

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0102

Reversed & Remanded

PROCEDURAL HISTORY: On December 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150333). Claimant filed a timely request for hearing. On January 9, 2019, ALJ Wyatt conducted a hearing, and on January 11, 2019 issued Order No. 19-UI-122607, concluding the employer discharged claimant, but not for misconduct. On January 31, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB considered the entire record, but did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Roseburg Forest Products employed claimant from May 10, 2016 until October 24, 2018 as a forklift driver.

(2) The employer's safety policy required forklift drivers to wear a seatbelt at all times while the forklift was in motion. On May 18, 2018, claimant received and signed a job safety list about "forklift safety best practices" while transporting loads that stated drivers were to always wear a seatbelt. Exhibit 1 at 3. Claimant understood that he was always to wear a seatbelt while the forklift was in motion.

(3) On October 23, 2018, claimant was driving a forklift. He stopped the forklift abruptly and immediately exited it. The shift supervisor saw claimant exit the forklift and went to look in the forklift. Claimant yelled, "Don't get in there," to the supervisor. Exhibit 1 at 7. The supervisor looked in the forklift and saw that the seatbelt was buckled. The supervisor went to speak to claimant and asked him why he had not been wearing his seatbelt. Exhibit 1 at 7. Claimant stated, "It's a pain in the ass to keep buckling and unbuckling." Exhibit 1 at 7. Claimant argued with the supervisor about the need to wear a seatbelt at all times while operating the forklift.

(4) Later on October 23, the supervisor determined that the employer would need to suspend claimant pending an investigation regarding claimant's continued employment. Exhibit 1 at 7. The supervisor called claimant on the radio to meet with him. Exhibit 1 at 7. When the supervisor told claimant that he had looked at claimant's past corrective action, claimant stated that he had been wearing his seatbelt during the incident earlier that shift. Exhibit 1 at 7. The supervisor told claimant that he was suspending him pending further investigation. Exhibit 1 at 7.

(5) On October 24, 2018, the employer discharged claimant for failing to wear his seatbelt while operating a forklift on October 23, 2018.

CONCLUSIONS AND REASONS: Order 19-UI-122607 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. 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is generally a "single or infrequent occurrence" of poor judgment "rather than a repeated act or pattern of other willful or wantonly negligent behavior." OAR 471-0300038(1)(d)(A).

In Order No. 19-UI-122607, the ALJ concluded that the employer discharged claimant, but not for misconduct. In so concluding, the ALJ found that the employer did not establish that claimant engaged in misconduct during the final incident on October 23, 2018, at which time, the employer asserted, claimant was driving the employer's lift truck without using a seatbelt in violation of the employer's forklift safety rules. The ALJ reasoned that claimant's testimony at hearing that he was wearing his seatbelt during the final incident on October 23 was "at least as credible" as the employer's testimony. Order No. 19-UI-122607 at 3.

On this record, we disagree with the ALJ's conclusion that the employer failed to meet its burden to show that claimant was not wearing his seatbelt while operating the forklift on October 23. The testimony from the employer's firsthand witness, corroborated by the statement he wrote shortly after the incident occurred, showed that claimant stopped and exited the forklift in a rapid manner and admitted not using his seatbelt, and did not assert he had been wearing a seatbelt until he learned he would be subject to corrective action for his conduct. Transcript at 13-16, 21-24, Exhibit 1 at 7. The testimony of the employer's firsthand witness, corroborated by his contemporaneous documentation of the incident, outweighs claimant's uncorroborated testimony that he was wearing his seatbelt while operating the forklift on October 23.

However, to determine if claimant's conduct in the final incident was misconduct, the ALJ must develop the record to determine if claimant's October 23 behavior was excusable as an isolated instance of poor judgment. The employer's witness testified at hearing that in August 2017, claimant pushed a loaded kiln cart over a safety stop and against a kiln door, and in October 2017 backed up into another forklift. Transcript at 7, 8. The witness also stated that claimant was given a written warning on April 11, 2018 for driving in an unsafe manner, and for leaving the work space in an unsafe condition on July 27, 2018. Transcript at 8, 9. It is not enough for purposes of an isolated instance of poor judgment analysis to conclude that claimant was subject to prior corrective action. The record must also be sufficiently developed to support a finding as to whether any previous violations were willful or wantonly negligent. The ALJ did not ask claimant about any of the prior instances of alleged misconduct. This matter must therefore be remanded for an inquiry into the circumstances of the prior instances when claimant allegedly violated the employer's expectations.

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 an isolated instance of poor judgment, Order No. 19-UI-122607 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 19-UI-122607 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: February 26, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-122607 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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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