

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0165

Reversed & Remanded
Revocada y Remitida para Otra Audiencia

PROCEDURAL HISTORY: On December 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95317). Claimant filed a timely request for hearing. On January 23, 2019, ALJ Griffin conducted an interpreted hearing, and on January 25, 2019, issued Order No. 19-UI-123442, concluding that claimant's discharge was not for misconduct. On February 13, 2019, 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. 19-UI-123442 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. 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined, in relevant part, as a single or infrequent occurrence of willful or wantonly negligent conduct, rather than a repeated act or pattern of other willfully or wantonly negligent behavior. OAR 471-030-0038(1)(d).

Claimant was a production worker at an employer food production facility. The behavior for which the employer discharged claimant occurred on November 27, 2018 when, in violation of the employer's contamination prevention policy that prohibited possessing or consuming food, drink, gum, candy, or

other items within the production area, claimant's supervisor observed her consuming gum or candy on the production floor, and claimant admitted to that conduct knowing it was prohibited. In Order No. 19-UI-123442, the ALJ concluded that claimant willfully violated the employer's policy by her November 27 conduct, but that her behavior did not constitute misconduct because it was excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Order No. 19-UI-123442 at 3. In support of this determination, the ALJ reasoned,

In this case, it is true that claimant had been previously disciplined for substantially similar conduct, chewing gum on the production floor. However, that conduct occurred well over a year before the conduct at issue here. Two instances of eating or chewing gum separated by 15 months certainly qualifies as "infrequent occurrence[s]." Claimant's only other disciplinary infraction in the 12 months preceding the incident that led to her discharge was a single violation of [the] employer's attendance policy which occurred five months before the final incident. Two disciplinary infractions in 12 months does not qualify as a "pattern of . . . willful or wantonly negligent behavior."

Order No. 19-UI-123442 at 3. However, the record shows that claimant had been disciplined for seven violations of the employer's policies over roughly a two and one-half year period. Exhibit 1. The previous infractions involved instances of leaving work early without notice, taking excessive breaks, chewing gum on the production floor, and a no-call, no-show, on a work day. In order to determine whether claimant's November 27 conduct was excusable as an isolated instance of poor judgment, on remand, the ALJ must inquire regarding these prior violations of the employer's policies to determine if those incidents represented a "pattern of other willfully or wantonly negligent behavior." The ALJ must ensure that the employer has the opportunity to develop the record as to claimant's conduct in those incidents. The inquiry should involve the policies violated, whether those policies were communicated and understood by claimant, when the conduct occurred and how claimant's conduct violated the policies, and whether claimant demonstrated at the time of the infractions or thereafter that she was conscious of her conduct and the policies in question, i.e., whether her actions were willful or wantonly negligent. The ALJ should also inquire regarding claimant's statement at termination that "everyone does it," to determine what behavior claimant was referring to, whether supervisors were aware of others' possible infractions and, if so, whether those other infractions were overlooked by them. Exhibit 1 at 11-13; Transcript at 11. Finally, the ALJ should inquire regarding claimant's reference to "FMLA" at hearing. Transcript at 9-10. The ALJ should inquire whether claimant had protected leave under the Family and Medical Leave Act (FMLA) and, if so, whether that protected leave was relevant regarding any of claimant's prior infractions. Assuming claimant appears at the hearing on remand, she should be allowed the opportunity to testify and respond to the employer's evidence.

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 November 27, 2018 was excusable as an isolated instance of poor judgment, Order No. 19-UI-123442 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-123442 is set aside, and this matter remanded for further proceedings consistent with this order. *La Orden de la Audiencia 19-UI-123442 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden.*

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

DATE of Service: March 21, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-123442 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

NOTA: La falta de cualquier parte de comparecer en la audiencia sobre la remisión no reinstalará la Orden 19-UI-123442 de la audiencia ni devolverá esta orden a la EAB. Solamente una aplicación oportuna para revisión de la orden subsiguiente de la nueva audiencia volverá este asunto a la 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

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Traditional Chinese

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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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