EO: 200
BYE: 202011

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

653
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0505

Reversed & Remanded

PROCEDURAL HISTORY: On April 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150933). Claimant filed a timely request for hearing. On May 16, 2019, ALJ Snyder conducted a hearing, and on May 24, 2019 issued Order No. 19-UI-130587, affirming the Department's decision. On June 3, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Order No. 19-UI-130587 stated that Exhibit 1 was admitted into evidence. However, the documents appearing in the hearing record are marked Exhibits 1, 2, 3, and 4. It appears that the employer marked them as exhibits before offering them and, although they were admitted as Exhibit 1, they were not marked as such. As a clerical matter, EAB has marked the documents that the employer offered at hearing as Exhibit 1.

Claimant submitted additional evidence to EAB that she did not offer into evidence at the hearing. Claimant did not explain how factors or circumstances beyond her reasonable control prevented her from offering those documents at the hearing, and did not declare that she had provided those documents to the other party as required by OAR 471-041-0080(2)(a) (May 23, 2019) and OAR 471-041-0090 (May 23, 2019). For these reasons, EAB generally would not have considered those documents offered for the first time on review. Because this matter has been remanded to gather additional evidence, however, claimant may offer these documents into evidence at the remand hearing, and they should be admitted if they are found relevant and material to the issues on which EAB has remanded this matter. To ensure that the documents may be considered for admission into evidence, claimant should follow the instructions appearing on the notice of the remand hearing as to documents a party wishes to have considered. Those instructions include that copies of such documents must be provided to all parties and the ALJ at their addresses as listed on the certificate of mailing prior to the date of the scheduled hearing on remand.

FINDINGS OF FACT: (1) Living Opportunities Inc. employed claimant as a supported living professional from May 24, 2018 until March 22, 2019. The employer provided services to support intellectually and developmentally disabled clients who resided in private homes.

(2) The employer expected that claimant would not accrue more than five unscheduled, unexcused absences in any twelve month period. The employer expected that claimant would not make errors when she administered medicines.

(3) On July 11, 12, and 30, 2018, December 27, 28, 29, 30, and 31, 2018, January 1 and 26, 2019 and March 5, 2019 claimant accrued unscheduled and unexcused absences. In total, claimant accrued eleven unscheduled absences. Claimant brought physicians' notes justifying her absences on some of those days.

(4) On November 15, 2018, January 10, 2019, February 1 and 7, 2019 and March 2 and 13, 2019, claimant made medication errors. The November 15, 2018 error occurred when claimant gave a medicine to a client more than an hour before the scheduled time for administration. The March 13, 2019 error resulted when a client did not receive a thyroid medicine. The employer believed that the error was the result of claimant failing to check the client's medication organizer to see that the client had not taken the thyroid medicine. Some of the errors occurred because, among other things, claimant was hurrying to complete her duties, was distracted by other duties or people, or the client with whom claimant was dealing made her anxious. As a result of receiving warnings for making these errors, claimant stopped rushing through medicine administration duties and double-checked to determine whether or not clients had taken medicines as scheduled.

(5) On March 19, 2019, claimant received a disciplinary action, two-day suspension and last chance agreement for eleven unscheduled absences. The last chance portion of the warning stated that claimant would be discharged if she incurred any additional absences without approval in the next 90 day period. That same day[1], claimant also received a second disciplinary action, two-day suspension, and last chance agreement for having made five medication errors in a 90 day period. The last chance portion of this warning stated that claimant would be discharged if she made any further medication errors in a 90-day period. The warning further stated that claimant's suspension would end when she returned to work for her next scheduled shift on March 21. Also on that day, Claimant received a third disciplinary action, two-day suspension, and last chance agreement for failing to follow a client's support plan and specific protocols set out in it. The warning detailed several other ways in which claimant's work performance was deemed inadequate. The last chance portion of the warning stated that claimant would be discharged for further violations of the employer's policies.

(6) Claimant was scheduled to work March 21 and 22, 2019. On March 20, 2019, claimant sent a text message to the director of supported services informing her that she was not able to report for work as scheduled on March 21 because a tire on her car was punctured and the car was not safe to drive. Claimant attached a picture of the punctured tire to the text. The director told claimant to contact her or the human resources manager the next day.

[1] Note incorrect date Exhibit 1, p. 17.

(7) On the morning of March 21, 2019, the human resources manager called claimant and left a voicemail message stating that, in line with the March 19 attendance warning and last chance agreement, the employer expected her to return to work for her 2:00 p.m. shift that day and if she did not she would be discharged. The manager asked claimant to contact her. The manager then emailed claimant at 9:53 a.m., notifying claimant that the employer expected her to report to work at 2:00 p.m. that day. At around 2:45 p.m., claimant called the human resources manager. The manager told claimant that she could be discharged if she did not report for work, and asked claimant if she was going to attend work. Claimant told the manager that she was not sure when she could report for work because she did not know when the punctured tire would be repaired. The human resources manager then asked claimant if claimant could take public transportation to work or could arrange for someone else to drive her. When claimant rejected those options, the manager asked claimant if claimant would allow her or another of the employer's managers to pick claimant up and drive claimant to work. Claimant told the manager that she was not comfortable riding to work with her or another manager and turned down the offered transportation. The human resources manager told claimant that if claimant did not contact her about when claimant would return to work on March 22, 2019, claimant would be discharged.

(8) Claimant did not contact the employer about returning to work on March 22, 2019. On March 22, 2019, claimant did not report for work. On March 22, 2019, the employer discharged claimant for failing to report for work on March 21 and 22, 2019.

CONCLUSIONS AND REASONS: The employer discharged claimant for willful or wantonly negligent behavior, but additional evidence is needed to determine whether the discharge was for misconduct.

Order No. 19-UI-130597 concluded that the employer discharged claimant for wantonly negligent behavior in not reporting for work on March 21 and 22, 2019. The order is correct.

Order No. 19-UI-130597 also concluded that claimant's discharge was for misconduct. However, the order did not consider whether claimant's behavior on March 21 and 22, 2019 was excused from constituting misconduct as an isolated instance of poor judgment. The record must be further developed to determine whether the behavior for which the employer discharged claimant should be excused as an isolated instance of poor judgment.

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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976)

Here, claimant did not report for work as scheduled on March 21 or 22, 2019 due to problems with her car. The employer's human resources manager testified that on March 21, 2019, she offered to drive claimant to and from work, or have another manager do so, but claimant refused the offer. Transcript at 20, 22; Exhibit 1 at 27. Claimant denied that the human resources manager made such an offer. Transcript 28. That the manager offered to arrange alternate transportation that would have allowed claimant to report for work that day is corroborated by a contemporaneous statement the manager prepared and signed on March 21, 2019, which documented the substance of the manager's discussions with claimant. Exhibit 1 at 27. On this record, it appears more likely than not that the human resources manager was willing to make arrangements that would have enabled claimant to report for work on at least March 21 and 22, 2019.

From the language of the March 19, 2019 last chance agreement addressing attendance and the employer's discussion with claimant when it was issued, claimant was reasonably aware that she could be discharged if she failed to report for work on March 21 and 22, 2019. Although the reasons that claimant could not drive her car to work on March 21 and 22, 2019 may have been beyond her reasonable control, the willingness of the human resources manager to make arrangements that would have allowed claimant to report for work eliminated that exigency. Claimant's refusal to allow the human resources manager or some other manager to transport her to and from work was at least a wantonly negligent violation of the employer's standards.

Even if claimant's refusal to allow a manager to pick her up and drive her to work on March 21 and 22 was wantonly negligent behavior, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

In order to determine if claimant's behavior on March 22 was excused from constituting misconduct as an isolated instance of poor judgment, additional information is required. The employer identified three types of behaviors that claimant engaged in before March 22 that might have been willful or wantonly negligent, and caused claimant's behavior on March 22 to fall outside of that, which may be considered an isolated instance of poor judgment. Those behaviors resulted in the three disciplinary actions that the employer issued to claimant on March 19, 2019 and were claimant's alleged medication errors,

claimant's unexcused absences from work, and claimant's alleged failure to follow a client's support plan, support plan protocols, inadequate work performance. Exhibit 1 at 13, 15, 17.

With respect to the alleged medication errors, the record must be developed sufficiently to determine whether any of those errors were willful or wantonly negligent or whether, when those errors occurred, claimant did not have the consciously aware mental state required to find willful or wantonly negligent behavior. *See* OAR 471-030-0038(1)(c). With respect to claimant's unscheduled absences, the record must also be developed to determine whether any of those absences resulted from willful or wantonly negligent behavior or whether they resulted from accidents, illness, disabilities, or exigent circumstances beyond claimant's reasonable control. *See* OAR 471-030-0038(3)(b). With respect to claimant's alleged failure to follow support plan protocols and inadequate performance, the record must also be sufficiently developed to determine whether any of the alleged deficiencies arose from willful or wantonly negligent behavior, were accompanied by a consciously aware mental state, and did not result from a lack of job skills or experience. *See* OAR 471-030-0038(3)(b).

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 was discharged from misconduct, Hearing Decision 19-UI-130587 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-130587 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: July 8, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-130587 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atencion al cliente. *Para llenar este formulario, puede visitar* https://www.surveymonkey.com/s/5WQXNJH. *Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل 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