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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-0935

Reversed & Remanded

PROCEDURAL HISTORY: On July 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130838). Claimant filed a timely request for hearing. On August 20, 2018 and September 10, 2018, ALJ Amesbury conducted a hearing, and on September 12, 2018 issued Order No. 18-UI-116456, reversing the Department's decision. On September 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that largely consisted of additional evidence, some of which was irrelevant since it related to claimant's actions after he was discharged and, as such, could have no bearing on whether the employer discharged claimant for misconduct. Because this matter has been remanded, the employer as well as claimant may offer any additional documentary evidence at the hearing on remand and, at that time, the ALJ will determine whether it is relevant and material to the issues on remand and should be admitted into evidence. The parties are advised to follow the instructions set out on the notice for the remand hearing to ensure that any documents they offer may be considered for admission into evidence, including that the documents must be served on the other parties and the ALJ in advance of the hearing.

CONCLUSIONS AND REASONS: Order No. 18-UI-116456 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment if it was a single or infrequent occurrence of willful or wantonly negligent behavior and it was not of a type that, among other things, exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship. OAR 471-030-0039(1)(d)(A); OAR 471-030-0038(1)(d)(D). The employer carries the burden to prove claimant's

misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-116456, the ALJ concluded that the employer discharged claimant but not for misconduct. Although the ALJ concluded that claimant's behavior on June 26, 2018 in screaming, yelling, making offensive comments about a coworker and threatening to seek to have the Oregon Liquor Control Commission (OLCC) initiate an enforcement action against the employer in retribution for promoting a particular employee was a willful or wantonly negligent violation of the employer's standards. The ALJ also concluded that claimant's behavior was excused from constituting misconduct as an isolated instance of poor judgment. Order No. 18-UI-116456 at 3. We agree that claimant's behavior on June 26 was willful or wantonly negligent. We find that the ALJ erred in concluding that the alleged violations of the employer's standards raised by the employer that occurred before June 26, 2018 should not be considered for purposes of determining if claimant's behavior on June 26 was excusable as an isolated instance of poor judgment on the ground that those prior violations, even if proved, were sufficiently "different in character and remote in time from the incident for which he was discharged." Order No. 18-UI-116456 at 3. As such, there is insufficient evidence in the record to determine whether claimant's behavior that occurred on June 26 may be excused as an isolated instance of poor judgment.

At hearing, one of the employer's witnesses brought up two specific past incidents, one on September 16, 2017 and the other on April 13, 2018, in which claimant allegedly yelled at customers, used foul, offensive or demeaning language and/or acted toward customers in an intimidating and physically aggressive manner. Transcript of August 20, 2018 Hearing at 14, 17. This behavior, if proved, would be sufficiently similar to that exhibited by claimant on June 26 to form a pattern that likely would cause claimant's behavior on June 26 to fall outside of the single or infrequent type needed to qualify as an isolated instance of poor judgment if claimant had a willful or wantonly negligent state of mind. With respect to both alleged incidents, the ALJ should ask the employer's witness(es) to describe the events that precipitated claimant's alleged behavior, what precisely claimant did and said to each customer (as close as possible to verbatim) and the customer's reaction, the tone and volume of claimant's voice during each interaction, claimant's demeanor, whether the interaction was witnessed by other customers and anything else noteworthy about claimant's behavior in the interaction. The ALJ should also ask the employer's witness(es) to identify any employer representatives who may have discussed the incident with claimant, when they did so, what the representatives said to claimant about the alleged incident and his behavior, what they may have pointed out to claimant about how the employer expected him to behave toward customers in the future or what the employer would do if claimant behaved in a similar manner in the future and claimant's reaction to the discussion, including what he said and whether he admitted to the behavior as alleged. The ALJ should make a similar inquiry about the incident occurring in 2015 or 2016 when claimant allegedly referred to a female customer as a "cunt." Transcript of September 10, 2018 Hearing at 49-50. In connection with this incident, the ALJ should ask the employer's witness(es) how the employer became aware of it.

The employer's witnesses also made general references throughout the hearing that suggested that claimant's alleged behavior on June 26 was a recurrence of behavior in which he treated customers or coworkers disrespectfully or in an offensive manner. Transcript of August 20, 2018 Hearing at 6 (behavior on June 26 was only "one of the incidents"), at 14 (claimant had a "problem in the past, mainly with women"), at 14 (claimant spoken to before about his treatment of others), at 19 (other

witness had information about prior situations involving claimant); Transcript of September 10, 2018 Hearing at 9 (June 26 "wasn't his [claimant's] only first occurrence" and there had been "other occurrences in the past"), at 37 ("many other times prior to [June 26] where [claimant's] conduct made me feel very uncomfortable with how he would speak about female customers and/or referring to his wife" in conversations with a witness-coworker and customers), at 37, 38 (claimant allegedly would state upon seeing certain customers or coworkers, "If I was single[,] I'd bang her"), at 49 (employer had received complaints from female employees about their discomfort in working with claimant because of how he treated female customers), at 50 (there had allegedly been similar past incidents with customers when claimant had behaved as he allegedly did on June 26 and customers had "voiced concern" over them). The ALJ should follow up on these statements, as appropriate, to determine if there were incidents in which claimant willfully or with wanton negligence violated the employer's standards prior to June 26 and, if so, how pervasive those violations were. The ALJ may be assisted by patterning his inquiry on the outline set forth above with respect to the September 16, 2017 and April 13, 2018 alleged incidents as well as the incident in 2015 or 2016.

At the hearing on remand, the ALJ should allow claimant to respond to the testimony of the employer's witness(es), as appropriate and relevant.

The intent of this decision is not to constrain the ALJ to asking only questions related to the specified subject matter. In addition to asking the questions suggested, the ALJ should ask any follow-up questions in all subject matter areas he deems necessary or relevant to whether or not claimant's work separation should be disqualifying. The ALJ should also allow the parties to provide any additional relevant and material evidence 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 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 willful or wantonly negligent behavior on June 26 should be excused from constituting misconduct as an isolated instance of poor judgement, Order No. 18-UI-116456 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-116456 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>November 1, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-116456 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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