

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0711

Reversed & Remanded

PROCEDURAL HISTORY: On May 31, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150618). Claimant filed a timely request for hearing. On June 25, 2018, ALJ Wymer conducted a hearing, and on June 28, 2018 issued Order No. 18-UI-112223, concluding the employer discharged claimant not for misconduct. On July 18, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument and the entire hearing record in reaching this decision.

CONCLUSION AND REASONS: Order No. 18-UI-112223 is reversed and this matter remanded for the ALJ to admit the documents marked as Exhibit 1 into the record and to further develop the hearing record. A copy of Exhibit 1 is attached to this decision.

OAR 471-040-0023(4) (August 1, 2004) states that a party that seeks to introduce documentary evidence into the record must provide the evidence to all other parties and the Department "prior to the commencement" of the hearing. OAR 471-040-0023(5) states as well that the ALJ may admit documentary evidence presented at the time of hearing "if inclusion of the evidence in the record is necessary to conduct a full and fair hearing," and may continue the hearing if necessary to allow the parties time to receive the documents. In addition, 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).

The employer provided documents to the ALJ and the parties before the hearing. The documents included copies of the employer's policies prohibiting abuse and neglect of its clients and setting out employees' required reporting responsibilities, claimant's acknowledgment of having received those policies, a summary of claimant's trainings, claimant's job description, claimant's 2016 performance

evaluation, claimant's discharge letter, and three statements from witnesses regarding the final incident resulting in claimant's discharge. Transcript at 9. The ALJ marked the documents as Exhibit 1. Claimant objected to Exhibit 1, asserting that he did not receive a copy of the documents. Transcript at 7. Although the ALJ permitted the parties to refer to the documents throughout the hearing, in Order No. 18-UI-112223 the ALJ did not admit them into the record, concluding that the employer did not provide claimant the documents in a timely manner. EAB concludes that the ALJ failed to give all parties a reasonable opportunity for a full and fair hearing because the employer did technically comply with OAR 471-040-0023. And even if the ALJ determined that claimant received the documents too close to the commencement of the hearing, because inclusion of the evidence was necessary for a full and fair hearing, the ALJ should have continued the hearing rather than refusing to admit the documents. The ALJ also failed to conduct a full inquiry into the facts necessary for consideration of whether claimant's discharge was for misconduct, so this matter is reversed and remanded to allow claimant an opportunity to respond to Exhibit 1 and 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) (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).

Claimant worked as a direct support associate for the employer, a non-profit agency that supports adults with developmental disabilities in residential and employment settings. The employer discharged claimant on April 19, 2018 because he allegedly put his hands on a client in his care in an aggressive manner and shoved him, which was contrary to the employer's policy of ensuring its clients were free from abuse. Claimant alleged that the client pushed him, and he pushed the client back. The April 19 incident was the only incident claimant had of unacceptable work behavior.

The employer reported the incident to the Oregon Department of Human Services (DHS). The ALJ should ask the parties if DHS substantiated the allegation of abuse or if it remains under investigation. Claimant testified at hearing that he "pushed [the client] away 'cause he was coming at me" "in a violent manner." Transcript at 41, 44. The ALJ should ask claimant if he moved away from the client, and if not, why not. The ALJ should ask the employer's witness, AB, if he testifies again at the hearing on remand, what he observed regarding the client on April 19 and the client's demeanor when the client shoved claimant on April 19. *See* Transcript at 21. AB testified that he saw claimant "get in [the client's] face," before the shoving began. Transcript at 21. The ALJ should ask claimant to respond to that testimony. AB also testified that claimant tried to apologize to the client after the incident. Transcript at 22. The ALJ should ask claimant if he tried to apologize to the client, and what he stated to the client. Claimant testified that a manager and one other direct support professional (AB) were present at the time of the incident but did not assist claimant. Transcript at 42-43. The ALJ should ask claimant if he asked

them for assistance, and if not, why not. The ALJ should ask claimant how the other employees knew or should have known claimant needed assistance, and what assistance he believed they could have provided. The ALJ should ask AB if claimant appeared to need assistance and why he did not assist claimant. The ALJ should ask claimant if he stated anything to the client after he shoved him, and if so, exactly what he stated to the client until the time claimant left work as well as asking the same questions of AB. Additionally, the ALJ should ask claimant about the information contained in the employer's statements from the witnesses regarding the April 19 incident, especially where the statements appear to contradict claimant's testimony. The ALJ should give both parties the opportunity to respond to the statements and the other party's testimony about the statements. Sworn testimony from a witness at hearing may be more persuasive than written statements where the declarants do not testify at hearing. The employer may wish to make arrangements to have AB and the other witnesses to the April 19 incident available for the hearing.

DECISION: Order No. 18-UI-112223 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 17, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-112223 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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