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BYE: 201603

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

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DS 005.00

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0520**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On February 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125856). Claimant filed a timely request for hearing. On April 3, 2015 and April 6, 2015, ALJ Wipperman conducted a hearing, and on April 16, 2015 issued Hearing Decision 15-UI-36987, affirming the Department's decision. On May 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision, to the extent it was relevant and based on the record.

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-36987 is reversed as unsupported by a complete record, and this matter remanded for additional evidence.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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.

We agree with the ALJ that the record fails to show that claimant was discharged for failing to recertify the employer with the TSA. The employer did not discover that claimant had failed to take action with

respect to the recertification until after claimant's discharge, and, therefore, claimant's conduct did not cause the discharge. We also agree with the ALJ's implicit finding that claimant was not discharged for sexual harassment. The employer presented no evidence tending to support its allegation that claimant made sexual advances toward his coworker, or conditioned favorable workplace conditions upon her compliance with his advances.

However, the ALJ also concluded that "claimant's ubiquitous use of communications media during the period following the December 18, 2014 email and the following meeting between Clancy and claimant" constituted a willful violation of the employer's expectations that could not be excused as a good faith error because "claimant's personal communications exceeded mere incidence."<sup>1</sup> In support of this conclusion, the ALJ found that that claimant agreed that he had "made consistent use of phone, text, email, and social networking sites for personal purposes while working during this period. " We disagree that the record was developed enough to support the ALJ's conclusion.

Although the employer had a policy in place since claimant's hire that prohibited use of the employer's computer or internet access for anything other than "company purposes," the employer's director of sales and claimant both indicated that some amount of personal communication at work was "commonplace," particularly when working long and flexible hours.<sup>2</sup> On December 18, 2014, the employer's CEO sent a company-wide email directive prohibiting the use of company equipment or work time for personal reasons, and claimant promptly acknowledged receipt of it. The ALJ did not ask the CEO or director of sales, however, whether some "commonplace" use of the employer's equipment and work time for personal communications continued to occur thereafter, or if all employees modified their behavior due to the directive.

The most pertinent time at issue is the period between the CEO's December 18<sup>th</sup> email and claimant's December 29<sup>th</sup> suspension from work, from which he never returned to work. Although the record tends to show that claimant made fairly liberal use of the employer's equipment and work time for personal communications with his coworker and the CEO's wife *prior* to that period, the record fails to show whether or how frequently claimant continued to use the equipment and work time after the receiving the CEO's directive prohibiting personal use. Although the employer alluded to one or two uses during the pertinent period, the ALJ did not ask the employer's witnesses for the dates or durations of claimant's personal use of equipment or work time for personal matters during that period, nor did the ALJ ask whether claimant used the employer's equipment or work time, or both, during any of those instances. Claimant admitted that he occasionally sent messages at work after receiving the December 18<sup>th</sup> email from the CEO, but also testified that he was working long and flexible hours at the time. The record does not show, and the ALJ did not ask, what times claimant was at work during the pertinent period of time, how he used the equipment or work time, whom he contacted, and for what duration, nor whether claimant had any reason to believe, based upon the previous company culture where it was commonplace to have some personal use occur, that the same culture persisted after the December 18<sup>th</sup> email. Without specific evidence about the dates and times of claimant's personal use of the employer's equipment or work time, or evidence that he was using work time for personal reasons, the record fails

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<sup>1</sup> Hearing Decision 15-UI-36987 at 3-4.

<sup>2</sup> Exhibit 1, "Exhibit A" to claimant's January 1, 2013 employment agreement; Transcript at 45, 70.

to support a finding that claimant's use was "ubiquitous," willful, or was not the result of a good faith error.

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, Hearing Decision 15-UI-36987 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 15-UI-36987 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>3</sup>

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service: June 23, 2015**

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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<sup>3</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-36987 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.