

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0526**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 171308). Claimant filed a timely request for hearing. On May 3, 2018, ALJ Schmidt conducted a hearing, and on May 4, 2018 issued Order No. 18-UI-108764, affirming the Department's decision. On May 21, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Although claimant submitted a written argument, he failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For that reason, EAB did not consider the argument when reaching this decision. However, in light of EAB's disposition of this matter, claimant has the opportunity to take testimony on remand from the coworker and the co-owner he sought to call as witnesses during the initial hearing.

At the initial hearing, the ALJ admitted the employer's Exhibit 1 into evidence, but failed to mark it. Because the reprimands comprising Exhibit 1 were readily identifiable from the record, EAB has corrected the ALJ's oversight, and as a clerical matter has marked the relevant documents as Exhibit 1.

**CONCLUSIONS AND REASONS:** Order 18-UI-108764 is reversed and this matter remanded for further 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) (January 11, 2018) 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 employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Order No. 18-UI-108764, the ALJ concluded that the employer discharged claimant for misconduct arising from his behavior during an interaction with the employer's female co-owner on March 9, 2018. In support of this conclusion, the ALJ determined that claimant's testimony denying the employer's allegations was less persuasive than that of the employer's female co-owner, and found as fact that in the interaction at issue, claimant willfully "muttered," "glared" at, and called the female co-owner a "bitch." Order No. 18-UI-108764 at 3. The ALJ further found that claimant's behavior toward the female co-owner on March 9, 2018 was not excused as an isolated instance of poor judgment because claimant was previously warned about having engaged in similar willful or wantonly negligent behavior in a reprimand that the employer prepared on January 26, 2018, and discussed with claimant on approximately February 2, 2018. Order No. 18-UI-108764 at 3. However, the record is insufficient to support the ALJ's conclusions.

At hearing, the testimony of the employer's single witness, the female co-owner, and claimant was irreconcilable, with the co-owner contending that claimant had treated her rudely and referred to her in a derogatory way in an interaction on March 9, 2018 and on other occasions, and claimant denying that he had ever done so. Transcript at 6-8, 10-16, 19-30. At the outset of the hearing, claimant's representative informed the ALJ that he made arrangements, and intended, to call one of claimant's coworkers to testify as a witness, and further informed the ALJ that, due to work commitments, the witness would only be available by phone during approximately the first 30 minutes of the hearing. Audio at ~1:00, ~2:23. From the testimony at the hearing, it became apparent that the witness had been present for some, if not all, of claimant's interaction with the female co-owner on March 9, 2018. Transcript at 19, 20. However the ALJ did not try to reach the witness by phone until 55 minutes into the hearing, at which time the witness did not answer his phone. Audio at ~55:00.

The witness that claimant sought to call was a relatively disinterested one who likely would be able to provide first-hand information corroborating either claimant's or the female co-owner's testimony about what claimant did not or did not do, and said or did not say, on March 9, 2018. While claimant did not subpoena the witness for hearing, it appeared that claimant had made arrangements with the witness and the witness had agreed that he would be available to testify at the hearing, subject to time constraints. Under these circumstances, and given the importance of the witness's testimony in resolving disputed facts at hearing, the ALJ should have taken testimony from claimant's witness earlier in the hearing, or continued the hearing for the purpose of securing that testimony. This matter is remanded for the purpose of taking testimony from claimant's witness. Claimant may want to subpoena the witness to ensure that he appears and testifies at the remand hearing.<sup>1</sup>

---

<sup>1</sup> Claimant should contact the Office of Administrative Hearings (OAH) if he wishes information on how to arrange for the issuance and proper service of such a subpoena at (503) 947-1515 or 1 (800) 311-3394. Claimant or the employer may obtain additional information about subpoenas or other evidentiary matters at [www.oregon.gov/oah/Pages/UI\\_Publications2.aspx](http://www.oregon.gov/oah/Pages/UI_Publications2.aspx).

On remand, the ALJ should inquire of the witness if he was present during the March 9, 2018 interaction between claimant and the female co-owner, and what he recalls about the interaction. In particular, the ALJ should ask if claimant “rolled his eyes” at the female co-owner, “glared,” “muttered,” called the female co-owner “a bitch,” or conspicuously backed up out of her way when the female co-owner walked through a doorway. Transcript at 7, 8. The ALJ also should ask the witness to describe any other aspects of what he observed on March 9, 2018 and what, if anything the female co-owner said to claimant that morning. The ALJ also should determine if the witness was present for other disputed interactions between the co-owner and claimant that formed the bases for and were described in the warnings dated January 26, 2018 and March 6, 2018 (Exhibit 1 at 2-4), and should question the witness as to his knowledge about them accordingly.

At hearing, claimant also sought to have the male co-owner testify as a witness on his behalf, but that co-owner was not present at the hearing and did not answer his phone when called. Audio at ~1:50, ~58:11. Over the course of the hearing, claimant referred several times to that co-owner’s presence during some of the alleged incidents that formed the bases for the January 26, 2018 and March 6, 2018 warnings. Exhibit 1 at 2-3; Transcript at 22. As with the other witness, this witness may shed important light on whether claimant and the female co-owner’s description of those alleged incidents was accurate. This matter is also remanded to allow the ALJ to take testimony from the male co-owner. As with the other witness, claimant may wish to subpoena the male co-owner to ensure that he appears and testifies at the remand hearing.

On remand, the ALJ should explore with the male co-owner the nature of claimant’s relationship with the female co-owner, how he would describe that relationship, and whether the female began taking a role in the employer’s business only relatively recently. *See* Transcript at 26. In addition, the ALJ should ask the male co-owner if around January 23, 2018 there was a dispute between claimant and the female co-owner, what the dispute was about, whether claimant or the female co-owner were “yelling,” whether one or both of them referred to the other in a derogatory way. Transcript at 22. The ALJ also should ask whether claimant called the female co-owner “a liar,” what claimant and the female co-owner said to each other during the dispute, and whether the male co-owner told the female co-owner to “please quiet down” because customers were present. Transcript at 22. The ALJ also should inquire of the male co-owner what, if anything, he knows about a dispute involving the refrigerator and microwave, and the substance of what claimant, the female co-owner and he said during the dispute, and whether there was any yelling and any derogatory references from claimant or the female co-owner during that dispute. Transcript at 24, 25. The ALJ further should ask the male co-owner if he is aware of an incident captured on video surveillance in which an employee referred to the female co-owner as a “bitch,” and to describe what he knows about it. Transcript at 27-28.

On remand, the ALJ also should develop the record about any incidents prior to March 9, 2018 in which the employer contends that claimant violated its expectations willfully or with wanton negligence as necessary to determine whether claimant’s alleged behavior is excused as an isolated instance of poor judgment. On remand, the ALJ should inquire into the alleged incidents set out in the January 26 and March 6, 2018 warnings with sufficient specificity to determine whether any or all of them constituted willful or wantonly negligent behavior on claimant’s part. The ALJ’s questioning should be appropriate to make this determination, and should include an inquiry of the employer’s witness, the female co-

owner, claimant and, if they have knowledge, of the individuals claimant calls as witnesses at the remand hearing, including the co-worker and the male co-owner.

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 unexcused misconduct, Hearing Decision 18-UI-108764 is reversed, and this matter remanded for further development of the record.

**DECISION:** Order No. 18-UI-108764 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: June 21, 2018**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-108764 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.