EO: 200
BYE: 202021

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-0759

Reversed & Remanded

PROCEDURAL HISTORY: On June 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160114). Claimant filed a timely request for hearing. On July 30, 2019, ALJ Murray-Roberts conducted a hearing and issued Order No. 19-UI-134226, affirming the Department's decision. On August 5, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: On July 26, 2019, the employer submitted documents to the Office of Administrative Hearings (OAH) for consideration by the ALJ at the July 30, 2019 hearing. However, the documents were not received at OAH until August 5, 2019, after the hearing had been held, and were not considered by the ALJ in formulating the order in this case. The documents consisted of three "Employee Warning Notice[s]" that the parties testified about, in part, during the hearing. Transcript at 11-12, 25. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The documents submitted by the employer are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, the employer's documents, marked as EAB Exhibit 1, are admitted into the record and a copy is attached. Any party that objects to the admission of EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

Because this case is being remanded to OAH for further information, each party will have the opportunity to testify about or respond to EAB Exhibit 1. They will also have the opportunity to offer any other new information the party considers relevant and material at the hearing on remand. However, any party that wishes to have new documentary evidence included in the record at the remand hearing must comply with the procedures set forth by OAH in the notice of hearing and should contact OAH directly if the party needs help understanding those procedures. During the remand hearing, the ALJ will decide if a party's additional information is relevant to the issues on remand and should be admitted into evidence, and the other party would have the opportunity to respond to the new information, if admitted.

FINDINGS OF FACT: (1) Lippert's Carpet One employed claimant as a salesperson beginning on November 21, 2016. Claimant worked from 8:00 a.m. to 5:00 p.m. on varying days of the week depending on the employer's work schedule.

(2) The employer expected its employees to report for work as scheduled or notify the employer in advance if the employee was going to be late or absent. Claimant was aware of the employer's expectations.

(3) On August 10, 2018, the employer gave claimant a warning notice for reporting late for work on August 9 and August 10, 2018. EAB Exhibit 1.

(4) On December 29, 2018, claimant was absent from work without notifying the employer that he would be absent. On December 31, 2018, claimant reported 20 minutes late for his scheduled shift.

(5) On January 2, 2019, the employer gave claimant his "final" warning notice, suspended him from work for two days, took away his store keys, and placed him on 90 days of probation. Exhibit 1; EAB Exhibit 1; Transcript at 12-13.

(6) On March 13, 2019, claimant was scheduled to work and attend a 7:30 a.m. sales meeting for all employees to discuss the health and goals of the company. However, that morning, claimant learned that his girlfriend had to fly to Seattle, Washington that day for medical reasons and that no one was available to care for their five-year-old son except him. Claimant sent a text message to the store manager informing him of these facts and that he would not be able to attend the meeting and perhaps his entire shift that day and was uncertain when he would be able to obtain childcare and report for work. The manager replied by text that the meeting was mandatory and directed claimant not to come in that day. Transcript at 19. He also notified claimant that he would speak to upper management about possible disciplinary action against claimant for his absence. Transcript at 19.

(7) Claimant was scheduled to work on March 14, 2019. His childcare circumstances had not changed from the previous day and it remained necessary for him to stay home to care for his son. Claimant did not report for work or notify the employer that he would be absent. Claimant believed that he had sufficiently explained his circumstances on March 13, the manager had directed him to not report for work that day pending possible disciplinary action, and the manager had not stated anything about reporting for work on March 14. That afternoon, the manager texted claimant about setting up "a meeting" with him on Friday, March 15, 2019 at 2:00 p.m. Transcript at 7. That evening, claimant responded by text that he had to fly to Seattle for personal matters and that if the employer was releasing him, he wanted to meet on Sunday to avoid a "sideshow" at work. Transcript at 7. The manager replied that a meeting at 2:00 p.m. on Friday at the store was necessary. Claimant did not respond to the manager's reply.

(8) On Friday March 15, 2019, claimant was in Seattle until late evening and did not report for work or notify the employer that he would be absent from work or the suggested meeting. Based on the messages he had received from the manager on March 13 and March 14, claimant assumed that he had been discharged.

CONCLUSION AND REASONS: Order No. 19-UI-134226 is reversed and this matter is remanded for further development of the record.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

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). "'[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-134226 concluded that on March 18, 2019, the employer discharged claimant for violating the employer's attendance policy, which constituted misconduct, reasoning:

> Claimant did not report to work, or contact [the] employer prior to his shift, on March 14th. While claimant testified that he had childcare issues, he did not explain why he could not make a telephone call to inform [the] employer. Also, while [the] employer told claimant not to come to work on March 13th, claimant testified that [the] employer did not state the same for March 14th. Claimant did not report to work, or contact [the] employer prior to his shift, on March 15th. While claimant testified that he believed he had been discharged, claimant also testified that [the] employer at no time told him he was discharged. Claimant knew of the expectation that he report to work or contact the employer if unable to report to work, and failed to comply…His conduct was a wantonly negligent violation of the employer's policy…Claimant's conduct cannot be excused as an isolated instance of poor judgment because he failed to contact the employer for two consecutive work shifts, and had been given a final warning regarding no call/no shows in January 2019.

Order No. 19-UI-134226 at 3. However, the record was not sufficiently developed to determine when the work separation occurred, whether the work separation was a discharge or a voluntary leaving, or whether it was disqualifying.

With regard to the date of the work separation, the evidence was inconsistent. The employer's witness first implied that it discharged claimant on March 17, 2019, but later testified that the discharge occurred "either on March 17th or March 18th." Transcript at 5-6. The employer's exhibit showed "DOT: 3/12/19." Exhibit 1. Claimant believed that he had been discharged on March 13 or March 14 because he missed a shift and mandatory sales meeting on March 13, he had been instructed not to report for work that day, and because he had not heard from the manager about working on March 14. Transcript

at 17-20, 25. The record fails to show precisely when the employer became unwilling to let claimant continue his employment, whether it was on March 13 when claimant missed a mandatory sales meeting in violation of the "final" warning and was instructed to not come in at all, on March 14 when claimant did not report for work due to childcare circumstances and failed to contact the employer, or on March 15 when claimant missed a required meeting reportedly set for 2:00 p.m. that day. The record also fails to show the purpose of the Friday meeting, when claimant's final check was prepared and sent to him, and whether the employer sent claimant correspondence clarifying the date and reason for the work separation. Finally, the record needs to be more fully developed regarding the incidents which were the subject of the prior warning notices.

With regard to claimant's conclusion that he had been discharged, the record fails to show precisely when claimant made a decision to no longer report for work or communicate with the employer because he believed that he had been discharged already. Nor does the record substantiate why claimant thought he had been discharged and whether any reasonably individual would have concluded that no continuing work was available under the circumstances.

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 or testimony about the work separation and prior incidents, 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 the date and nature of claimant's work separation and whether it was disqualifying, Order No. 19-UI-134226 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-134226 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: <u>September 10, 2019</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-134226 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

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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