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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
2017-EAB-1233

Reversed & Remanded

PROCEDURAL HISTORY: On July 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 85212). The employer filed a timely request for hearing. On September 29, 2017, ALJ Frank conducted a hearing, and on October 6, 2017 issued Hearing Decision 17-UI-94068, reversing the Department's decision. On October 23, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the letter that claimant submitted in which she requested that the witness she planned to call at the hearing to testify on her behalf be allowed an opportunity to do so.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-94068 is reversed and this matter is remanded for further development of the record.

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. The employer has the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-94068, the ALJ concluded that claimant was discharged for misconduct after reporting for work on several occasions at least 10 minutes after the 7:30 a.m. scheduled beginning of her shift as a dental assistant. In reaching this conclusion, the ALJ rejected claimant's explanation for often arriving at the workplace shortly after 7:30 a.m. and found as fact that no employer representative ever advised claimant that, despite the starting time shown on the weekly work schedule, she could permissibly report for work as late as 7:45 a.m. so long as she was not assigned to work with a dentist who began seeing patients earlier than that time. Hearing Decision 17-UI-94068 at 1-2. However, the

current record is insufficient to support the ALJ's conclusion or to allow us to determine whether claimant's arrival at work after 7:30 a.m. was or was not misconduct.

In the letter claimant submitted to EAB, claimant stated that she told the ALJ at the beginning of the hearing that she had a witness who was available to testify by phone and that witness would testify that she was present when the employer's practice manager told claimant that, regardless of the start time shown on the employer's written work schedule, she was allowed to start work as late as 7:45 a.m. if the dentist she was assigned to assist that day would not begin seeing patients before 7:45 a.m. Claimant did, in fact, notify the ALJ of the availability by phone of this witness and her desire to have this witness give testimony on her behalf. Audio at ~10:14, ~10:45, ~34:00. However, at the conclusion of the hearing, the ALJ cut claimant off when it appeared she was going to begin discussing the substance of that witness's expected testimony and ended the hearing without calling that witness to give testimony or asking claimant if she still wanted to call that witness on her behalf. Audio at ~34:00.

For that reason, information about claimant's witness was not part of the hearing record and is therefore new information. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider information not offered during the hearing if that information is relevant and material to EAB's determination and factors or circumstances beyond a party's reasonable control prevented the party from offering that information into evidence at the hearing. Based on claimant's proffer, the testimony from claimant's witness is likely relevant to the issue of whether claimant violated the employer's standards with wanton negligence since, if claimant accurately described what that witness heard the practice manager tell claimant, the witness can corroborate claimant's principal justification for arriving to work after 7:30 a.m. but before 7:45. The testimony of this witness would further be relevant since the ALJ based the determination he reached in Hearing Decision 17-UI-94068 on an explicit rejection of claimant's testimony that the practice manager advised her she could arrive for work at any time up to 7:45 a.m. despite the start time indicated on the employer's work schedule. Hearing Decision 17-UI-94068 at 2. That the ALJ failed to call claimant's witness to testify on claimant's behalf at hearing, after claimant had advised him of the availability of the witness and her desire to have the witness testify and without ascertaining whether the witness had relevant and material facts to offer into the hearing record, was a factor or circumstance beyond claimant's reasonable control. As such, claimant has met the standard for considering the testimony of her witness as new information under OAR 471-041-0090(2). Accordingly, we remand this matter for the purpose of taking testimony from claimant's witness.

On remand, the ALJ should ask claimant's witness to identify the position she held with the employer, how she came to overhear the practice manager speaking to claimant about claimant's arrival time to work, what her location was in reference to the alleged conversation, what conversation preceded and motivated the practice manager's statement(s) to claimant, what exactly, in detail, the witness overheard the practice manager state to claimant about when she was expected to arrive to work and any other matters, what claimant's response, if any, was and when that alleged conversation occurred. The ALJ should also inquire of the witness what, if anything, the practice manager said during that conversation about when claimant was expected to arrive if she was assigned to work with Dr. F or any other dentist who was going to begin seeing patients earlier than 7:45 a.m. on a particular day. If the practice manager did not explicitly address the issue of when claimant was expected to arrive if she was going to work with Dr. F or any other dentist who began seeing patients earlier that 7:45 a.m., the ALJ should further inquire of the witness what, if anything, the witness understood from the practice manager's statements about when claimant was expected to arrive for work if she was assigned to work with Dr. F

or any other dentist who began seeing patients before 7:45 a.m. and why. The ALJ should also inquire of the witness, if she knows, whether other dental assistants were available to assist Dr. F or any other dentists who began seeing patients before 7:45 a.m. in the event that claimant was assigned to work with them and did not arrive at work until 7:45 a.m. and, if so, whether they reasonably would be expected to provide dental assistant services until claimant arrived at work. The ALJ should follow up the testimony of the witness, as appropriate, to determine whether it is credible and whether or not it supports claimant's contentions, and should also give the employer an opportunity cross-examine the witness and to present evidence in response to the witness's testimony.

Claimant's written argument stated that her witness was, at the time of the argument, only available to participate in a hearing if the hearing was scheduled for a Friday, and every effort should be made to schedule the hearing on a Friday to accommodate participation in the hearing by claimant's witness since that is the primary reason for this remand. Claimant should notify the Office of Administrative Hearings (OAH) immediately if her witness's availability has changed since the date she wrote the argument. To facilitate an effective remand hearing, claimant should ensure that her witness is available to testify at the time set for the hearing and, if the witness will testify by phone at a location independent of claimant's location, ensure that her witness either calls into the hearing conference line using the number and access code provided on the Notice of Hearing, or that claimant has the phone number at which the ALJ can call the witness at the time of the hearing.

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 did not hear testimony from claimant's witness and thereby failed to develop the record necessary for a determination of whether claimant was discharged for misconduct, Hearing Decision 17-UI-94068 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-94068 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>November 21, 2017</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-94068 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. 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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