EO: 200
BYE: 201939

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

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VQ 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0110

Reversed & Remanded

PROCEDURAL HISTORY: On November 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151318). Claimant filed a timely request for hearing. On January 14, 2019, ALJ A. Mann conducted a hearing, and on January 16, 2019, issued Order No. 19-UI-122886, concluding claimant quit working for the employer without good cause. On February 1, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written argument and new information not provided at hearing to EAB, but failed to certify that she provided a copy to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider claimant's argument or new information when reaching this decision. However, because the case is being remanded to the Office of Administrative Hearings for further development of the record, claimant may offer the information contained in her written argument at the hearing on remand. At that time, the ALJ will decide if that information is relevant to the issues on remand and should be admitted into evidence, and the employer will have the opportunity to respond to the information. As it will state on the OAH notice for the hearing on remand, if the parties have documents that they wish to have considered at the hearing, they must provide copies of the documents to all parties and to the ALJ at OAH prior to the date of the hearing.

FINDINGS OF FACT: (1) Joseph T. Hagen & Associates employed claimant from September 30, 2016 until September 22, 2018 as a secretary and paralegal.

(2) The employer expected claimant to obtain verbal permission from him before paying herself for paralegal work. Claimant understood the employer's expectation.

(3) At the end of August 2018, claimant told the employer she planned to relocate. In early September 2018, claimant offered to continue working remotely after she relocated. On or about mid-September 2018, the employer hired a new secretary, who claimant began to train on or about September 17, 2018.

(4) On September 19, 2018, while claimant was training the new secretary, claimant and the new secretary prepared a check to claimant for her wages, and two checks to claimant for paralegal work on two different cases. Claimant did not obtain permission from the employer to prepare the checks, to have the new secretary prepare the checks, or to stamp the checks with the employer's signature stamp. Claimant knew that the new secretary did not ask for permission, either.

(5) On September 20 and 21, 2018, claimant took vacation time off from work. Claimant was scheduled to return to work on Monday, September 24, 2018. On September 21, 2018, the employer sent claimant a text message asking claimant to return the checks written on September 19, 2018 without the employer's permission. Claimant responded by email, "I didn't type that check but I earned that money and it is owed to me upon leaving the firm." Exhibit 3. Claimant sent another email stating, "I can give it back to you but you will just have to give it back to me on my last day anyways." Exhibit 3. Claimant stated in a text message to the employer, "It's paralegal and I should have asked permission." Exhibit 3.

(6) On Saturday, September 22, 2018, the employer sent claimant a text messages stating, "Michelle, on Monday please bring your check payable to the firm for the paralegal fees you paid yourself thank you." Exhibit 3. Claimant responded, "I don't have that money. Sorry, Joe." Exhibit 3. The employer responded to claimant, "I said I don't want you in the office. You took money you shouldn't have." Exhibit 3. Claimant responded, "So you are letting me go two weeks early?" Exhibit 3. Claimant did not arrange to repay the money.

(7) The employer discharged claimant on September 22, 2018 because claimant took payment for paralegal work from the employer without obtaining permission from the employer first, and told the employer she would not return the funds.

CONCLUSIONS AND REASONS: Order No. 19-UI-122886 is reversed and this matter remanded for further proceedings.

Nature of the Work Separation. The first issue this case presents is the nature of the work separation. The standard for determining how to characterize the nature of the work separation is set out at OAR 471-030-0038(2) (January 11, 2018). If claimant could have continued to work for the same employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). For purposes of determining if a work separation occurred, the term "work" means the continuing relationship between an employer and an employee.

In Order No. 19-UI-122886, the ALJ determined that the preponderance of the evidence showed that claimant quit work on October 3, 2018.[1] The ALJ reasoned that claimant's emails referring to money "owed to me upon leaving the firm," money that the employer "will just have to give . . . back to me on my last day anyways," and asking if the employer was "letting me go two weeks early?" supported the employer's testimony that claimant had planned to quit on October 3, 2018 and contradicted claimant's

[1] Order No. 19-UI-122886 at 3.

testimony that she was going to continue working remotely for the employer after October 3.[2] The ALJ concluded that because claimant did not provide evidence regarding the October 3 quit, she failed to show that she quit work with good cause.[3]

Although claimant's emails may show that claimant planned to quit on October 3, we conclude that the work separation occurred on September 22, 2018. On September 22, the employer told claimant, "I don't want you in the office," after claimant stated that she no longer had the paralegal funds to return to the employer. Claimant had been scheduled to return to work on September 24, and the record does not show that she was unwilling to do so. However, the employer did not allow claimant to return to work after September 22. The separation was, therefore, a discharge.

Discharge. 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).

The employer ended claimant's employment because claimant wrote herself (or had the new secretary write her) two checks for paralegal work without obtaining authorization for those specific payments from the employer beforehand. Claimant asserted that she had used the employer's signature stamp numerous times to pay herself without prior authorization (Exhibit 2), but the weight of the persuasive evidence shows that claimant knew or should have known that she was not permitted to receive payment for *paralegal work* without permission from her employer first. When the employer asked claimant to return the checks written without his permission, claimant admitted in a text message in response to the employer, "[The checks were for] paralegal [work] and I should have asked permission." Claimant testified that she made that statement to the employer because she was "backing off" and "flustered," and had earned the fees. Transcript at 53. However, claimant's testimony regarding that admission does not show she did not know or understand the employer's policy requiring her to obtain authorization to pay herself for paralegal work. We are not persuaded that prior checks for paralegal work bearing the employer's signature stamp show that claimant did not obtain authorization for such payments in the past, or that the employer permitted her to write the checks without his authorization. The employer's testimony regarding its policy for prior authorization for payment for paralegal work was logical and supported by the written statement from the new secretary that claimant had trained her to go to the employer for signatures on checks written to herself. Exhibit 3. We conclude that claimant's conduct of

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[2] Order No. 19-UI-122886 at 3.
[3] Order No. 19-UI-122886 at 3.

having two checks issued to her for paralegal fees without obtaining authorization from the employer first was at least wantonly negligent conduct, and not a good faith error.

However, to determine if claimant's conduct in the final incident was misconduct, the ALJ must develop the record to determine if claimant's conduct in issuing herself the checks was excusable as an isolated instance of poor judgment. The record does not contain information show if claimant had been 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 must ask claimant about any alleged prior instances of willful or wantonly negligent behavior. This matter must therefore be remanded for an inquiry into any circumstances of prior instances when claimant allegedly violated the employer's expectations.

Planned Quit. It is also necessary for the ALJ to determine if a "planned quit" occurred for purposes of ORS 657.176(8).[4] ORS 657.176(8) provides in general that when an individual has notified an employer that she will quit work on a specific date, and the employer discharged her no more than fifteen days prior to that date, an individual's eligibility for benefits as determined by the discharge will be affected if the planned quit was not for good cause. In August 2018, claimant notified the employer that she would be relocating, and we presume she would then be unable to continue working onsite at the employer's office. The record is not clear as to whether claimant notified the employer that she would quit work on a specific date, what claimant told the employer regarding her future employment, what the parties agreed would occur at that time, and if the parties modified that agreement at a later time, including when the employer hired a new secretary. If there was a planned quit as defined by ORS 657.176(8), then the ALJ must develop the record as to whether there claimant had good cause for the planned quit.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal

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[4] ORS 657.176(8) provides, for purposes of determining whether an individual shall be disqualified from benefits:

[W]hen an individual has notified an employer that the individual will leave work on a specific date and it is determined that:

(a) The voluntary leaving would be for reasons that do not constitute good cause;

(b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and

(c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving,

then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010).

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 and whether ORS 657.176(8), regarding a planned quit, applies to this case, Order No. 19-UI-122886 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 19-UI-122886 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: March 4, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-122886 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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