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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1495

Reversed & Remanded

PROCEDURAL HISTORY: On November 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130657). Claimant filed a timely request for hearing. On December 6, 2017, ALJ Clink conducted a hearing, and on December 8, 2017 issued Hearing Decision 17-UI-98659, affirming the Department's decision. On December 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-98659 should be set aside as unsupported by a complete record, 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

As the hearing record developed, it became clear that the conduct that resulted in claimant's discharge had also prompted the possibility of criminal charges against her, and, at the time of the hearing, one of the employer's witnesses testified that the matter was with a grand jury. Transcript at 12. As a result, the ALJ advised claimant that her testimony "is potentially something that could be used in the court case" and gave claimant the option "to proceed or not to proceed"; claimant acknowledged the advisement and stated, "I will proceed cautiously." Transcript at 16.

After asking claimant some questions about her conduct at work, the ALJ stated, "I think in view of the pending case I'd like to stop the hearing there" and asked if claimant had more to include in the record. Transcript at 23. Claimant then provided a significant amount of testimony, primarily stating that she did not believe she was engaging in wrongdoing, after which the ALJ stated, "for purpose of the unemployment hearing, and I think we actually have enough of this information . . . [b]ut in view of the ongoing criminal case, I – I'm inclined to stop the hearing as soon as possible." Transcript at 26. Although the ALJ's caution is understandable given the potentiality of criminal charges related to the conduct that is at the heart of this case, once the ALJ properly advised claimant of that possibility the ALJ retained a duty to conduct a full and fair inquiry into the matters at issue and erred in failing to follow up on relevant lines of inquiry.

The ALJ found as fact that claimant "understood the doctor approved her signing for prescriptions" and "routinely signed prescriptions" for the doctor during and after the doctor's maternity leave, but nevertheless concluded that claimant's discharge was for misconduct, and not excusable as an isolated instance of poor judgment, because her actions routinely violated the law and, were willful or wantonly negligent, and were recurring. Hearing Decision 17-UI-98659 at 1, 2. However, the ALJ did not develop the record or address in the hearing decision the issue of whether or not claimant's conduct was excusable as a good faith error.

The ALJ found as fact that "claimant has a state license or certification and her training covered legal aspects of her work." Hearing Decision 17-UI-98659 at 1. However, the ALJ did not inquire fully with claimant or the employer as to the nature of her training, whether there were any licensure or certification exams she had to pass as a condition of maintaining the license or certification, and, if so, what the training and/or exams included with respect to prescriptions. To the extent claimant testified that the employer's practices were different as far as her responsibilities went, the ALJ did not ask claimant why she thought, given her education and licensure, it would be acceptable for her to sign the doctor's name to prescriptions.

Claimant testified that her authority with respect to medications was "delegated under a doctor," and that there was "a lot of delegating in this department." Transcript at 18, 19. She testified that she did what the doctor asked her to do, to the best of her ability, "did what [the doctor] would want me to do," "believed that I was communicating with [the doctor] but now I know I wasn't," "had signed her name so many times before in her absence," and "was assuming that I would be backed up on this from the beginning." Transcript at 19, 20, 21. She also testified that she did her work "the way [the doctor] taught me. You can't just sit around and wait. You've got to move forward." Transcript at 35. Nevertheless, the ALJ did not ask claimant whether and when the doctor ever told claimant to sign the doctor's name to prescriptions or prescription refills or follow up on that answer.

The employer had the doctor present as a potential witness at the hearing, and notified the ALJ of that fact. Transcript at 10. However, despite claimant's allegation that the doctor had somehow authorized her to sign prescriptions or refill prescription orders, the ALJ did not call the doctor during the hearing or ask the employer to present a witness to respond or to rebut claimant's assertion that the doctor delegated prescription authority to her. Given claimant's testimony that she had repeatedly over a significant period signed prescriptions for the doctor, and her testimony that she did not hide her actions from the doctor, the ALJ should have inquired with both parties about what claimant did to make her

actions known to the doctor, why she thought the doctor was aware of her actions, and whether the doctor was or was not aware that claimant was signing her name to prescriptions.

One of the employer's witnesses also testified that claimant had reported to him that she tried to contact the doctor about the prescription refills prior to signing the doctor's name to them in the final incident, and, when she could not reach the doctor, she consulted a pharmacy technician and received a message with a "thumbs up" icon from the technician, which claimant thought indicated "that was an okay to go ahead and fill the script." Transcript at 31. The ALJ did not ask claimant who she tried to contact about the prescriptions at issue, what happened, what exactly she thought the "thumbs up" from the technician meant, whether she thought the technician who sent it had the authority to prescribe medications, why she thought the person had that authority, and, depending on her answers, why she nevertheless signed the doctor's name to the prescriptions if she thought refilling them had already been approved by someone.

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 or a good faith error, Hearing Decision 17-UI-98659 is reversed, and this matter is remanded for development of the record.

On remand, as at the original hearing, claimant should be advised of her right against self-incrimination, and be allowed the choice of whether or not to answer these and any other questions the ALJ might have.

DECISION: Hearing Decision 17-UI-98659 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>February 2, 2018</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-98659 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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