhibit 1 at 2, 5, 6, 7. On remand the ALJ should ask the employer to provide, as closely as it can, a verbatim account of the phone conversations in which it contends claimant violated its standards of professionalism or any other of its standards, including the customers' parts of the interactions so the entire context of claimant's statements, and what claimant might have been reacting to, may be gauged. In this regard, it would be appropriate for the ALJ to allow the employer the opportunity to play into the record any audios of the calls at issue that it has, as it offered to do during the hearing. *See* Transcript at 7, 39. In connection with all calls in which the employer contends that claimant manifested rudeness, condescension, disrespect, unprofessionalism or the like in violation of the employer's standards, the ALJ should develop the evidence, as appropriate, about the specific statements that claimant made or what exactly she did in the calls and what in her word choice, tone or otherwise violated the employer's standards. As well, the employer should be allowed to offer any additional relevant information it has about the calls.

The ALJ should ask claimant if she agrees with the information or audios that the employer presents about the content of the phone calls and if not, to state how her disagreement. The ALJ should allow claimant to explain why she behaved as she did in the calls, to what, if anything, she was reacting to in the calls, whether she was aware that she was engaging with customers in those calls in a way the employer would consider condescending, rude, unprofessional or otherwise a violation of its standards and, if so, why she did so anyway, and if not, why she did not. As appropriate, the ALJ should allow claimant an opportunity to respond to the employer's evidence about the calls and to explain why she reacted in the calls as she did. Also, as appropriate, the employer should be allowed and opportunity to respond to claimant's further testimony at the hearing on remand.

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 willful or wantonly negligent behavior in violation of the employer's standards, Hearing Decision 18-UI-101884 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 18-UI-101884 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 15, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-101884 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. 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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