

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0793

Reversed & Remanded

PROCEDURAL HISTORY: On June 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 151950). The employer filed a timely request for hearing. On July 25, 2019, ALJ Shoemake conducted a hearing, and on August 1, 2019 issued Order No. 19-UI-134392, affirming the Department's decision. On August 14, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained documents that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. However, given the outcome of this case, either party may choose to offer documents into evidence at the remand hearing; if so, the parties should follow the instructions that will be provided by the Office of Administrative Hearings (OAH) in the notice of hearing scheduling the remand hearing.

FINDINGS OF FACT: (1) Trust Builders Inc. employed claimant as an administrative assistant from August 9, 2017 to June 3, 2019.

(2) The employer expected claimant to report to work on time. Claimant understood the expectation, but had medical problems and personal obligations that sometimes made that difficult. She was often late to work for both of those reasons, and the employer spoke to her several times about her tardiness. The employer also had concerns about claimant's work performance, and, on March 22, 2019, warned her about her performance.

(3) On June 3, 2019, the employer discharged claimant.

CONCLUSIONS AND REASONS: Additional evidence is required to reach a decision in this case.

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).

The order under review concluded that the employer discharged claimant. *See* Order No. 19-UI-134392 at 2. Additional evidence is necessary to support that conclusion.

The parties agreed that the work separation in this case was at least somewhat mutual. Although there is evidence suggesting that the initial idea to terminate the employment relationship came from the employer, the record did not include an inquiry into the date upon which each party decided that they no longer wanted to continue the employment relationship. In the case where some evidence suggests the work separation might have been mutual, such an inquiry is required to support any decision about the nature of the work separation.

Regardless whether the evidence on remand shows that the work separation was a quit or a discharge, additional evidence is necessary to determine whether the work separation was disqualifying. If claimant is determined to have quit work, no record has yet been developed as to whether she had good cause for leaving work.¹ If claimant is determined to have been discharged, additional evidence is also required.

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). However, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant’s discharge was not for misconduct, reasoning that she was often late to work due to a medical condition, and no other evidence in the record established that “claimant’s tardiness or inability to meet the employer’s standards of work performance was a willful or wantonly negligent disregard of the employer’s interests.” Order No. 19-UI-134392 at 2. The record does not support the order’s ultimate conclusion.

First, the record does not show the proximate cause of the discharge. In other words, it does not show what it was that triggered the employer’s decision to discharge claimant on June 3rd, or whether the

¹ A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). “Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.” OAR 471-030-0038(4) (December 23, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time. A claimant with a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

triggering event was tardiness or work performance issues. The misconduct analysis must begin with the proximate cause; only if claimant's conduct in that event was willful or wantonly negligent would the employer's prior allegations be material.

To the extent the employer discharged claimant because of her performance issues, the record must be developed. For example, the record should show what the employer's expectations were, why and how the employer thought claimant violated the expectations, the circumstances under which that occurred, why claimant performed tasks in the manner she did, whether she knew or should have known she was violating the employer's expectations at the time, and whether claimant possessed or lacked the skills or experience to perform the job in the manner the employer expected.

Next, the employer identified a variety of dates upon which claimant was tardy, but the record is not clear as to which of those events occurred because of claimant's medical condition, or which occurred because of claimant's other obligations, such as helping a friend or transporting her children. The record does not show if the employer's concern about each of those events was claimant's tardiness, receiving deficient notice of her tardiness, or concerns about how much time it took claimant to report to the workplace after she said she would be there as soon as she could.

Claimant also testified that not all of her tardiness was the result of her medical problems. However, the record does not contain a detailed inquiry into each instance of tardiness, and the reason for each instance. Nor does the record include claimant's responses to each incident of tardiness, such as the reason she was tardy, or the reason or reasons she thought she had provided adequate notice of each instance or would otherwise be excused by the employer.

Finally, there is no factual dispute that claimant had spinal issues, nerve problems in her hands and arms, and insomnia, all of which affected her ability to report to work on time on at least some of the occasions at issue. However, the record does not show whether claimant was receiving medical treatment for her conditions, or how she was treating her symptoms. The record does not show how many times claimant was tardy because of her medical conditions, or what, if any, efforts claimant made to report to work on time despite her situation, including setting alarms, going to bed early, seeking medical treatment for her insomnia, waking up earlier, or other such measures. Claimant testified that one reason she was late to work was the time it took to transport her children in the morning. The record does not show how many times claimant was tardy because of her children, or what, if any, efforts she made to get to work on time, such as leaving earlier, finding alternative transportation for her children, trying alternative routes, etc. Absent such inquiries, the record does not show whether or not claimant's tardiness was wantonly negligent.

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 nature of claimant's work separation and whether it was disqualifying, Order No. 19-UI-134392 is reversed, and this matter is remanded.

Nothing in this decision is intended to constrain the ALJ's discretion to fully develop a record on remand, including inquiries into isolated instances of poor judgment, good faith error, or other exculpatory provisions. However, we note that claimant's failure to provide medical excuses to the employer, or into the hearing record, is not relevant to this case. Absent evidence that the employer's policies required her to provide a doctor's note documenting her need for time off, tardy arrivals, or accommodations, claimant's failure to provide them has no bearing on whether or not she should be disqualified for benefits because of her work separation from the employer.

DECISION: Order No. 19-UI-134392 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: September 18, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-134392 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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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