

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0206**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant but not for misconduct (decision # 121006). Claimant filed a timely request for hearing. On February 6, 2019, ALJ Murdock conducted a hearing, and on February 8, 2019 issued Order No. 19-UI-124354, concluding that the employer discharged claimant for misconduct, but incorrectly stating that decision # 121006 was affirmed. On February 22, 2019, ALJ Murdock issued Order No. 19-UI-125090 amending Order No. 19-UI-124354 to state correctly that decision # 121006 was actually reversed. On February 23, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but did not certify that she provided the argument to the other parties as required by OAR 471-041-0080(2) (October 29, 2006). Claimant's written argument also contained new information not presented during the hearing, and claimant did not show, as required by OAR 471-041-0090(2) (October 29, 2006), that she was prevented from offering that information by factors or circumstances beyond her reasonable control. Given EAB's disposition of this matter, claimant may present this new information at the hearing on remand, at which time the ALJ will determine whether it is relevant to the issues on remand and whether it should be admitted into evidence. If claimant or the employer choose to offer documentary evidence at the hearing on remand, they are advised to follow the instructions about such evidence set out in the notice scheduling the remand hearing to ensure that the ALJ may consider it, including that copies of it must be provided to the other parties and the ALJ prior to the hearing.

**FINDINGS OF FACT:** (1) PEO III LLC employed claimant from 2012 until November 26, 2018, last as storage manager.

(2) Some of the employer's customers paid for the employer's services using cash. The employer expected that claimant would not remove cash from the employer's till for personal use. Claimant understood the employer's expectation.

(3) On April 24, 2018, claimant removed \$20 from the till for personal use. Claimant left a note informing the coworker who was scheduled to next handle the till that she had taken \$20 out of it, but planned to return the money the next morning. The employer discovered what claimant had done and issued a written corrective action notice to her. The corrective action advised claimant that she was not allowed to take money from the till and that if she did so again she could be disciplined. An employer representative also told claimant that she could be discharged if she removed cash from the till again.

(4) After April 24, the employer suspected that claimant was continuing to take money from the till and engaging in other cash irregularities. At some point, the employer reported at least some of its suspicions about claimant's cash handling to local law enforcement and claimant's actions were investigated.

(5) On November 24, 2018, claimant removed \$60 from the till. Claimant did not leave a note informing anyone that she had done so.

(6) On November 26, 2018, the employer's vice-president of operation went the workplace to discharge claimant based on the employer's suspicions that claimant was mishandling cash and removing it from the till for personal use. As of the time the vice-president's arrived, claimant had not returned the \$60 she had taken to the till and the vice-president was not aware that money was missing from the till. The vice-president told claimant she was discharging her because the business was "going in a different direction." Audio at ~23:11. After claimant left the workplace, the vice-president counted the till and discovered that it was short \$60. The vice-president contacted claimant and claimant said she had taken the \$60, but had intended to return it. Later that day, claimant's friend returned \$60 to the employer on claimant's behalf.

**CONCLUSIONS AND REASONS:** Order No. 19-UI-125090 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.

In Order No. 19-UI-125090, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ based her conclusion on the finding that, since claimant "continued to take the employer's money from the worksite without permission" after April 24, 2018, her behavior was at least a wantonly negligent violation of the employer's standards. Order No. 19-UI-1265090 at 3. However, there is insufficient evidence in the record to support the ALJ's conclusion.

The employer did not know when it discharged claimant on November 26, 2018 that money was missing from the till. While the employer may have had "suspicions" at that time that claimant had continued taking money from the till or was otherwise mishandling cash after the April 24<sup>th</sup> incident for which it did not discharge claimant, the record is not sufficiently developed to show what those suspicions were or to infer from them that claimant had likely engaged in misconduct.

The ALJ should inquire sufficiently into the precise nature and strength of the employer's suspicions that money was not accurately being taken care of by claimant. Audio at ~ 8:45; *see also* Audio at ~8:14, ~10:10, ~22:47, ~23:29. The ALJ should ask what those suspicions were, on what they were based, and what corroboration the employer had that those suspicions were well-founded. The ALJ should seek more detailed information about the employer's conversations with claimant's coworker, apparently about claimant's cash handling, including how it came about that the employer spoke to the coworker about claimant, the substance of the coworker's statement, when it was made, and what the employer inferred from it. Audio at ~ 23:39. The employer also should seek more detailed information about why the employer contacted law enforcement about claimant's activities, what the employer told law enforcement, what it asked law enforcement to investigate and why, what crimes the employer thought claimant might have committed and the results of the investigations, and when those contacts with law enforcement occurred.

In addition, the ALJ should develop the evidence about the proximate cause of claimant's discharge on November 26<sup>th</sup>. The ALJ should inquire into when the employer decided that it would discharge claimant, whether particular incident(s) or suspicion(s) triggered its decision to discharge claimant on November 26<sup>th</sup> and, if so, what they were, and if no particular incidents or suspicions existed, exactly what caused the employer to decide to discharge claimant on that day.

The ALJ should also conduct additional inquiry about the circumstances under which claimant removed the \$60 taken from the employer's till on Saturday, November 24<sup>th</sup>. The ALJ should ask claimant if she agrees with the employer that she did not work on November 24 and, if so, how she became aware that she needed to take that money from the till to get change for the next work day and why the employee who worked on November 24 did not get the change for the till.

The intent of this decision is not to constrain the ALJ to ask only the questions set out above, and the ALJ should ask any follow-up questions she deems necessary or relevant to the nature of claimant's work separation and whether or not it should be disqualifying. The ALJ should also allow the parties to respond to the testimony and evidence presented by the other, provide any additional relevant and material information about the work separation, and to cross-examine each other as necessary.

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 the employer discharged claimant for misconduct, Order No. 19-UI-125090 is reversed, and this matter remanded for further development of the record.

**DECISION:** Order No. 19-UI-125090 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: March 29, 2019**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-125090 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**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**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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