

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0410

Reversed & Remanded
Revocada y Remitida para Otra Audiencia

PROCEDURAL HISTORY: On March 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 115631). Claimant filed a timely request for hearing. On April 8, 2019 and April 12, 2019, ALJ Seideman conducted a hearing, and on April 19, 2019 issued Order No. 19-UI-128495, concluding the employer discharged claimant for misconduct. On April 25, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Millennium Building Services Inc. employed claimant from August 2017 to February 8, 2019.

(2) Between July 31, 2018 and September 7, 2018, claimant took an approved leave of absence under the Family Medical Leave Act (FMLA) to care for her hospitalized son in Cuba. When she returned to work from her leave of absence, she had 224 hours of FMLA leave available to her.

(3) On December 3, 2018, claimant returned to Cuba to care for her seriously ill and hospitalized son. Claimant was unable to communicate with the employer from Cuba, and asked the employer to communicate with her daughter instead. The employer notified claimant's daughter that claimant was required to return from her leave of absence by January 17, 2019 when her leave of absence expired.

(4) On January 15, 2019, the employer notified claimant's daughter that claimant's leave was expiring. Claimant's daughter told the employer that claimant would return by February 1, 2019.

(5) Claimant did not return to work on February 1, 2019. The employer called claimant's daughter and stated that claimant would lose her job if she did not return by February 7th. Claimant did not return to work by February 7th, and on February 8, 2019, the employer discharged her.

(6) On February 9, 2019, claimant reported to the workplace ready to resume working.

CONCLUSIONS AND REASONS: The employer discharged claimant, but additional evidence is necessary to determine whether the discharge was for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Order No. 19-UI-128495 concluded that the employer discharged claimant. The order is correct. Claimant demonstrated her willingness and desire to continue working for the employer by returning to work once she returned from her trip to Cuba. The employer would not allow her to do so. The work separation therefore was a discharge.

Order No. 19-UI-128495 also concluded, however, that claimant's discharge was for misconduct because her "disregard of the employer's communication was a willful disregard of the employer's interest and constituted misconduct," and was not excusable as an isolated instance of poor judgment because "[t]here were several instances in the chain of events which occurred over a period of time." Order No. 19-UI-128495 at 4. The record does not support those conclusions.

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) 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.

In order to determine whether claimant's failure to return from her leave of absence within a period of time the employer considered acceptable was or was not willful or wantonly negligent, additional information is required. For instance, the record does not show whether claimant knew what date her FMLA leave expired, was aware of the dates the employer had expected claimant to return to work, or, if so, when she knew. The record shows that claimant lacked internet access or a printer while in Cuba, but was not developed with information about whether other means of communication were available to her. For example, the record does not show whether claimant had access to a phone, why she had the ability to contact her daughter but not the employer, whether she made any attempts to contact the employer, how she communicated with her daughter while she was in Cuba, or whether and how her daughter communicated any of the employer's return-to-work deadlines to her.

Claimant's daughter also testified that she had tried to get a plane ticket for claimant to return home as soon as possible, but the record was not developed with any information about those efforts. For instance, the record does not show when claimant originally planned to return to work, whether or not claimant booked her flight to Cuba with a scheduled return flight, when claimant and/or her daughter began trying to book claimant's return flight, what claimant's daughter did to try to get claimant a plane

ticket, what dates claimant tried to fly back to the U.S., and why claimant was unable to return home in time to resume working by any of the dates the employer established as claimant's return to work dates.

Additionally, regardless whether claimant's failure to return to work was willful or wantonly negligent, OAR 471-030-0038(3)(d) provides that a "[d]ischarge for 'compelling family reasons,' when the individual has made the attempt to maintain the employer-employee relationship, is not misconduct." Compelling family reasons includes the "illness or disability of a member of the individual's immediate family" that "necessitates care by another and the individual's employer does not accommodate the employee's request for time off." OAR 471-030-0038(1)(e)(B). A "member of the individual's immediate family" includes minor children under the age of 18. OAR 471-030-0038(1)(f).

In order to determine whether claimant's failure to return from her leave of absence within a period of time the employer considered acceptable was or was not for "compelling family reasons," additional information is also required. For instance, although the record establishes that claimant was in Cuba to care for her son, the record also shows that her son was hospitalized. The record must be developed as to whether claimant's son was hospitalized the entire time claimant was in Cuba, and, if so, why he "necessitated" or required claimant to care for him. The record must also be developed as to claimant's son's age, as only minor children under the age of 18 fall under the "compelling family reasons" exception.

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 misconduct, Order No. 19-UI-128495 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 19-UI-128495 is set aside, and this matter remanded for further proceedings consistent with this order. *La Orden de la Audiencia 19-UI-128495 se pone a un lado, y este caso se remite para otros procedimientos constantes con esta orden.*

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

DATE of Service: May 30, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-128495 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 presentarse a la audiencia sobre la remisión no reinstalará la Orden de la Audiencia No. 19-UI-128495, ni devolverá esta orden a la EAB. Solamente una aplicación oportuna para revisión de la orden subsiguiente de la nueva audiencia volverá este caso a la EAB.*



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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الاستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.