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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
# 2017-EAB-0914-R

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On June 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 121530). The employer filed a timely request for hearing. On July 10, 2017, ALJ Seideman conducted a hearing, and on July 12, 2017 issued Hearing Decision 17-UI-87752, affirming the Department's decision. On July 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On August 17, 2017, EAB issued Appeals Board Decision 2017-EAB-0914, reversing and remanding this matter because the hearing record was incomplete. On September 1, 2017, the Office of Administrative Hearings (OAH) supplemented the record and returned the case to EAB. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-87752 should be reversed and this matter remanded.

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, 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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was not for misconduct because although she was unable to work due to her ongoing "medical problems," she "had a good relationship with employer," "employer knew of her situation," and "[t]here is no showing of any willful or wantonly negligent disregard of the employer's interest and in fact the employer was very complimentary of her and said they wanted her back." Hearing Decision 17-UI-87752 at 3. We disagree that the record supports the ALJ's conclusion.

The employer submitted evidence suggesting that it discharged claimant in part because she had not been scheduled to work for several months. *See* Exhibit 4. There is no dispute that claimant was physically incapable of working due to her illness during that period, nor can there be any dispute that her continued absences from work were not misconduct for purposes of unemployment insurance benefits. However, the employer also submitted a significant amount of evidence suggesting that claimant might also have been discharged for failing to communicate with the employer about her absences for an extended period of time despite the employer having repeatedly requested that claimant do so. For example, on February 15, 2017 the employer sent a letter to claimant in which it told her to call the office when she was ready to work, but also asked her "[p]lease call the office"; on February 16, 2017 the employer sent an email to claimant asking her what her plan was; and on March 22, 2017 the employer called claimant and left a message asking her to call the office. Exhibit 1, 3. Claimant did not respond to any of the employer's messages. Depending on the circumstances, claimant's failure to communicate with the employer about her absences might or might not constitute disqualifying misconduct; however, the record was not sufficiently developed to reach any conclusion on that issue.

On remand, the ALJ should ask the employer whether or not claimant's failure to communicate with the employer was a factor it considered when deciding whether or not to discharge her on April 19, 2017. The ALJ should also ask claimant and the employer about the employer's communication attempts. How many times did the employer try to contact claimant? On what dates? Was each attempt by phone, email, mail, text message or some other form of communication? To what phone number(s) or address(es) did the employer send each attempt? Did the employer leave voicemail messages? The employer's February 15, 2017 letter asked claimant to contact the employer's office "when you are ready to work," suggesting that claimant should wait until she was ready to return to work before she contacted the employer, but also asked her just to call the office. *See* Exhibit 1. What did the employer's other messages say? Did any of them say she was required to contact the employer sooner? When did the employer tell claimant to contact it? Did claimant receive any calls, emails, letters or text messages? Did any of those messages tell claimant she was supposed to call the employer? Did claimant understand the employer wanted her to contact the office while she was unwell, or did she believe the employer wanted her to wait until she was well enough to return to work before she contacted the office? What was the reason that claimant believed as she did? Was claimant physically or mentally capable of contacting the employer between February 15th and April 19th or was she too ill? Did claimant make any attempts to communicate with the employer between February 15th and April 19th? Did claimant ask any friends or family to attempt to communicate with the employer on her behalf? If so, when, and what did she do or say, or who did she ask to communicate on her behalf and what did they say? If not, why did claimant think it would be acceptable to the employer for her to be off work for approximately three months without making any attempt to communicate with the employer about her ability to work or health status? Did claimant believe the employer would continue to employer her indefinitely? What did claimant think would happen? The ALJ should also ask the parties any follow up questions necessary to develop a full hearing record.

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 17-UI-87752 is reversed, and this matter is remanded for development of the record.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-87752 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.

**DECISION:** Hearing Decision 17-UI-87752 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: September 27, 2017**

**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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