

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0532

Reversed & Remanded

PROCEDURAL HISTORY: On April 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 155905). The employer filed a timely request for hearing. On May 14, 2019, ALJ Snyder conducted a hearing, and on May 22, 2019, issued Order No. 19-UI-130411, affirming the Department's decision. On June 10, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The employer submitted to EAB copies of documents from the State of Oregon's investigation into the final incident that prompted the employer to discharge claimant. Although the employer did not offer these documents into evidence during the hearing, OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider information not presented at the hearing if it is relevant to the issues before EAB and the party offering it on review shows that factors or circumstances beyond the party's reasonable control prevented it from offering it during the hearing. The documents were not available until after the hearing, which was a circumstance beyond the employer's reasonable control that prevented it from having that information available and offering it into evidence during the hearing. Because the information relates to the final incident that caused the employer to discharge claimant and appears to provide information that contradicts the record and impeaches some of claimant's testimony, it is relevant regarding the factual findings and the matter of the parties' credibility. The employer has made the required showing under OAR 471-041-0090(2), and the copies of documents from the State of Oregon's investigation submitted are admitted into the record as EAB Exhibit 1.

A copy of EAB Exhibit 1 accompanies the copies of this decision sent to the parties. Any party who objects to the admission of EAB Exhibit 1 must submit any such objections to this office in writing, setting forth the basis for the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received and sustained, EAB Exhibit 1 will remain a part of the record. As appropriate, EAB Exhibit 1 should be used as a basis for further inquiry of the parties at the hearing on remand.

FINDINGS OF FACT: (1) Pathway Enterprises Inc. employed claimant from April 24, 2018 until March 20, 2019 as a direct support professional.

(2) The employer expected claimant to follow clients' care plans and refrain from restraining the individuals he supported at work where the individuals' care plans did not provide for restraint.

(3) On March 19, 2019, while claimant was working, an individual who had dementia went into the kitchen after dinner and asked for a snack. The individual had already had a beverage and snack after dinner. Claimant gave him a cheese stick. The individual replied that he wanted another cheese stick. Claimant refused to give the individual a second cheese stick and offered the individual grapes instead. The individual became upset and struck claimant in the face, knocking off claimant's glasses. Claimant held the individual's forearms and spoke with him. The individual left the kitchen and went into his room. Claimant wrote an account of what occurred with the individual in the employer's log book.

(4) On March 20, 2019, the employer's program manager learned that claimant had restrained the individual on March 19, 2019. The program manager reviewed claimant's account of what occurred in the log book, discussed the incident with claimant, and discharged claimant for holding the individual's arms on March 19, 2019.

CONCLUSION AND REASONS: Order No. 19-UI-130411 is reversed and this matter is remanded for further development of the record.

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).

Order No. 19-UI-130411 concluded that the employer discharged claimant, but not for misconduct. The order reasoned that claimant's conduct during the final incident on March 19, 2019 was not a willful or wantonly negligent violation of the employer's standards, but also that it was a good faith error.¹ The order reasoned that claimant "believed that he had handled the situation appropriately and successfully," and believed that his conduct during the final incident did not violate the employer's expectations.² However, because the record was not sufficiently developed to determine whether claimant's conduct was a willful or wantonly negligent violation, or a good faith error or isolated instance of poor judgment, Order No. 19-UI-130411 must be remanded for additional inquiry.

¹ Order No. 19-UI-130411 at 3.

² Order No. 19-UI-130411 at 3.

Claimant alleged that a paper “published on a wall” at his workplace suggested that direct support professionals “make a personal contact” with individuals to support the individuals. Transcript at 26. Claimant also alleged that personal contact was a “very special tool,” useful with dementia patients, and that the Oregon Intervention System (OIS) was “not set around dementia.” Transcript at 27, 38. The record does not show where the paper was on the wall, what it said, whether the employer knew about it, and why claimant allegedly believed that “a personal contact” meant physical contact. The record does not show who told claimant to touch individuals with dementia and under what circumstances, if ever. The record does not show what physical contact, if any, was permitted under the March 19 individual’s care plan. The record does not show whether claimant found the paper on the wall to conflict with what he was taught through the OIS or the March 19th individual’s care plan, and why he allegedly believed the employer would condone him modifying the OIS techniques when supporting an individual with dementia, and when supporting the March 19 individual. The record does not show who, if anyone, was present during the March 19 incident.

The record lacks sufficient detail regarding the nature of the claimant’s contact with the individual on March 19, such as whether claimant was holding the arms to restrain him or to touch him. The record does not show how long claimant was holding the individual’s arms, or why he continued to hold him for that length of time. The record does not show if the individual resisted the touching or not, or what his reaction was to claimant holding his arms. The record does not show if the individual tried to get away from claimant while claimant held his arms, or what the individual said at that time. Claimant alleged that the individual “could have turned away and walked away from [claimant] at any time.” Transcript at 26. The record does not show if the employer agreed with that assertion.

The employer alleged that there had been a “pattern” of claimant “thinking he knew what was best and deliberately choosing not to follow [care] plans . . . and just doing his own thing that he thought was best which was not supported through the OIS or this person’s plan.” Transcript at 9, 33. The record does not contain an inquiry into the alleged prior conduct that constituted a pattern of not following individuals’ care plans. The record does not contain evidence about the details of what occurred during the alleged prior incidents, whether the employer spoke to claimant about the incidents, what the employer told claimant with regard to following care plans and the OIS, and if the employer gave claimant warnings. The record does not show what occurred during the December 19, 2018 incident or claimant’s explanation for his conduct, including regarding his comment on the January 10, 2019 warning. *See* Hearing Exhibit 1. Claimant should be given a chance to respond to any assertions regarding prior conduct. The parties should have the opportunity to describe and respond to the information contained in EAB Exhibit 1.

The intent of this decision is not to constrain the inquiry on remand. In addition to the suggested lines of inquiry, any additional inquiry that is necessary or relevant to the nature of claimant’s work separation and whether or not it is disqualifying also should be made. On remand, the parties should also be allowed 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

further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 19-UI-130411 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-130411 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: July 17, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-130411 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 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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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