

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0435

Reversed & Remanded

PROCEDURAL HISTORY: On February 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121936). Claimant filed a timely request for hearing. On April 1, 2019 and April 15, 2019, ALJ Seideman conducted a hearing, and on April 23, 2019 issued Order No. 19-UI-128622, affirming the Department's decision. On May 3, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted three written arguments to EAB, but she did not state on any of the arguments that she provided a copy to the employer as required by OAR 471-041-0080(2)(a). The arguments also included new information that was not made part of the hearing record, and claimant did not establish that factors or circumstances beyond her reasonable control prevented her from providing the information during the hearing, as required by OAR 471-041-0090. EAB therefore did not consider claimant's arguments when reaching this decision.

EVIDENTIARY MATTER: The record contains two videos the ALJ erroneously failed to receive into evidence. The video that recorded the events that occurred in the back room, hallway, and retail space of the employer's business is admitted into evidence as EAB Exhibit 1. The video that recorded the events that occurred in the office on January 16th is admitted into evidence as EAB Exhibit 2. Both are admitted as necessary to complete the record. OAR 471-041-0090(1)(a). Any party that objects to our doing so must submit a written objection to EAB in writing within 10 days of the date of this decision. Unless such objection is received and sustained, the additional evidence will remain in the record. OAR 471-041-0090(2).

CONCLUSIONS AND REASONS: Order No. 19-UI-128622 is reversed, and this matter remanded.

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-128622 stated that the parties disputed the nature of the work separation; without weighing the evidence or any analysis, the order simply stated, “I conclude that the work separation was a discharge.” See Order No. 19-UI-128622 at 3. The record was insufficiently developed to reach any conclusion as to the nature of the work separation.

There is no dispute that claimant was arrested at work on January 16, 2019, and never returned to work after that point in time. However, neither party was asked at what point during the January 16th events – which included a discussion in the office, claimant’s time spent in the back room, and some time on the retail floor – either party became unwilling to continue the employment relationship. Neither party was asked at the hearing whether claimant could have continued to work for the employer for an additional period of time after January 16th, whether she was willing to continue working, or, if she was, whether the employer did not allow her to do so. Absent an inquiry into the nature of the work separation, the record will not support a finding as to whether the work separation was a quit or a discharge.

If the record on remand shows that the employer discharged claimant, 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. Isolated instances of poor judgment, good faith errors, and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The evidence from the hearing and Exhibits 1 through 16, while extensive, is insufficient to show whether misconduct occurred. The record generally shows what happened, and in what sequence, but fails to show what the employer’s expectations were of claimant’s behavior with respect to insubordination, taking a warning from the employer and not returning it upon request, and behaving in an upset manner in the workplace. The record fails to show whether and how the employer notified claimant of any such expectations. The record also fails to show whether, assuming arguendo that claimant’s behavior violated those expectations, claimant’s violation(s) were willful or wantonly negligent, particularly in consideration of claimant’s emotional state and recent concussion. The record contains no inquiry into whether claimant was acting in good faith, whether her behavior was excusable as an isolated instance of poor judgment, or whether it was the result of her recent injury. Absent an inquiry into those basic elements of misconduct, the record cannot show whether or not claimant’s possible discharge was for misconduct.

If the record on remand shows that that claimant quit work, a claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the 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 sensitivity, exercising ordinary common sense,

would have no reasonable alternative but to leave work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

The record contains no voluntary leaving inquiry. If the ALJ on remand determines that claimant quit work, an inquiry as to whether or not she had good cause must be conducted.

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 any determination in this case, Order No. 19-UI-128622 is reversed, and this matter is remanded for development of the record.

It is regrettably notable that the ALJ demonstrated considerable confusion during the proceedings underlying this decision, including not recognizing which documents were exhibited by which parties, and repeatedly indicating during the proceedings and in the order that claimant submitted particular pieces of evidence and a thumb drive despite it being apparent that she had not, and despite her repeated denials that she had submitted those materials. Although the ALJ admitted all the parties' offered documents in their entirety without suggesting that he thought any portion of the documents were irrelevant or unduly repetitious, the ALJ made critical and prejudicial sounding statements during the hearing exaggerating the length of the parties' evidence, characterizing documents as being "encyclopedic" or too long, and stating or implying that he would not read encyclopedias or things that were too long. The ALJ's discharge analysis conflated what claimant said to the employer on her final day of work and what she said about the employer's testimony at the hearing. Although the ALJ continued the hearing specifically to allow time for videos of claimant's last day at work to be submitted into evidence, he disregarded the videos at the continued hearing, refused to entertain them being admitted into evidence despite requests that he admit and watch them, and ultimately ended the hearing without admitting the videos into evidence. The ALJ also incorrectly characterized the length of the videos without having knowledge of their length, suggesting that they might be hours long even though each lasted only minutes. Given those circumstances, and the general disorganization of the underlying proceedings, it would be appropriate that a different ALJ be assigned to conduct the remand hearing.

DECISION: Order No. 19-UI-128622 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 6, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-128622 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 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
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