

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1158

Reversed & Remanded

PROCEDURAL HISTORY: On November 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125051). Claimant filed a timely request for hearing. On December 12, 2018, ALJ Wyatt conducted a hearing, and on December 14, 2018 issued Order No. 18-UI-121308, concluding that claimant's discharge was not for misconduct. On December 18, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

CONCLUSIONS AND REASONS: Order No. 18-UI-121308 is reversed and this matter is 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). Among other things, an isolated instance of poor judgment means that the behavior for which claimant was discharged was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A).

Claimant was a grocery cart clerk. The behavior for which the employer discharged claimant was that on October 11, 2018, in violation of the employer's policies, he failed to report an accident in which a cart he was moving struck a customer's car. In Order No. 18-UI-121308, the ALJ found that claimant violated the employer's expectations in the October 11 incident involving the cart, but his behavior did not constitute misconduct because it was excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Order No. 18-UI-121308 at 3. In support of this determination, the ALJ reasoned that "in approximately two years working as a cart clerk, claimant had not hit any vehicle with his carts,

and claimant intended to report the incident after he completed work [with the carts].” Order No. 18-UI-121308 at 3. However, the ALJ did not apply the correct standard when he implicitly determined that claimant’s wanton negligence on October 11 was a single occurrence of willful or wantonly negligent behavior in violation of the employer’s standards. This matter is remanded to allow the ALJ to apply the proper standard and, in light of that standard, to fully develop the evidence as to whether any of claimant’s alleged prior violations of the employer’s expectations were willful or wantonly negligent, which precludes his behavior on October 11 from being excused as an isolated instance of poor judgment.

At hearing, the employer’s witness, the store manager, referred to claimant having exhausted the employer’s five step progressive disciplinary processes by his behavior on October 11, and that the employer discharged him as a result. Audio at ~14:56. Despite this reference, the ALJ did not inquire into any of claimant’s alleged violations of the employer’s expectations before October 11, reasoning that such past violations were relevant only if those past violations involved “violations of the same policy [as was allegedly violated on October 11] or any similar actions to . . . allowing the cart to hit the car and then not reporting it.” Audio at ~17:00. However, the language and plain meaning of OAR 471-030-0038(1)(d)(A) does not limit the relevant inquiry about prior violations only to those that involved the same policy or the same or substantially similar behavior to the behavior for which claimant was discharged. Rather, OAR 471-030-0038(1)(d)(A) generally states that the behavior for which claimant was discharged must have been a single or infrequent occurrence “rather than a repeated act or pattern of *other willful or wantonly negligent behavior*. (emphasis added). The type of similarity between the behavior for which claimant was discharged and the prior violations that will disqualify that behavior from being excused as an isolated instance of poor judgment is not that the same or similar policies or employer expectations were violated or that the same or similar fact patterns were involved. The issue is whether the prior violations involved the same state of mind, which is willful or wantonly negligent. For this reason, the ALJ erred in the standard he applied in excusing claimant’s behavior on October 11 as an isolated instance of poor judgment, and in not developing the relevant evidence about claimant’s behavior before October 11 that allegedly violated the employer’s standards.

On remand, the ALJ should seek information from the employer as to claimant’s behavior occurring before October 11 that caused the employer to invoke steps in its disciplinary process as well as any other behavior of claimant that the employer may contend violated its reasonable expectations. With respect to each identified prior incident, the ALJ should elicit sufficient information to determine whether claimant’s behavior was willful or wantonly negligent, including the policy or expectation that claimant allegedly violated, whether and how claimant was aware or reasonably aware of the policy or expectation, a description of how he supposedly violated the policy or expectation, why he may have done so and any justifications or explanations for why he behaved as he did on that occasion. The ALJ should also afford claimant an opportunity to respond to the evidence that is presented about his alleged prior violations. In addition to making the inquiries that EAB has outlined, the ALJ should further ask any follow-up questions he deems necessary or relevant to the nature of claimant’s work separation and whether or not it should be disqualifying.

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 behavior on

October 11 is excusable as an isolated instance of poor judgment, Order No. 18-UI-1158 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 18-UI-121308 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 17, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-121308 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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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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