EO: 200
BYE: 202110

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

055
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0496

Reversed & Remanded

PROCEDURAL HISTORY: On April 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and he was disqualified from benefits effective March 15, 2020 (decision # 85256). Claimant filed a timely request for hearing. On June 8, 2020, ALJ J. Williams conducted a hearing, and on June 10, 2020 issued Order No. 20-UI-150915, affirming decision # 85256. On June 25, 2020, claimant filed a timely application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant's written arguments, received by EAB on June 29, 2020 and July 6, 2020. The documents have been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. On remand, both parties should be given the opportunity to testify about or respond to EAB Exhibit 1.

FINDINGS OF FACT: (1) Rich Holland Painting, Incorporated employed claimant as a painter from March 19, 2018 to March 16, 2020.

(2) The employer expected all employees to notify the employer of an absence or tardiness an hour before each shift. Claimant's shift began at 7:00 a.m., and he was required to notify the employer of absences by 6:00 a.m. The employer provided claimant with a copy of its attendance policy upon hire, and again through an October 2019 memo about the attendance policy, which the employer provided claimant in October 2019 and at least ten subsequent occasions.

(3) Each day between March 2, 2020 and March 5, 2020, claimant reported to work late. He did not notify the employer he was going to be tardy on any of those occasions.

(4) On March 6, 2020, claimant notified the employer that he was going to be absent from work due to illness by texting the employer more than an hour prior to the start of his shift. Several hours later claimant sent a text message to the employer apologizing for being unreliable and promising not to be unreliable in the future.

(5) On March 9, 2020, claimant was absent from work due to illness. He did not notify the employer he was going to be absent until one hour thirty-one minutes after his shift started. On March 10, 2020, claimant reported to work late and did not notify the employer he was going to be tardy. On March 11, 2020, claimant was absent from work due to illness. He did not notify the employer he was going to be absent until one hour forty-five minutes after his shift started. On March 13, 2020, claimant reported to work late and did not notify the employer he was going to be tardy.

(6) On March 16, 2020, claimant was again absent from work due to illness. The employer requested that claimant provide a doctor's note confirming he was seen, on the doctor's official letterhead, and signed by the doctor. Claimant obtained a doctor's note confirming that he had an appointment with the doctor on March 16, 2020 and sent it to the employer by text message at 3:58 p.m. During that text exchange, claimant asked questions about his "2 year Vacation time/PTO increase."[1] The employer responded that they would review claimant's PTO the following day.

(7) Later on March 16, 2020, at 5:51 p.m., the employer notified claimant that he was discharged.[2]

CONCLUSIONS AND REASONS: Order No. 20-UI-150915 is set aside, and this matter remanded for additional evidence necessary to complete 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).

The order under review implicitly found that the employer discharged claimant because of his March 13th tardiness and failure to notify the employer that he was going to arrive late.[3] The record does not support a determination that claimant was discharged because of his March 13th conduct.

The employer's witnesses consistently testified at the hearing that the employer decided to discharge claimant because of the March 13th incident.[4] However, other evidence in the record, including text

[1] Exhibit 1, 12:26 p.m. text message.

[2] EAB Exhibit 1.

[3] *See* Order No. 20-UI-150915 at 2, 3 (the order did not explicitly state that claimant was discharged because of his March 13th conduct, but it also does not include any findings or analysis about claimant's March 16th absence, whether or not he notified the employer of that absence, the employer's request for a doctor's note, or the employer's text to claimant that they would review his PTO on March 17th; the order therefore implicitly suggests that the employer discharged claimant because of the events that occurred on March 13th).

messages and record of a phone call attributed to the employer, suggest that the employer had not already decided to discharge claimant as of March 13th.[5] It also appears that claimant's March 13th conduct had caused the employer to plan to call a meeting to discuss claimant's attendance and continued employment, and did not actually cause the employer to decide to discharge him.[6]

Additionally, it is illogical that the employer decided to discharge claimant on March 13th. For instance, on March 16th the employer at least twice asked claimant to provide the employer with a doctor's note verifying that claimant had seen the doctor on March 16th, ostensibly to justify claimant's March 16th absence. It is illogical that the employer would have asked for a medical excuse for claimant's March 16th absence, and followed up with claimant about whether he intended to provide one. If the employer had already decided to discharge claimant based on events that occurred prior to March 16th, no doctor's note would be necessary. It is also illogical that the employer decided to discharge claimant on March 13th but chose to wait until the next workday to notify claimant of the discharge because it was "so late in the day" on March 13th, because it appears that the employer also waited until well after the end of claimant's usual work hours on March 16th before notifying claimant that he was discharged.[7]

Because, on this record, it is illogical that the employer discharged claimant solely based upon conduct that occurred on March 13th and prior, the evidence does not show that it is more likely than not that the March 13th tardiness was the "final decision." Additional evidence is necessary to determine whether the employer discharged claimant because of his conduct on March 13th or March 16th.

On remand, the record must be developed as to the date of claimant's discharge, including why, if the employer decided to discharge claimant on March 13th, the employer asked for a doctor's note, agreed to check on claimant's PTO on March 17th, and called claimant later than the end of his usual shift on March 16th to tell claimant he was discharged. The record should be developed with testimony from the employer to resolve the apparent discrepancy between the employer's testimony that the employer decided to discharge claimant on March 13th and the other evidence suggesting the employer did not decide to discharge claimant until March 16th. Claimant should also be allowed to explain events of March 13th and March 16th from his perspective, including what the employer said when discharging claimant during the March 16th phone call.

The record must be developed with evidence about the duration of claimant's usual shifts of work, specifically, what time claimant's usual workday ended. If the employer decided to discharge claimant on March 13th, the employer should be allowed to testify about what time the employer made that decision. The employer should also be allowed to testify about why they decided to wait until almost

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[4] *See* Transcript at 5-6 (that was "the final decision"), Transcript at 9 (claimant's March 16th absence "had nothing to do with my decision"), and Transcript at 10-11 ("I made the final decision on the 13th, but being it was so late in the day, we made the call on the 16th" and that claimant's "actions on [the 16th] had nothing to do with the decision").

[5] *See* Exhibit 1; EAB Exhibit 1.

[6] *See* Exhibit 1.

[7] In the absence of evidence that claimant traditionally worked 10+ hour shifts, we infer that a shift beginning at 7:00 a.m., like claimant's did, is likely to end at least one hour prior to 5:00 p.m.

6:00 p.m. on March 16th to notify claimant of the discharge. Claimant should be allowed to respond to the employer's evidence.

The order under review also concluded that claimant's discharge was for misconduct, because claimant violated the employer's attendance policy by repeatedly, and with wanton negligence, failing to notify the employer of his absences and tardiness at least an hour prior to the start of his shift, culminating in claimant's March 13th tardiness and failure to notify the employer that he would be late.[8] The record does not support that conclusion for the reasons already explained in this decision.

The record has been adequately developed with respect to claimant's March 13th and prior conduct. However, additional evidence is required about claimant's March 16th conduct. The record should be developed with evidence from both parties about why claimant was absent, whether claimant notified the employer of the March 16th absence an hour before his shift, and, if so, whether the triggering incident on March 16th was claimant's absence, failure to notify the employer of his absence an hour prior to his shift, or both. The employer should be given the opportunity to testify about what the employer told claimant about the reason for the discharge during the March 16th discharge phone call, and claimant should be allowed to respond and explain that call from his perspective. The record should also be developed with evidence about whether the doctor's note was a factor in the employer's discharge decision, and why the employer asked for the doctor's note.

Additionally, the text messages in Exhibit 1 are difficult to read, and the majority of the printed messages do not display the date and time the text messages were sent. On remand, the parties should be given the opportunity to identify which of the text messages are relevant to determining whether the discharge occurred on March 13th or March 16th, and which text messages are relevant to whether the discharge was for misconduct. The parties must also be given the opportunity to explain or clarify the dates and times any of the relevant text messages were sent.

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. 20-UI-150915 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-150915 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: <u>July 30, 2020</u>

[8] Order No. 20-UI-150915 at 3-4.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-150915 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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