

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0234**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On January 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134405). Claimant filed a timely request for hearing. On February 8, 2018, ALJ C. Smith conducted a hearing, and on February 16, 2018 issued Hearing Decision 18-UI-103427, concluding the employer discharged claimant, but not for misconduct. On March 1, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

However, because the case is remanded to the Office of Administrative Hearings (OAH) for further information, the employer may offer the new information at the hearing on remand. At that time, the ALJ will decide if that information is relevant to the issues on remand and should be admitted into evidence, and claimant would have the opportunity to respond to the information. As the Notice of Hearing from OAH states, if a party has documents it wishes to have considered at the hearing, it must provide copies of the documents to all parties and to the ALJ prior to the date of the hearing. There were occasions in the record where claimant's testimony was unclear or unresponsive to the question asked of him, and suggest that claimant may benefit from having an interpreter at the hearing on remand.

**CONCLUSIONS AND REASONS:** Hearing Decision 18-UI-103427 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. 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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). For an instance of poor judgment to be isolated, 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). However, some acts, even if isolated, such as acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

In Hearing Decision 18-UI-103427, the ALJ found that on January 2, 2018, claimant yelled at the employer's managers and called them "motherfuckers," and in doing so, willfully or wantonly disregarded the employer's reasonable expectations against such behavior. Hearing Decision 18-UI-103427 at 1, 3. The ALJ asked the witnesses about a prior incident on or about December 19, 2017, when claimant allegedly yelled during a meeting with the owner because he was dissatisfied with a work assignment. Audio Record at 18:00-18:28. Based on that information, the ALJ implicitly determined that the prior incident was not a willful or wantonly negligent violation of the employer's expectations, and concluded that the incident on January 2 was an isolated instance of poor judgment, and therefore, not misconduct. *Id.*

However, the record is not sufficient to determine if the final incident was an isolated instance of poor judgment. The employer's owner testified that during a meeting on December 21, 2017, claimant became loud and called the owner and two managers "racists" during a meeting. Audio Record at 28:29-29:33. It is not clear from the record, if this was the same meeting referred to as the final incident, or a prior meeting. The employer's witness also testified that, on December 28, 2017, claimant refused to work on an assigned task and walked out of work. Audio Record at 13:05-13:17. The employer considered claimant's conduct on that occasion serious enough to give him a write-up and a suspension. Moreover, the witness referred to multiple attendance occurrences in late 2017, some of which may have been violations of the employer's attendance notification procedures. Audio Record 18:31-19:01. By way of explanation, claimant asserted that some of this conduct was related to mistreatment of him in the workplace, at least in part due to alleged sexual harassment by a coworker.

On remand, the ALJ must inquire into the specifics of the prior incidents alleged by the employer with both parties. In addition to asking the parties when each incident occurred, who was present, and what each person present said, the ALJ must ask both parties to describe his or her version of those events as specifically as possible, including how each incident related, if at all, to claimant's allegations of sexual harassment at work. The ALJ must ask the employer for the dates and a detailed description of each of the prior incidents in which claimant allegedly made inappropriate statements at work (such as foul language), refused to perform assigned work, or had an unexcused absence or tardy from work. The ALJ must ask claimant to describe his version of those same events as specifically as possible.

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 18-UI-103427 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 18-UI-103427 is set aside, and this matter is remanded for further proceedings consistent with this order.

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

**DATE of Service: March 30, 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](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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