

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0242**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On November 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73820). Claimant filed a timely request for hearing. On February 6, 2016, ALJ Vincent conducted a hearing, and on February 20, 2016 issued Hearing Decision 16-UI-52712, affirming the Department's decision. On February 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-52712 is reversed and this matter is remanded for further proceedings.

Claimant did not report for work as scheduled on October 6, 2015 and October 7, 2015. In Hearing Decision 16-UI-52712, the ALJ concluded the employer discharged claimant for misconduct as a result of his failure to report for work on those days and to notify the employer of his absences. However, the employer's witness testified that the employer assumed by claimant's failure to call or report for work on those days that he had "voluntarily separated," and it was not clear that the employer ever notified claimant that he had been discharged. Audio at ~ 9:18, ~15:14. While claimant agreed he did not report for work on October 6, 2015 and October 7, 2015, he was never asked and did not volunteer whether he was discharged or whether he left work. Rather, claimant referred to certain personal exigencies that he thought prevented him from reporting to work on those days and to the employer's refusal to permit him to take two weeks' vacation to deal with those exigencies. Audio at ~18:00, ~19:09, ~24:56, ~26:04.

On remand, the ALJ should further explore the nature of the work separation by inquiring whether the employer was willing to allow claimant to continue working after his absences began and, if applicable, when the employer became unwilling to allow claimant to continue. The ALJ also should inquire into whether any representative of the employer tried to contact claimant after his absences began on October 6, 2015, the purpose of the contact, if it did not, why not, and whether the employer ever communicated to claimant that it would not allow him to return to work. The ALJ should further inquire into the reason that the employer decided to discharge claimant for those absences rather than imposing a lesser disciplinary sanction since claimant apparently did not have history of past absences or attendance violations. Audio at ~14:00.

The ALJ also should develop evidence about the nature of the work separation from claimant's perspective and whether he was willing to continue working for the employer. While it was not disputed claimant failed to report for work beginning on October 6, 2015, the ALJ should have inquired about any communications from claimant to the employer that told it or should have alerted it to the fact he was going to be absent from work and for what length of time. The ALJ should explore how long claimant intended to remain at home and not report for work when his absences started on October 6, 2015, including whether he intended to not report for work for the entire two weeks he had requested off, until his chores at home were completed or until some other time and if claimant's timeline for his absences changed, when and why it did so. The ALJ should further inquire into the circumstances that resulted in claimant not returning to work after October 6, 2015, why he did not contact the employer to report his absences on October 6, 2015 and each day thereafter, what he thought was going to happen to his continued employment if his absences continued and, if he thought the employer might allow him to return to work, on what he based this impression. To the extent, claimant intended at some point to return to work, the ALJ should develop evidence about claimant's communication of this intention to the employer or, if he did not, why not.

During the hearing, claimant presented evidence suggesting that the employer was acting with hostility toward him, trying to induce him to quit work, and had refused to permit him to take the two weeks off he requested to allow him perform his necessary chores at home as an impetus for quitting. Audio at ~18:53, ~19:09, ~27:00, ~27:30, ~27:32, ~29:44. The ALJ should have, but did not, seek information from claimant about whether this was his contention and, if so, develop the evidence about why claimant thought his supervisor was "a dick," when and to whom claimant filed the "notice of a hostile and combative work environment" he referred to in his testimony and the substance of this "notice." Audio at ~27:00. As appropriate, the ALJ should inquire the specifics of any incidents that claimant might contend supported the view that his supervisor(s) or the work environment was hostile, including those described in Exhibit 1, any complaints claimant made to the employer about his supervisor(s)' behavior toward him and any actions the employer took in response to claimant's complaints. The ALJ should also further explore the "business necessity" that caused the employer to deny claimant's request for two weeks off to perform personal chores at home, including specifically why only claimant could perform the maintenance tasks at the older hotel during claimant's vacation, why the person who had been performing maintenance tasks at that hotel before claimant's reassignment could not have continue to perform the maintenance work for that two weeks, whether claimant's contention that the employer did not fill the maintenance position at the older hotel after claimant left work was correct, and if so, why the employer did not, and any other specific facts that support the employer had legitimate business reasons for denying claimant's request for two weeks off. Audio at ~19:24, ~27:32, ~30:43, ~31:20.

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 nature of the work separation and if it was a discharge, whether that discharge was for misconduct or if it was a voluntary leaving, whether claimant showed good cause, Hearing Decision 16-UI-52712 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 16-UI-52712 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** April 7, 2016

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-52712 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.

**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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