

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1147

Reversed & Remanded

PROCEDURAL HISTORY: On October 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 152122). Claimant filed a timely request for hearing. On December 5, 2018, ALJ Scott conducted a hearing, and on December 6, 2018 issued Order No. 18-UI-120743, reversing the Department's decision and concluding the employer discharged claimant but not for misconduct. On December 12, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Order 18-UI-120743 is reversed and this matter remanded for further proceedings.

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) (January 11, 2018) 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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness testified that the employer discharged claimant because she did not respond to the employer's messages offering work to her on October 2, 3, 5, 7 and 8, 2018. In Order No. 18-UI-120743, the ALJ found that on October 5, 2018, after claimant communicated to the employer's operations manager that she had been ill on October 2, 3 and 5, the employer gave claimant "another chance" to respond to any work it offered to her, and she failed to respond to the employer's subsequent offers of work on October 7 and 8. Order No. 18-UI-120743 at 2, 4. However, the ALJ concluded that claimant's failure to respond to those offers was not misconduct since the "same reasoning" set out in OAR 471-030-0038(3)(b) applied to "lack of acceptance of work due to illness," and claimant's illness and that of her daughter had continued through October 7 and 8. Order No. 18-UI-120743 at 4.

We disagree. Accepting (or reporting) for work and responding to offers of work are differently impacted by illness, which does not necessarily prevent one from responding to an offer of work, either accepting or declining it, as it may prevent one from actually working. Further development of the record is needed to determine if claimant's failure to respond to the offered work, as distinct from accepting or reporting for it, was or was not misconduct.

Assuming claimant was not aware that the employer expected her to respond by accepting or declining any shifts that she was offered before she received the October 5, 2018 text message from the operations manager, that message may have informed her that such responses were required. Claimant testified she first became aware that there was a problem with her not responding to the employer's previous offers of work from the October 5 text she received from the operations manager, and she described that text as stating, "If we do not hear back from you by 5:00, [we] will consider it to be a voluntary quit." Audio at ~12:01. The operations manager described the substance as being, "Call the office and if we did not hear back by 5:00, we would assume she had voluntarily quit." Audio at ~18:57.

This text may have alerted claimant to the employer's expectation of a response before claimant was offered work on October 7 and 8. The ALJ should develop the record as to what exactly was said in the text, as comprehensively as the parties can recall, including what it may have said about claimant's obligation to respond to the work offered to her on October 5, and generally responding to other work that the employer might offer to her. The ALJ should follow up with claimant about what she understood the employer's expectations to be in connection with responding to work the employer offered after she received the October 5 text, and on what she based that understanding. The ALJ should also inquire of the employer the substance of what it thought it was conveying to claimant by the October 5 text, if it intended to notify her that she should generally respond to all work that the employer offered to her, and on what it based its understanding.

At hearing, the employer's witness also referred to telephone calls, text messages and voicemail messages from the employer's scheduler to claimant on October 7 and 8 offering work, to which claimant did not respond. Audio at ~19:47. The ALJ should ask both the employer and claimant the times of day these communications were attempted and the substance of what they said to determine if the employer informed claimant that it expected her to respond by either accepting or declining the work it offered and the time, if any, by which she was expected to respond. The ALJ should further inquire of claimant as to the time of day she accessed these communications, why she did not respond to them, if her own or her child's illness prevented her from responding and, if so, how they impeded her from responding. Or, if she did not understand that the employer expected her to respond to the work offered on those days, why she did not think a response was needed. If the evidence elicited on remand suggests that the employer may have expressly informed claimant on October 5 that it expected her to respond to its offers of work, the ALJ should explore why claimant did not apply what she learned on October 5 to the offers made on October 7 and 8.

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 was claimant was discharged for misconduct, Order No. 18-UI-120743 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-120743 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 11, 2019

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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