

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0821

Reversed & Remanded

PROCEDURAL HISTORY: On June 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause and was disqualified from receiving unemployment insurance benefits effective May 26, 2019 (decision # 102112). On July 14, 2019, claimant filed a timely request for hearing. On July 18, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing before ALJ Snyder scheduled for July 29, 2019 at 9:30 a.m. On July 29, 2019, the ALJ conducted a hearing, and on August 6, 2019, issued Order No. 19-UI-134587, concluding that the employer discharged claimant, but not for misconduct, and was not disqualified from receiving benefits. On August 22, 2019, the employer filed a timely application for review of Order No. 19-UI-134587 with the Employment Appeals Board (EAB).

EAB did not consider the employer's argument because the employer did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information 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 as required by OAR 471-041-0090 (May 13, 2019). The employer may offer its new information at the remand hearing, however, according to the instructions OAH will provide on the notice scheduling the remand hearing.

FINDINGS OF FACT: (1) Ho's Enterprises, Inc. employed claimant as a cashier at the employer's 7-11 store from December 2018 to May 27, 2019.

(2) Sometime in early to mid-May 2019, claimant accepted a counterfeit \$50 bill from a customer and subsequently realized his mistake. Claimant told the owner about it and admitted fault in accepting the counterfeit money. Claimant kept the counterfeit \$50 bill.

(3) On May 25, 2019, claimant was not scheduled to work. He went to the employer's store while off-duty, bought pizzas, used the register to process his own cash transaction, and he made a cash drop into the employer's safe. At some point on May 25, 2019, claimant used a \$50 bill from his pocket.

(4) On May 26, 2019, an owner opened the safe and reviewed the contents of claimant's cash drop envelope from the night before. The owner found that one of the \$50 bills in the envelope was counterfeit. The owner reviewed security video footage from the previous night, observed claimant making his own cash transaction while off-duty, and concluded that he had paid for his pizza purchase using the counterfeit \$50 bill.

(5) On May 27, 2019, the owners talked to claimant and suggested that he was the one who had used the counterfeit bill and had used it intentionally to "swap[]" it with real money. Transcript at 5, 7, 13. Claimant denied having used counterfeit money or having swapped the bill for real money, and said he still had the counterfeit bill at home. Transcript at 9. The owners said if claimant really still had the counterfeit bill he should bring it in to prove what that he was saying was true. Claimant was offended that the owners were accusing him of dishonesty and left the store.

(6) Claimant did not return to work thereafter. He heard from a coworker that he was fired, and when he reported for his next scheduled shift two employees told him he had been removed from the schedule.

CONCLUSIONS AND REASONS: Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that the employer discharged claimant is **adopted**. This matter is otherwise set aside and remanded.

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

The order under review concluded that claimant's discharge was not for misconduct, reasoning that the employer did not meet its burden to prove misconduct by a preponderance of the evidence. Order No. 19-UI-134587 at 4. The record was not developed sufficiently to support that conclusion. There are too many discrepancies within each party's testimony, and additional evidence is required to determine whether either or both parties lack credibility, and to reach a decision in this case.

Both parties offered witnesses to testify on their behalf, but the ALJ did not allow either witness to testify. Although the ALJ has an obligation to conduct and control the hearing, and ensure that irrelevant, immaterial, or unduly repetitious evidence is excluded, there is nothing in this record to suggest that either parties' witness did not have relevant, material, and new evidence to offer during the hearing. See OAR 471-040-0025(3) and (5). The employer's witness apparently was present during the final meeting between the owner and claimant and therefore could potentially clarify facts in dispute. The record fails to show what claimant's witness might have testified about, because the ALJ did not ask before closing the hearing despite the fact that a significant portion of what transpired remained in dispute. Transcript at 34-35. On remand, both parties should be given, at a minimum, the chance to make an offer of proof about what type of evidence their witnesses might provide, and, if the ALJ determines after the offer of proof is made that either witness has relevant, material, and not unduly repetitious information, one or both witnesses should be allowed to testify.

Claimant alleged that someone called “Trevor” was standing right next to him during all relevant events on May 25th; the owner disputed his claim. *Compare* Transcript at 26; Transcript at 31. The ALJ did not ask the owner, who had viewed videotapes of the store on May 25th, where Trevor, or any other employee, was while claimant was at the register. Nor was claimant asked to clarify when Trevor was standing near him. The ALJ also did not ask why claimant, who was off duty, processed his own transaction on May 25th, opened the cash drawer, made a safe drop, and/or made his own change, if another employee was standing right next to him.

The owner alleged that surveillance video showed that claimant paid for his purchase with the counterfeit \$50 bill from his pocket, and took \$48 in change from the register. Transcript at 6-7. The owner also alleged, however, that claimant set a \$50 bill down next to the food case, and Trevor, an employee, found the money. Transcript at 31-32. Claimant also disputed that he paid for anything with a \$50 bill, but rather claimed that he paid for the pizza with \$2 in quarters and only exchanged the \$50 for smaller bills, in what appears to have been two separate transactions. Transcript at 25-26. The owner, who claimed to have watched videos of claimant’s transactions, did not mention that there were two separate transactions, or mention claimant using quarters to pay for anything. The record needs to be clarified as to how many transactions there were on May 25th. The record must also be clarified as to what claimant’s actions were, and what the other employee’s actions were, with respect to the \$50 bill.

Additional inquiry should be made into why the owner thought claimant was responsible for the counterfeit \$50 bill the owner found in the safe on May 26th. The owner alleged that she saw claimant on video remove a counterfeit \$50 from his pocket. However, the record does not show why the owner thought the \$50 bill was counterfeit when she saw it on video, or what characteristics or features she saw on the video that would indicate that the bill was counterfeit. The owner testified that claimant straightened the \$50 bill after removing it from his pocket. The record does not show if the bill was crumpled or otherwise had characteristics that would allow her to distinguish the \$50 bill from claimant’s pocket from the other two \$50 bills in the safe the following day. The owner’s testimony that claimant removed the bill from his pocket, straightened it with the other two bills, and then did a cash drop into the safe must also be reconciled with the owner’s testimony about Trevor having found the \$50 bill by the food case, picked it up, and taken it.

The owner alleged that claimant “admitted” passing the counterfeit \$50 bill. Transcript at 9. When asked to explain, however, the owner only indicated that she concluded claimant had to be guilty because why else would he have processed his own transaction that night. The record does not, however, show what claimant said when he admitted his guilt. The ALJ must ask the employer what words claimant said when he allegedly “admitted” that he had passed the counterfeit money at work. The owner also alleged that claimant admitted guilt to police. Transcript at 16. If the employer has evidence of that admission, including evidence of a conviction, or a police report, the employer should submit such evidence prior to the remand hearing in accordance with instructions set forth in the notice scheduling the remand hearing.

Claimant testified initially that he found the real \$50 bill by May 28th and indicated the employer probably would not want to see it because the owner had already concluded he had been dishonest. Transcript at 25. Claimant later testified, however, that he did not provide it on May 27th “[b]ecause I – I couldn’t find it and that’s when I found it. When I went looking for it and I * * * - didn’t - it wasn’t in there. * * * I – my girlfriend actually took it and she had it and just dis- - uh, disregarded of it. * * * A

month after the fact * * * because when she didn't respond she – we didn't want to – she didn't want to have it, uh, here at the house or on any of us, so she – yeah, she destroyed it.” Transcript at 29. The record must be clarified as to whether claimant found the counterfeit bill on the 28th, or a month later, or whether the bill was just “disregarded” or “destroyed” and he never found it.

Finally, the owner alleged that she never heard from claimant after May 27th. Transcript at 12. However, claimant alleged at the hearing that he contacted the owner with a text on May 28, 2019 to prove that he had found the counterfeit \$50 bill at his home. Transcript at 25. The employer's written argument, although not considered, included a copy of a note that appears to be similar to what claimant described, suggesting the owner's testimony on that issue was inaccurate. The parties should be allowed to testify about the text or note, and the owner should be provided with an opportunity to explain why she denied having heard from claimant when she appears to have received some communication from him.

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 claimant's discharge was for misconduct, Order No. 19-UI-134587 is reversed, and this matter is remanded.

DECISION: Order No. 19-UI-134587 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell, D. P. Hettle, and S. Alba

DATE of Service: September 27, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-134587 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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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