

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0458

Reversed & Remanded

PROCEDURAL HISTORY: On April 4, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 75720). The employer filed a timely request for hearing. On April 30, 2019, ALJ Griffin conducted a hearing, and on May 6, 2019, issued Order No. 19-UI-129344, affirming the Department's decision. On May 15, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB with its application for review. EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Ruan Logistics Corporation employed claimant from November 2018 until March 8, 2019 as a nighttime delivery driver.

(2) On March 5, 2019, the employer began a new procedure for drivers to notify the employer when they expected to complete a delivery after the scheduled delivery time. The new procedure required a driver who expected a delivery to be more than 30 minutes late to call a new "after hours" dispatch telephone number to report that the delivery would be late. Exhibit 1. The dispatch center would inform the customer.

(3) On March 5, 2019, claimant did not call the after-hours dispatch number before he completed a delivery to a customer more than three hours late.

(4) On March 11, 2019, the employer discharged claimant for failing to call the after-hours dispatch number on March 5 to report that his load would arrive more than 30 minutes late to a customer.

CONCLUSIONS AND REASONS: Order No. 19-UI-129344 is reversed, and this matter remanded.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful

or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (December 23, 2018). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The evidence from the hearing and Exhibit 1 is insufficient to show whether misconduct occurred. The record shows that the employer expected claimant to call its after-hours dispatch telephone number to report if he was going to deliver a load late. The record shows that claimant received the March 5 load from another driver, who had picked it up from a warehouse. The record does not show how the employer expected claimant to know when the load was scheduled to arrive at its final destination with the customer. The record does not show what form the delivery deadline was on or how it was transmitted to claimant, if at all. The record does not show if claimant received a dispatch form for the March 5 delivery, and what information it contained, such as the expected delivery time. The record does not show what time claimant began his delivery route on March 5, or when he arrived at the customer’s location. The record does not show if claimant relied on the prior driver to tell him the delivery deadline.

The record does not show if claimant knew or should have known that the employer expected him to report his delivery would be late based on when the customer expected to receive the delivery, or if claimant understood he was to report he was late only when his own leg of the delivery was running late due to issues such as inclement weather on his own route, or mechanical issues with his own vehicle. The record does not show whether claimant had ever previously notified the employer before that loads would be late, and if he did, under what circumstances. The record does not show if claimant knew or should have known from prior warnings or other notice from the employer that it expected claimant to report if a load was going to be late, and under what circumstances. The record does not show whose responsibility it was to notify the employer if a load was likely to arrive late to a customer. The record does not show if the employer expected the warehouse to inform the employer if a load left the warehouse late, or if the driver who brought claimant a load was to notify the employer that they had left the warehouse late. The record does not show if the notification responsibility shifted under certain circumstances, such as who was at fault for the late delivery.

Claimant also testified that he was not aware of the employer’s new policy that he call an after-hours dispatch telephone number if his load would be late. Transcript at 12-13. The record does not show if claimant ever acknowledged to the employer that he had received the new procedure. There were two sets of text messages about the new after-hours procedure. Exhibit 1. The record does not show how the timing of the text messages corresponded to claimant’s delivery route. Nor does the record show if claimant followed a prior procedure, rather than the new one, on March 5, to notify the employer that the delivery would be late. The employer’s fleet manager alleged that he told claimant at hire that he expected claimant to reply to text messages, and that claimant often failed to return or acknowledge text messages. Transcript at 10. The record does not show when the employer sent the text messages, how frequently the employer expected claimant to check for text messages, how the employer made claimant

aware of the frequency with which he was expected to check for text messages, when claimant actually checked his telephone for text messages on the day in question, or if there was a reason claimant may not have received text messages on time or at all. The record does not clarify if or how Exhibit 1 shows the text messages it contains were sent to claimant.

If the evidence from the hearing on remand shows that claimant's conduct in the final incident was willful or wantonly negligent, it would be necessary for the ALJ to develop the record further to determine if the conduct in the final incident was an isolated instance of poor judgment.

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 further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 19-UI-129344 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-129344 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: June 21, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-129344 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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