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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0593

Reversed & Remanded

PROCEDURAL HISTORY: On April 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 73308). The employer filed a timely request for hearing. On May 22, 2018 and June 5, 2018, ALJ Meerdink conducted a hearing, and on June 7, 2018 issued Order No. 18-UI-110843, concluding claimant's discharge was not for misconduct. On June 12, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: This matter is reversed and remanded for additional evidence.

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. Isolated incidents of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded claimant's discharge for using excessive force against a youth in his custody was not for misconduct. The ALJ found as fact that claimant acted under the belief that "the youth was acting in a threatening way" because he was "moving faster than claimant wanted him to" and "turned around quickly," and that he therefore considered his use of force "appropriate under the employer's policies." Order No. 18-UI-110843 at 2. The ALJ found as fact that the employer "reviewed a video recording of the February 23 incident, and believed that claimant had exceeded the appropriate application of force," and discharged him for that reason. *Id*. The ALJ reasoned that because the employer's evidence was based upon "hearsay testimony about what claimant did after reviewing a

video recording of the incident," and claimant's contradictory testimony was "first-hand," and "[w]ithout *any evidence* to undermine the credibility of claimant's testimony," claimant's "first-hand account is more persuasive than the employer's hearsay account." *Id.* at 3 (emphasis added). The ALJ concluded that because "claimant perceived" the youth "to be threatening," it was "within the employer's policies regarding acceptable use of force." *Id.* The ALJ then also stated that claimant's conduct, even if it had been a willful or wantonly negligent violation of the employer's policy, would still, at worst, have been a good faith error because he "genuinely believed that his conduct fell within the acceptable uses of force with juveniles." *Id.* The record does not support the ALJ's conclusions.

As a preliminary matter, we disagree under the circumstances described that claimant's conduct, if willful or wantonly negligent, was also excusable as a good faith error. If claimant's conduct was willful, *i.e.* an intentional violation of the employer's prohibition against the excessive use of force against juveniles, it cannot follow that he simultaneously held a genuine belief that his conduct fell within the acceptable uses of force. Likewise, if the record established that claimant's conduct was wantonly negligent, *i.e.* a conscious indifference to the standards of behavior the employer had the right to expect of him, under circumstances where he knew or should have known that his conduct would probably violate the employer's expectations with respect to acceptable uses of force, the record could not also establish that claimant genuinely believed his conduct did not violate those same expectations.

We also disagree with the ALJ that the record was "without any evidence" undermining claimant's credibility. For example, the employer alleged claimant was dishonest with the employer by falsely reporting that he was sick and using sick leave to spend time with his child on her birthday in May 2013, and there is a suggestion of discrepancies between claimant's written incident report after the February 2018 incident and his answers to certain questions in the March 2, 2018 investigatory meeting. *See* Exhibit 1. The record does not show whether claimant's credibility was undermined by those incidents, however, and the ALJ should conduct additional inquiry into the matter on remand.

We disagree with the ALJ that claimant's use of force against the youth in February 2018 was "within the employer's policies regarding acceptable use of force." The employer's policy, as stated in Exhibit 1, was that "staff will use reasonable and appropriate physical interventions within the scope of their job as necessary," and that "staff will assess each individual situation and use the least restrictive means necessary to diffuse the situation." Exhibit 1, March 6, 2018 letter. Under the employer's policy, then, the fact that claimant "perceived" a threat does not alone establish that his use of force was within the employer's policies. Claimant's use of force must also have been, objectively, reasonable, appropriate, and the least restrictive means of diffusing the situation. However, the record was not developed sufficiently to allow a determination about whether claimant's use of force was reasonable, appropriate, and the least restrictive means of diffusing the situation, and the ALJ must do so on remand.

The ALJ should further examine claimant about the basis for his perceptions regarding the use of force. Exhibit 1 suggests that claimant might subjectively have considered the youth physically compliant during the incident; the ALJ should ask claimant to describe in detail what was happening at the time of the incident, and why given the youth's physical compliance he felt it was reasonable, appropriate, or minimally restrictive to physically restrain the youth. The record also shows two other employees accompanied that claimant at the time of the incident; the ALJ should inquire with claimant about how the presence of other employees factored into his perception of threat from the youth.

In the course of that inquiry, we note that employer had video surveillance footage of the incident, and that the employer's witness stated that he watched the footage and saw the incident, including how the youth and claimant behaved. On remand, the ALJ should ask the employer's witness to specifically describe what he saw on the video, including whether the witness saw the entire incident, whether there were any gaps in the video during which the witness could not see what was happening between claimant and the youth, what claimant did during the incident, what the youth did during the incident, what any other employees or youth who were present were doing at the time, and whether there was an accompanying audio recording and, if so, what was said during the incident. If there are any discrepancies between claimant's description and the employer's, the ALJ should examine the parties about the discrepancies to determine which description is the most likely under the circumstances.

The ALJ should also inquire further with the employer what claimant's coworker reported to the employer when he initially complained to the employer about claimant's conduct and in any additional interviews or investigation, and, if the employer has the information, why the coworker concluded claimant's treatment of the youth should be reported to the employer. The ALJ should ask the employer to explain what the second staff person said about claimant's treatment of the youth. Claimant testified at one point during the hearing that he thought another employee had used a restraint hold against the same youth; the ALJ should ask the parties whether that occurred during the same February 23rd incident and what the circumstances were.

Finally, the ALJ should ask the parties any other questions he deems necessary to aid in a determination of why or why not the parties considered claimant's restraint of the youth reasonable and appropriate, and, if it was not the least restrictive means of diffusing the situation, what the employer thought claimant should have done instead. Once the ALJ has developed the record sufficiently to allow for a determination of whether claimant's restraint of the youth in the final incident was, objectively, reasonable, appropriate, and the least restrictive means necessary to diffuse the situation, the ALJ should also conduct a further, similar inquiry with the parties about the 2016 and 2017 incidents, such that the record will support a determination of whether or not claimant's conduct in 2018 should be excused as an isolated instance of poor judgment.

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, Order No. 18-UI-110843 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-110843 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: <u>July 12, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-110843 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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