

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0278**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 163959). Claimant filed a timely request for hearing. On February 2, 2017, ALJ Monroe conducted a hearing, and on February 17, 2017 issued Hearing Decision 17-UI-77289, affirming the Department's decision. On March 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** The ALJ stated at the hearing that she would hold the record open until February 7, 2017 to allow claimant time to receive Exhibit 1, review it, and submit any written objections to the exhibit being admitted into evidence. Audio recording at ~ 11:00. Although the ALJ did not include any detailed rulings in her decision, it appears that neither party objected to admission of Exhibit 1 into the record. Exhibit 1 was, therefore, admitted into the record and we considered it when reaching this decision.

The ALJ also stated at the end of the hearing that she would hold the record open until February 7, 2017 to allow the employer time to submit emails claimant sent to the employer's president after July 28, 2016, and would allow claimant until February 9, 2017 to object to those documents. Although the employer submitted additional documents including emails from claimant to the employer's president sent after July 28, 2016, it does not appear on this record that the ALJ marked those documents or ruled on their admissibility. Claimant also submitted to the ALJ, while the record was open, copies of emails he sent to the employer's president during the relevant period of time; the record fails to show, however, that the ALJ marked claimant's submission or ruled on their admissibility, either.

OAR 471-041-0090(1) (October 29, 2006) provides that exhibits that were offered, but not received into evidence may be received by EAB into the record as necessary to complete the record. The documents claimant and the employer offered into evidence are relevant and material to the issue at hand, which is whether and with what frequency claimant emailed the employer's president about his day-to-day activities between July 28<sup>th</sup> and his discharge date, and what those emails included. Those documents are necessary to complete the record, and we therefore receive them into evidence.

The new exhibits are marked and admitted as follows: Exhibit EAB 1 consists of the 31-page fax the employer sent to the Office of Administrative Hearings (OAH) on February 3, 2017; Exhibit EAB 2 consists of the 39-page fax the employer sent to OAH on February 3, 2017; and Exhibit EAB 3 consists of the 41-page fax claimant sent to OAH on February 6, 2017. EAB considered all three new exhibits when reaching this decision. A copy of all three exhibits has been mailed to the parties with this decision. Any party that objects to EAB's admission of these exhibits must submit the objection to EAB in writing, received by EAB within 10 days of the Date of Service of this decision. Unless such objection is both received and sustained by EAB, Exhibits EAB 1, EAB 2 and EAB 3 will remain in the record.

**FINDINGS OF FACT:** (1) Green-Tek, Inc. employed claimant as a northwest sales representative from May 2, 2016 to September 14, 2016.

(2) On April 14, 2016, the employer's president emailed claimant a job offer, including a description of claimant's responsibilities that included: "Report back to me by phone and email on your progress on a constant basis." Exhibit 1, April 14, 2016 email. The president included a notation that said "[t]o discuss" immediately after that item. *Id.* The "[t]o discuss" notation used throughout the offer letter indicated areas in which claimant, the president and/or the human resources person needed to discuss that topic in more detail at another time.

(3) Claimant began performing services in mid-May 2016. He reported his sales calls to the president, sent in photographs of the places he visited, and felt he was providing as much information as possible. He did not report his activities to the president on a daily basis, and did not understand that he was required to do so. He was aware that the president was dissatisfied with his reports but felt confused about the president's expectations.

(4) On July 10 or July 11, 2016, the president spoke with claimant about the reports. The president thought he made it clear during the conversation that he wanted daily reports that included not just where claimant made sales calls, but also a description of what he did at each stop. By July 19, 2016, claimant had not submitted a report the president found satisfactory. On July 19, July 25 and July 28, the president repeatedly asked claimant to provide more information in his reports, and, in the July 28<sup>th</sup> email, provided claimant with an example of the type of description he wanted.

(5) Thereafter, claimant provided near-daily emails to the president, including emails explaining by the day or week what sales calls he planned to make during the designated period, emails about quotes and orders he was processing, and, at either the close of his workday or the morning of the day after, a description of the results of each of his sales activities, and responses to the president's requests for additional information. Claimant did not work every day between July 28<sup>th</sup> and September 14<sup>th</sup>; he did not send daily sales activity reports on days he did not work, did not send daily reports to the president on days where he missed work due to a doctor's appointment, and did not send daily reports on days where he had to renew his company car rental agreement. Between July 28, 2016 and September 6, 2016, claimant sent the president at least 21 emails in which he described his sales activities.

(6) On September 7, 2016, claimant sent an email asking to speak with the president the following morning. The president agreed. Claimant did not call the president on September 8, 2016, and neither

claimant nor the president followed up about that call. On Friday, September 9, 2016, claimant sent the president an email listing his sales activities from September 7 and September 8. On September 13, 2016, claimant sent the president an email that included a description of his activities on September 10, and listed his planned activities for the week of September 12 through September 16, 2016.

(7) By September 14, 2016, the president concluded that claimant had engaged in a “pattern” of not communicating over a period of “weeks and months” and discharged claimant. Transcript at 6.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant’s discharge was not for misconduct.

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) (August 3, 2011) defines misconduct to include 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. The employer has the burden of proof in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). To meet that burden, the employer must produce sufficient evidence to establish not only what claimant did, but also establish that he acted willfully or with wanton negligence.

The ALJ concluded that claimant’s discharge was for misconduct, reasoning that although “claimant testified that he complied with the employer’s expectations,” the evidence “fails to establish that claimant provided the requested activity summaries on a daily basis,” and, given that he was aware that the employer wanted daily summaries, his failure to send them was a willful or wantonly negligent violation of the employer’s expectation. Hearing Decision 17-UI-77289 at 3. We disagree.

The employer’s president alleged that he asked claimant to send him quick daily sales activity reports, “And – and I – I didn’t – I just never got it.” Transcript at 6. The record shows, however, that claimant sent at least 21 reports to the employer in the final five or six weeks of his employment, in addition to those sent before July 28. Claimant did not work seven days a week and took some workdays off work for medical appointments or to deal with his company rental car. Absent evidence that claimant was on duty on the days he did not send the employer daily reports, claimant’s submission of 21 reports in a five or six week period fails to establish that he did not submit activity reports every day he worked.

The president alleged that after July 28<sup>th</sup>, the date upon which it appears that he gave claimant specific guidelines and an example of the kind of report he wanted, that claimant’s “reports only came to me when they came, which was I think once or twice” or “one or two maybe” and “[t]hat was it.” Transcript at 36, 41. When the ALJ asked the president to confirm that claimant sent only one email after July 28<sup>th</sup> that included a description of his activities, and the president responded, “That’s correct.” Transcript at 42-43. The record shows, however, that claimant sent at least 21 reports during that

period, making the president's testimony that he had only submitted one or two incorrect.<sup>1</sup> Given the employer's unreliable evidence about the number of emails claimant sent to the president, the employer has not met its burden with respect to this allegation. The president also alleged that claimant's final communication to the president occurred on September 7<sup>th</sup>, and "I never heard back from him." Transcript at 13-14. The evidence shows otherwise. Although the record does not show that claimant ever spoke to the president after September 7<sup>th</sup>, claimant did send emails listing and describing his daily activities. Claimant did not, therefore, suspend contact with the employer after September 7<sup>th</sup>, and the employer has not met its burden with respect to its allegation that he did.

There is no dispute that the employer required claimant to provide daily emails describing his sales activities. That expectation is only reasonable to the extent that it applied to claimant's work days; claimant testified that the only days he did not send emails to the president were days that he did not work. Given that the president failed to provide reliable testimony about the volume or frequency of claimant's emails, we find claimant's testimony, supported by the emails submitted by both parties, persuasive that he did, in fact, send emails to the president every day he worked. To any extent the president considered the information claimant provided in the emails inadequate, or in violation of its expectation that claimant provide specific information, the record fails to show that claimant's willfully or with wanton negligence failed to comply with the expectations or instructions received from the president. Claimant was confused about the expectation, tried to adapt when the president or the salesman claimant worked under modified the expectation, and "work[ed] as hard as I could." *See* Transcript at 21, 28, 30, 34. Claimant testified that he sent activity reports to the president "Every day that I was on the road. Every call that I made. Everything got sent back to him. It may not have got in that night, but it got in that morning . . . I was doing the best I could." Transcript at 25, 28.

The evidence, considered as a whole, established that although the employer was not satisfied with claimant's performance with respect to submitting reports to the employer, claimant made sincere efforts to meet the expectations and adapt to changes in them. His failure to satisfy the employer's expectations despite that effort was not the result of willful or wantonly negligent misconduct. We therefore conclude that claimant's discharge was not for misconduct and he is not subject to disqualification from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 17-UI-77289 is set aside, as outlined above.<sup>2</sup>

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

**DATE of Service:** April 5, 2017

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<sup>1</sup> The employer offered to provide a disk or printouts of every email claimant sent during his employment but did not. Exhibit EAB 3, which claimant submitted, includes emails that the employer did not include in Exhibit 1, Exhibit EAB 1 or Exhibit EAB 2, suggesting that EAB does not have a complete record of claimant's emails to the president during his employment, nor does EAB have a complete record of claimant's emails to the president sent after July 28<sup>th</sup>. We therefore do not know the actual number of emails and daily activity reports claimant submitted, and can only judge claimant's activities based on the emails in this record, which suggest that claimant substantially complied with the expectation at issue.

<sup>2</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

**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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