

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0316

Reversed & Remanded

PROCEDURAL HISTORY: On February 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 122824). Claimant filed a timely request for hearing. On March 13, 2018, ALJ Griffin conducted a hearing, and on March 14, 2018, issued Order No. 18-UI-105120, concluding the employer discharged claimant, but not for misconduct. On March 28, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's representative submitted written argument in which he sought to have EAB consider new information that he did not offer during the hearing. Given EAB's disposition of this matter, the employer 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 willfully or with wanton negligence engaged in behaviors for which the employer discharged him or which otherwise violated the employer's standards.

CONCLUSIONS AND REASONS: Order No. 18-UI-105120 is reversed and this matter is 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.

At hearing, the employer asserted that it discharged claimant due to his deteriorating behavior during the prior year, especially during the last weeks, and culminating in his behavior on November 4, 2017. The employer described that behavior as including incidents of “poor decision making,” “bad food handling” and otherwise creating a bad environment in the kitchen resulting in his discharge on November 7, 2017. Audio Record ~ 14:00 to 21:00. In Order No. 18-UI-105120, the ALJ concluded the employer discharged claimant, but not for misconduct, reasoning:

As the employer testified at hearing there was no final incident of conduct which caused employer to discharge claimant. Rather, it was the steady decline in the quality of the relationship between claimant, the chef, and the remainder of the staff. Moreover, employer received the impression that claimant did not truly wish to work for employer any longer. This is not a willful or wantonly negligent disregard of the standards of conduct an employer has a right to expect of an employee.

Order No. 18-UI-105120 at 3. We disagree with the ALJ’s decision after concluding the record was not sufficiently developed to support the ALJ’s decision, or any conclusions as to whether or not claimant should be disqualified from receiving benefits based on the discharge.

In response to the ALJ’s inquiry regarding whether there was a “final incident” that caused the employer to discharge claimant, the employer’s witness indicated that November 4 was claimant’s “most argumentative day” over the past year and that after that day, he determined that claimant should be discharged in the interest of the employer’s business. Audio Record ~ 18:30 to 19:15. However, the ALJ never inquired about the nature of the arguments that occurred that day, what was said by claimant to the chef, who was presumably his supervisor, and what it was about claimant’s statements and argumentativeness with his supervisor that lead the employer to decide that it needed to discharge claimant for the good of the business. Rather, the ALJ accepted the employer’s conclusory statements and did not inquire about the specific words that claimant used during the arguments at issue or exactly what it was about claimant’s behavior during those arguments that was objectionable to such an extent that his behavior could no longer be tolerated.

On remand the ALJ should ask the employer to provide, as closely as it can, a verbatim account of the arguments in question during which it contended claimant violated its standards of professionalism within the kitchen or other standards or expectations it may have had so that it can be determined whether claimant’s conduct amounted to a willful or wantonly negligent violation of those standards. The ALJ also should ask claimant if he agrees with the information the employer presents about the content of the arguments and if not, to state his disagreement. The ALJ should allow claimant to explain why he behaved as he did during the arguments and whether he was aware that he may have been engaging with the chef or staff in a way the employer would consider condescending, rude, unprofessional or otherwise a violation of its standards and, if so, why he did so anyway, and if not, why he did not. If appropriate, the ALJ should likewise inquire about any prior incidents to determine whether, or not, the final incident was isolated. Also, as appropriate, the employer should be allowed an 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, Order No. 18-UI-105120 is reversed, and this matter remanded for further development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-105120 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.

DECISION: Order No. 18-UI-105120 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 23, 2018

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