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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
2016-EAB-0667

Reversed & Remanded

PROCEDURAL HISTORY: On April 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 81359). Claimant filed a timely request for hearing. On May 17, 2016, ALJ M. Davis conducted a hearing, and on May 23, 2016, issued Hearing Decision 16-UI-60172, concluding that claimant voluntarily left work without good cause. On June 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Manpower U.S., a temporary agency, employed claimant from November 27, 2015 until January 27, 2016. The employer assigned claimant to work in a temporary position as a call center representative for its client, Convergys.

(2) Convergys' policy required that employees call a "sick line" telephone number if they were going to be absent, late to work, or needed to leave work early. Claimant knew about and understood Convergys' policy.

(3) Claimant stopped reporting for work at Convergys after December 30, 2015.

(4) Between January 12 and 18, 2016, the lead supervisor at Convergys and the employer's recruiter exchanged emails about claimant's failure to report for work and the supervisor's inability to contact claimant.

(5) On January 19, 2016, the employer's recruiter sent claimant an email which stated in relevant part:

> We have contacted Convergys and they are still interested in having you back to work. Please let me know ASAP – by the end of day today – if you would like to return.
>
> If possible you have a phone number we can reach out it would be great to be able to contact you by both phone and email. Exhibit 1.

(6) On January 26, 2016, claimant responded to the recruiter's email by emailing the recruiter a telephone number.

(7) On January 27, 2016, the Convergys lead supervisor told the employer to end claimant's work assignment because claimant had not contacted Convergys. Also on January 27, the employer's recruiter sent claimant an email, informing claimant that "Convergys has decided to end your assignment at their site." Exhibit 1.

CONCLUSION AND REASONS: Hearing Decision 16-UI-60172 is reversed, and this matter remanded to OAH for additional information.

The first issue the ALJ considered was whether claimant voluntarily quit work or was discharged by the employer. Where, as here, an individual works for a temporary agency or leasing company, the employment relationship is deemed severed at the time that a work assignment ends. OAR 471-030-0038(1)(a) (August 3, 2011). If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The ALJ concluded that "[b]ecause claimant stopped contacting both the employer and Converges [sic], she demonstrated that she was no longer willing to continue working and the work separation was a voluntary quit." Hearing Decision 16-UI-61072 at 3. We disagree. Claimant's January 26, 2016 email indicated she was willing to continue working for Convergys, the company where the employer had assigned her to work as a temporary employee. On January 27, 2016, however, the employer ended claimant's assignment at the request of Convergys. Claimant's work separation was therefore a discharge.

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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

Because the ALJ concluded that claimant's work separation was a voluntary leaving, she failed to conduct an inquiry sufficient to determine whether the employer discharged claimant for misconduct. On remand, the ALJ must inquire into the facts that show whether claimant's behavior was willful and wantonly negligent. Claimant testified that she stopped reporting for work after December 30, 2015 because her car broke down and because reliable transportation in the form of a loaner car was

unavailable for a few days. Audio recording at 20:26 and 20:48. On remand, the ALJ must ask claimant when her car broke down, when she obtained the loaner car, and why she did not begin reporting for work once she obtained the loaner car. Claimant also testified that she repeatedly called the Convergys "help line" to report her absences, and that she also sent a number of emails to her supervisor, asking if she would be permitted to return to work. Audio recording at 21:41. The ALJ must inquire when claimant called the Convergys sick line and what messages she left when she called; the ALJ must also ask to whom at Convergys claimant directed her emails, when she sent these emails, and what she said in these emails. The employer's witness testified that its recruiter contacted claimant on January 17, 2016, and that claimant told the recruiter that her phone was out of service, and that she believed that the employer had discharged her because she had acquired seven points under its attendance policy. Audio recording at 14:55. The ALJ should ask claimant about this and any other contact she had with one of the employer's representatives, and ask claimant what, if anything the recruiter advised her to do during these contacts. Finally, the ALJ must inquire why claimant waited until January 26 to give the employer's recruiter her telephone number, after the recruiter notified claimant on January 19 that claimant needed to immediately contact the recruiter.

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 to determine whether the employer discharged claimant for misconduct, Hearing Decision 16-UI-60172 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-60172 is set aside, and this matter remanded for further proceedings consistent with this order.[1]

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

DATE of Service: <u>July 11, 2016</u>

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. 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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[1] The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-60172 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.