

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0410**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On March 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant the employer discharged claimant for misconduct (decision # 134500). Claimant filed a timely request for hearing. On April 17, 2018, ALJ Griffin conducted a hearing, and on April 18, 2018, issued Order No. 18-UI-107610, concluding the employer discharged claimant, but not for misconduct. On April 21, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Order No. 18-UI-107610 should be reversed, and this matter remanded for additional proceedings.

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.

On or about January 29, 2018, the employer, Liberty Inn, a hotel, discharged claimant from her employment as a housekeeper based on a report from the owner that a room he checked into had a bed with sheets that had not been stripped and replaced and that the replacement room he was given also had a bed with sheets that had not been stripped and replaced, with both rooms having being assigned to claimant for cleaning, just prior to the owner's occupancy.

At the hearing on the Department's denial of benefits to claimant based on her alleged misconduct, both claimant and the employer's witness were unrepresented by counsel or an experienced advocate. At the start of the hearing, claimant indicated that she would testify and had a coworker witness she also wanted to testify. At that time, the employer's witness, its general manager, indicated that he would

testify and had no other witnesses. However, while the ALJ was offline attempting to contact claimant's witness, the employer's witness inquired, "don't you think it would be pertinent if we call the owner...the witness to the room not being clean?", a question the ALJ apparently did not hear. Audio Record ~ 24:30 to 27:30. Shortly thereafter, the ALJ asked the employer's witness "anything else on behalf of the employer?" and the witness responded, "No." Audio Record ~ 33:00 to 33:30. Thereafter, the ALJ allowed claimant to testify again before asking her if she "was through", to which she responded "yes." However, the ALJ did not ask the employer's witness the same question and then closed the record, immediately after which the employer's witness asked the ALJ, "Were you interested in calling the owner at all?" to which the ALJ responded that he had already closed the record. The employer's witness explained that he was waiting for the ALJ to ask him if he had any other questions for the ALJ. At that point, rather than call the employer's eyewitness, the owner, to testify, the ALJ reiterated that he had just closed the record and the employer's opportunity to call the owner had expired. Audio Record ~ 33:30 to 35:00.

In Order No.18-UI-107610, the ALJ stated regarding his evidentiary ruling:

After the record was closed, employer moved to reopen the record to call an additional witness. The representative indicated that he was confused as to proper time to call additional witnesses. I denied the motion. At the start of the hearing the employer representative was asked if the employer had any additional witnesses or representatives scheduled to call in to the telephone hearing. The representative indicated that it did not. Then following an explanation for the procedure for the hearing, I asked if he had any questions about procedure. He indicated that he did not. Finally, before I closed the record I asked the employer's representative if he had anything else to offer on behalf of the employer. He indicated that he did not. Under all these circumstances, I found that the employer's motion to reopen the record was not well taken therefore denied it.

Order No.18-UI-107610 at 1. We disagree and conclude that under the circumstances, the ALJ erred in not reopening the record and that due process required the ALJ to call the employer's witness and allow the employer to offer eyewitness testimony on the critical issue in the case – whether the room or rooms in question had been properly cleaned by claimant.

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, particularly when a party or parties are unrepresented. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). The court in *Dennis* emphasized that the ALJ's responsibility to inquire fully is simply a requirement that relevant evidence does not go unrepresented because of the ignorance or inexperience of a party and that the necessary inquiry should be apparent from the nature of the proceedings and the evidence adduced. *Id.* Because the ALJ failed to develop the record necessary for a determination of whether claimant willfully or with wanton negligence failed to clean the assigned hotel rooms occupied by the employer's witness as expected, Order No. 18-UI-107610 is reversed, and this matter is remanded for development of the record.

**DECISION:** Order No. 18-UI-107610 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>1</sup>

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

**DATE of Service:** May 24, 2018

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<sup>1</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-107610 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.