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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-0795

Reversed & Remanded

PROCEDURAL HISTORY: On June 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #142131). Claimant filed a timely request for hearing. On July 18, 2018 and August 1, 2018, ALJ Murdock conducted a hearing, and on August 8, 2018 issued Order No. 18-UI-114588, affirming the Department's decision. On August 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

CORRECTION TO ORDER. In the History of the Case set out in Order No. 18-UI-114588, the ALJ stated that claimant did not participate in the hearing. However, claimant did in fact appear and participates in the hearing through an interpreter.

CONCLUSIONS AND REASONS: Order No. 18-UI-114588 is reversed and this matter is 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division,* 25 Or App 661, 550 P2d 1233 (1976). Isolated instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant worked as a janitor for a private organization that provided jobs for individuals with disabilities. In Order No. 18-UI-114588, the ALJ concluded the employer established that it discharged

claimant for misconduct. The ALJ based this conclusion on the findings that, on occasion, claimant had willfully taken unauthorized breaks at unscheduled times and that claimant's actions in doing so were willful violations of the employer's standards of behavior. Order 18-UI-114588 at 3. While the ALJ found as fact that claimant had given the employer a physician's note authorizing him to take breaks in addition to those regularly scheduled by the employer because of a disability, the ALJ also found that claimant did not ask for, and was not taking, physician-authorized breaks when he was on the breaks that led to his discharge. Order No. 18-UI-114588 at 3. We disagree and conclude that the record is insufficiently developed to support the ALJ's conclusions.

Claimant's participation at the hearing was through a Somali interpreter. Due to phone problems, interruptions resulting from claimant's apparent eagerness to explain himself and dislocations arising from the interpretation process, the record of claimant's hearing testimony is often difficult to follow. For clarity and to ensure claimant has an adequate opportunity to respond to the employer's allegations, this case should be remanded for further development of the record.

On remand, the ALJ should ask claimant questions that require him to respond specifically to the employer's allegations about the events underlying the issuance of the April 5, 2018 warning, which appears to have included the final incident(s) before discharge. The ALJ may wish to structure the examination of claimant around the employer's documents. *See* Exhibit 1 at 2, 6, 8, 9. The ALJ's inquiry should include the date(s) on which the event(s) referred to in the April 5 warning occurred, whether claimant was watching videos on his phone or otherwise taking unscheduled break(s), or denies doing so. If claimant denies doing so, the ALJ should ask if he was doing anything that might have been misinterpreted by an observer as watching videos on his phone, "hiding in the corner" at 3:45 a.m. on April 4, 2018, going "missing from his work route for extended periods of time," or otherwise taking authorized break(s) from work. *Id.*; *see also* Transcript of July18, 2018 hearing at 7.

With respect to the final incident, the ALJ should also explicitly ask claimant if he is denying that he took the break(s) that the employer contended were unauthorized in the April 5 warning and if he is denying taking actions that might have been misconstrued as watching videos or taking unauthorized breaks. The ALJ also should explicitly ask claimant if he is, or is not, contending that the break(s) underlying the April 5, 2018 warning were taken pursuant to his physician's note. If claimant contends that the break(s) were taken under the authority the note, the ALJ should ask whether claimant sought permission from a supervisor to take the otherwise unauthorized break(s) and, if not, why not. Finally, the ALJ should ask claimant what he was trying to tell the interpreter at the hearing, which the interpreter described as, "[H]e [claimant] just explain that, um, what happened that time that was caught at 1:48 and – and, uh, a guy called Antonio. And he signed a letter and, uh, that was the termination." Transcript of August 1, 2018 hearing at 12. The ALJ should follow up as appropriate if what claimant was trying to express is relevant to his discharge.

Claimant should also be questioned about the incidents underlying the warnings issued on June 5, 2017 and January 25, 2018 because it may become necessary to evaluate whether claimant's behavior during the final incident was excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). The ALJ should ask claimant to respond specifically to the employer's allegations about the events underlying the warnings to ensure that claimant's position about them and claimant's state of mind during them is understood. *See* Exhibit 1 at 10, 11. The ALJ's inquiry should be similar to that outlined above in connection with the event(s) underlying the April 5 warning. In addition, the ALJ

should ask claimant if he ever took an additional break at work pursuant to his physician's note and if he did or did not seek permission from his supervisor before taking such a break and why he did or did not. Finally, claimant's testimony at hearing about the physician's note authorizing additional breaks was somewhat confusing because he first brought up the note as an apparent justification for taking additional breaks and then appeared to insist that he had not taken any of the breaks that the employer alleged were unauthorized. *See* Transcript of August 1, 2018 hearing at 13. The ALJ should clarify claimant's testimony on this matter as it relates to the breaks at issue. Specifically, the ALJ should make a sufficient inquiry to determine if claimant took any of the allegedly unauthorized breaks thinking they were permitted under the physician's note and, if claimant did not seek specific permission to do so, why he did not and if he did not think he needed specific permission every time he needed to take an extra or additional break.

On remand, the ALJ should allow the employer to respond claimant's testimony. The intent of this decision is not to limit the ALJ to asking only the questions that EAB has outlined or suggested. In addition to asking those questions, the ALJ should ask any follow-up questions necessary or relevant to the nature of claimant's work separation and whether or not it should be disqualifying. The ALJ should also allow the parties to provide any additional relevant and material information about the work separation, and to cross-examine each other as necessary.

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 generally 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 or was not discharged for misconduct, Hearing Decision 18-UI-114588 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-114588 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: <u>September 14, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-114588 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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