

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0217

Reversed & Remanded

PROCEDURAL HISTORY: On January 16, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141340). Claimant filed a timely request for hearing. On February 19, 2019, ALJ Dorr conducted a hearing, and on February 22, 2019, issued Order No. 19-UI-125117, affirming the Department's decision. On February 28, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDING OF FACT: (1) Fishskin Upholstery Studios LLC employed claimant from September 2017 until it discharged claimant on January 2, 2019.

(2) On January 2, 2019, claimant's employer had scheduled her to begin work at 8:00 a.m. Claimant had car trouble and before her shift began, sent the employer a text message stating that she would be late for work. Claimant normally communicated with the employer with text messages. Claimant reported to work late, at 8:30 a.m.

(3) Immediately upon her arrival at work on January 2, 2019, the employer discharged claimant for reporting to work late.

CONCLUSIONS AND REASONS: Order No. 19-UI-125117 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)(A).

Claimant worked for the employer's upholstery business. The employer discharged claimant because she reported to work late on January 2, 2019 due to "car trouble," after her superiors allegedly warned her repeatedly, including on December 6, 17 and 31, 2018, that the employer would discharge her if she reported to work late again. Transcript at 6. In Order No. 19-UI-125117, the ALJ concluded that claimant's tardiness on January 2 was wantonly negligent because claimant had "been late several times in the past due to car problems," knew or should have known that her car was "prone to mechanical problems," and had "reasonable steps [claimant] could have undertaken to avoid being late again due to her car, such as checking whether her car was operating ahead of her scheduled shift and, if not, finding alternate transportation to get to work on time. Order No. 19-UI-125117 at 2-3. The ALJ concluded further that the January 2 incident was not an isolated instance of poor judgment because it was "part of a long-time pattern" and therefore, not isolated. Order No. 19-UI-125117 at 3.

However, the record is insufficient to determine whether claimant's tardiness on January 2, 2019 constituted a willful or wantonly negligent violation of the employer's attendance expectations, and whether her conduct on that date was an isolated instance of poor judgment. On remand, the ALJ must clarify what claimant knew or should have known on January 2 regarding the employer's attendance expectations, including her alleged understanding that she could compensate for tardiness and avoid discharge by working without pay. *See* Claimant's Written Argument. The ALJ must ask questions of the parties to determine if claimant's understanding of the employer's attendance expectations changed after her alleged incidents of tardiness in December 2018. The ALJ must inquire into the facts that show whether claimant's behavior relating to her "car trouble" was willful or wantonly negligent. The ALJ should inquire of claimant what was wrong with the car, and whether it was a new or reoccurring problem. The ALJ should ask claimant if claimant took any measures to avoid being late for work due to car problems before and on January 2, 2019. The ALJ should ask claimant about her alternate transportation options, if any, and why she was unable to report to work on time using alternate transportation on January 2. If the ALJ finds it to be relevant, the ALJ should ask claimant about the money that the employer allegedly loaned her to repair her vehicle and if she used the money to repair her vehicle, and if not, why not.

The ALJ failed to conduct an inquiry into the facts necessary for consideration of whether any of claimant's prior violations of the employer's attendance policy were willful or wantonly negligent. Absent such an inquiry, we cannot determine whether claimant's exercise of poor judgment on January 2, 2019 was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. We therefore cannot determine whether the employer discharged claimant for misconduct or an isolated instance of poor judgment.

The intent of this decision is not to constrain the ALJ to asking only questions related to the specified subject matters addressed in this decision. Therefore, in addition to asking the questions suggested, the ALJ should ask any questions deemed necessary or relevant to whether claimant's work separation should be disqualifying. The ALJ should also allow the parties to 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 claimant's behavior on January 2, 2019 was a willful or wantonly negligent disregard of the employer's interest, or excusable as an isolated instance of poor judgment, Order No. 19-UI-125117 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-125117 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: April 3, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-125117 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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