EO: 200
BYE: 202023

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0753

Reversed & Remanded

PROCEDURAL HISTORY: On July 12, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 80255). The employer filed a timely request for hearing. On July 31, 2019, ALJ Murray-Roberts conducted a hearing, and on August 7, 2019 issued Order No. 19-UI-134617, affirming the Department's decision. On August 12, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Clackamas County employed claimant as nurse practitioner in a medical clinic located in a school from August 27, 2018 until May 20, 2019. The clinic did not have an on-site manager.

(2) The employer expected claimant to report on time for work or notify a manager if she was going to be late. Notwithstanding this expectation, claimant thought it was sufficient if she notified clinic staff when she was going to report late for work. The employer also expected claimant to limit her lunch breaks to thirty minutes unless she had a manager's permission to take a longer lunch. The employer further expected claimant to submit accurate time cards. Claimant understood the employer's latter expectations.

(3) Before April 2019, claimant's manager and the medical provider advised claimant that she should engage in team-building activities with her clinic coworkers.

(4) On April 5, 2019, in the early morning, horses that claimant kept stabled on her farm got out and claimant had to catch and bring them in. As a result, claimant did not have time to take her children to the babysitter and had to transport the children to school herself. Before the 7:00 a.m. start of her shift, claimant sent a text message to her coworkers informing them that she would be two hours late to work that day, and arranging to have all of her patient appointments that day re-scheduled to two hours later. Claimant did not notify a manager that she was going to be late.

(5) Also on April 5, a medical assistant (MA) asked claimant to join her for lunch and claimant agreed. Claimant did not tell a manager that she intended to engage in team-building activities during her lunch break or ask a manager if she could take a longer lunch than thirty minutes. That day, claimant and the MA went off-site for lunch and took a one-hour lunch break. During the time claimant and the MA were away at lunch an emergency arose in the clinic.

(6) Also on April 5, at around 2:45 p.m., claimant received a notification from the employer's time system that she needed to submit her timecards for the current pay period. Claimant's timecards were pre-populated with standard start and end times and a standard half hour lunch break, which totaled eight hours of work per workday. After receiving the notification, claimant pushed a button that submitted her pre-populated timecards, including for April 5. Claimant did not consider that she had arrived two hours late for work that day and took half an hour longer for a lunch than was reflected on the pre-populated timecard. Claimant's timecard for April 5 reported that she worked eight hours that day when she actually had worked five and a half hours.

(7) Sometime after April 5, the employer initiated an investigation of claimant's activities on April 5. On May 13, 2019, the employer sent claimant a notice stating that the employer proposed to dismiss claimant from employment for unsatisfactory work performance. The notice went on to state that the employer would hold a meeting on May 15, 2019 where claimant could present information on her own behalf and in mitigation of the employer's allegations. That day, the employer met with claimant and claimant's representative and told them that the director intended to dismiss claimant from employment. That day, the employer placed claimant on paid administrative leave.

(8) Subsequently, the employer notified claimant that the meeting in which she would be allowed to present information was rescheduled to May 20, 2019. Before May 20, the employer decided that the employer would discharge claimant based on her behavior on April 5, including reporting late for work without notifying a manager, taking an hour lunch without a manager's permission, and submitting an inaccurate timecard. The employer was unwilling to allow claimant to return to work on or after May 20. Before May 20, claimant's representative told claimant that the employer was going to discharge her on May 23, 2019, and if wanted to resign she should do so before that day.

(9) On May 20, 2019, claimant submitted a written resignation to the employer. Sometime before claimant notified the employer of her resignation, the employer had decided the employer would not allow claimant to return to work.

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-134617 concluded that the employer discharged claimant despite claimant's submission of a resignation. The order is correct. While claimant tendered a resignation on May 20, the

employer had decided before May 20 that the employer was not willing to allow claimant to continue working. The work separation was therefore a discharge.

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-134617 concluded that claimant's discharge was not for misconduct. The order first reasoned that claimant did not consciously submit an inaccurate timecard on April 5 and, therefore, did not willfully or with wanton negligence violate the employer's expectations by submitting it. Order No. 19-UI-134617 at 4. The order is correct in this conclusion.

Order No. 19-UI-134617 also concluded that when claimant reported two hours late for work on April 5 without informing a manager, her behavior was a willful or wantonly negligent violation of the employer's standards because she "understood" that the employer's policy required her to notify a manager if she was going to be late. Order No. 19-UI-134617 at 4. However, the order then excused this alleged violation from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The order is incorrect in its conclusion that claimant's behavior was wantonly negligent.

Claimant denied she was aware that the employer required her to notify a manager if she was going to be late, and testified she thought that it was permissible simply to let her coworkers know, as she did on April 5. Transcript at 23. While the employer's witness contradicted claimant's denial, there was no reason to prefer the employer's witness's testimony to claimant's testimony. On this record, the employer did not show that claimant's failure to notify her manager that she was going to be late on April 5 was a willful or wantonly negligent violation of the employer's standards.

Order No 19-UI-134617 finally concluded that claimant taking a one-hour lunch on April 5 without having a manager's permission was not a willful or wantonly negligent violation of the employer's standards "because she did not expect the lunch break to be longer than 30 minutes, and [] the lunch lasted longer than expected." Order No. 19-UI-113416 at 4. However, claimant knew her lunch break was limited to 30 minutes, presumably knew or should have known when the lunch had lasted longer than 30 minutes and, under usual circumstances, knew or should have known that she needed permission from a manager if she wanted to extend her lunch beyond 30 minutes. Transcript at 30, 34. Claimant was consciously indifferent to the consequences of her behavior when she allowed her lunch break to extend longer than 30 minutes without seeking managerial permission. Under the circumstances, claimant's behavior in extending her lunch on April 5 was at least wantonly negligent.

However, 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).

OAR 471-030-0038(1)(d). In order to determine if claimant's wanton negligence in taking an extended lunch on April 5 was excused from misconduct as an isolated instance of poor judgment, the record should be more fully developed as to any allegedly willful or wantonly negligent violations of the employer's standards that claimant engaged in prior to April 5. While the record shows the employer was not certain whether claimant had ever turned in an inaccurate timecard or taken an extended lunch before April 5, other potential violations of the employer's standards should also be explored on remand to evaluate whether they were willful or wantonly negligent violations of those standards. Transcript at 12, 34, 35. The potential violations referred to in the proposed dismissal letter should also be explored. Exhibit 1, Notification of Proposed Dismissal as a Probationary Employee at 2-4.

Claimant's wantonly negligent extension of her lunch break on April 5 might also be excused from constituting misconduct if it was a good faith error under OAR 3471-030-0038(3)(b). Claimant justified the extended lunch with the MA as a being a "team building activity." Transcript at 22, 26, 29, 34. The record should be more fully developed as to whether claimant sincerely believed the employer would overlook her taking an extended lunch without permission as a team building activity and the basis for that belief. For instance, the record does not show if claimant consciously considered the lunch an opportunity for team building at any time on April 5, either before, during, or after the lunch, and what, if anything, the MA knew about a team building purpose for the lunch. The record also does not show what team building activities occurred during the lunch and why claimant thought that having a team building lunch meant that she did not need to have permission from a manager to extend the lunch longer than 30 minutes. The record further does not indicate why the employer did not deduct the 30 extra minutes for the lunch from claimant's time card for April 5 as the employer did for the two hours claimant was late on that day. Transcript at 18. The record also does not show the substance of the employer's conversation with the MA about the extended lunch. Transcript at 18.

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 the employer discharged claimant for misconduct, Order No. 19-UI-134617 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-134617 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: September 18, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-134617 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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.

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