EO: 700
BYE: 202102

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
2020-EAB-0609

Reversed & Remanded

PROCEDURAL HISTORY: On July 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receipt of benefits effective January 12, 2020 (decision # 92716). Claimant filed a timely request for hearing. On September 8, 2020, ALJ Roberts conducted a hearing, and on September 9, 2020 issued Order No. 20-UI-153739, concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits. On September 14, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

ADDITIONAL EVIDENCE: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). OAR 471-041-0090(1)(b) provides:

> (b) Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that:
>
> > (A) The additional evidence is relevant and material to EAB's determination, and
> >
> > (B) Factors or circumstances beyond the party's reasonable control prevented the party from offering the additional evidence into the hearing record.

Here, the additional evidence consists of a Umatilla County Police Department police report dated January 19, 2020, which was appended to the employer's written argument. The employer explained in their written argument that they were unable to obtain a copy of the police report prior to the hearing. As such, factors or circumstances beyond the employer's reasonable control prevented them from offering the report into the hearing record. For reasons addressed in the Conclusions and Reasons, below, the report is both relevant and material to EAB's determination of this issue.

The police report has been marked as EAB Exhibit 1. A copy of the exhibit has not been provided to the parties, as the employer certified that they provided a copy of the police report to claimant at the time they filed their application for review. If claimant has not received a copy, claimant may request a copy

of EAB Exhibit 1 by contacting EAB directly. Any party that objects to our admitting 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, the exhibit will remain in the record.

WRITTEN ARGUMENT: EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Double D Contracting & Excavating LLC (the employer) employed claimant as a carpenter from early 2019 until January 17, 2020.

(2) The employer did not have a written attendance policy, but expected employees to report to work when scheduled.

(3) Claimant was frequently tardy for work, arriving late as much as three times each week. At some point, the employer verbally warned claimant to improve his punctuality. Prior to January 17, 2020, claimant had never been a "no-call/no-show" for work.

(4) The employer and their crew—including claimant—had planned to meet at the home of a crew member on January 17, 2020 at approximately 7:00 am in order to travel together to a job site. The employer and the crew met as planned, but claimant never arrived. The employer attempted to contact claimant by phone but could not reach him. At approximately 7:15 am, the employer and the crew left for the job site without claimant.

(5) Because claimant was a "no-call/no-show" on January 17, 2020, the employer discharged him that same day.

(6) At some point between the evening of January 16, 2020 and the afternoon of January 19, 2020, claimant spent time at his home with a female companion. The companion gave claimant drugs which sedated or incapacitated him. While claimant was asleep, she stole his car and several of his personal possessions.

CONCLUSIONS AND REASONS: Order No. 20-UI-153739 is reversed and this matter remanded to the Office of Administrative Hearings (OAH).

Misconduct

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) (September 22, 2020). "'[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). In a discharge case, 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 correctly identified claimant's "no-call/no-show" absence from work on January 17, 2020 as the final incident that led the employer to discharge him. The parties agree that claimant neither arrived for work that day nor notified the employer of his absence prior to the absence itself. However, in light of the police report that the employer submitted with their application for review, further development of the record is necessary in order to resolve material discrepancies between the police report and the parties' testimony at hearing.

Claimant testified that his absence on January 17, 2020 was the result of having been drugged and subsequently robbed by a female companion the previous evening, which induced him to oversleep until about 9:00 or 10:00 am. Audio record at 24:35 to 25:30. Claimant likewise testified that he spoke to the employer later on January 17, 2020 and at that point explained what had happened. Audio record at 27:10. Conversely, the employer testified that he believed claimant had reported the incident to him on January 18, 2020, and that based on that account, the employer believed that claimant had been drugged that same day, rather than two days prior. Audio record at 32:05 to 33:15.

The date on which claimant was drugged and robbed is crucial to the disposition of this issue. The order under review concluded that, due to being drugged on January 16, 2020, claimant neither consciously failed to report to work on January 17, 2020 nor was absent that day as a result of his indifference to the consequences of his conduct, and therefore was not discharged for misconduct. This reasoning is sound when premised upon a finding that claimant was drugged on January 16, 2020. To resolve the parties' dispute regarding the date and make that finding, the order noted that both parties testified credibly, that the evidence was equally balanced, and that "the uncertainty must be resolved in claimant's favor because the employer has the burden of proof." Order No. 20-UI-153739 at 2, FN1.

However, the police report that the employer submitted in fact suggests that claimant may have been drugged and robbed on another date entirely. The narrative drafted by the responding officer indicates that they arrived at claimant's home at approximately 6:35 pm on January 19, 2020; that claimant "appeared to be under the influence of a controlled substance" and "displayed delayed reactions and heavy speech"; and that claimant reported to the officer that he had woken up at about 4:15 pm that day to find that his possessions had been stolen. EAB Exhibit 1 at 3.

Although the police report's dates are internally consistent, the report has not been certified as a true copy, and neither party has authenticated its account as accurate.[1] If the dates in the report are accurate, the drugging and robbery could not possibly have been the cause of claimant's absence on January 17, 2020. On remand, the ALJ should provide both parties with the opportunity to either authenticate or rebut the assertions in the police report. Further, should subsequent findings support the conclusion that claimant was a "no-call/no-show" on January 17, 2020 for a different reason, the ALJ should inquire as to what actually did cause claimant's absence that day, and should subsequently premise the misconduct analysis on those circumstances.

[1] The employer states in their written argument that they were mistaken in testifying that claimant contacted them about the robbery on January 18, 2020 because "…as you can see by the police report [claimant] had not even been drugged or robbed by the 18th of Jan[uary]." Employer's Written Argument at 2. Merely taking the police report as accurate without offering corroborating evidence to support such a conclusion, however, is insufficient to authenticate the report as accurate.

Isolated Instance of Poor Judgment

Isolated instances of poor judgment, good faith errors, unavoidable accidents, 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) (September 22, 2020). 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).

After concluding that the evidence did not support a finding that claimant's absence on January 17, 2020 was willful or wantonly negligent, the order under review nevertheless explored an alternative theory that the absence, even if it was willful or wantonly negligent, would meet the criteria for an isolated instance of poor judgment. To support this conclusion, the order reasoned that the "no-call/no-show" was a "single or infrequent occurrence" rather than a "repeated act or pattern" because while claimant had been tardy previously, tardiness was "not similar conduct to a no-call/no-show." Order No. 20-UI-153739 at 5. The order further suggested that, "even if [the no-call/no-show] was similar conduct [to being tardy]," the evidence did not establish "…that claimant knew or had reason to know that being tardy was a violation of the employer's expectations" because he was "...never told that his job would be in jeopardy if he continued to be tardy." Order No. 20-UI-153739 at 5.

If the outcome of the decision on remand rests on the question of whether the "no-call/no-show" was an isolated instance of poor judgment, however, the ALJ should consider that question with the recognition that OAR 471-030-0038(1)(d)(B) does not require that the final incident be "similar" to other willful or wantonly negligent behavior in order to be part of a pattern of such behavior. In other words, if claimant had engaged in pattern of other willful or wantonly negligent behavior prior to the final incident, the final incident—even if dissimilar to the previous behavior—would be part of a pattern of such behavior.

Similarly, such an analysis should not be premised upon whether claimant was told that his job would be in jeopardy if he continued to be late for work. Wanton negligence as defined in OAR 471-030-0038(1)(c) requires only that an individual consciously act (or fail to act) with indifference to the consequences of their actions when they know or should know that such conduct would probably result in a violation of the employer's standards of behavior. It does not require an awareness of the consequences of such behavior. Here, the employer's testimony suggests that claimant may well have been aware that the employer disapproved of claimant's repeated tardiness. As such, the ALJ should further inquire as to whether claimant understood (or had reason to understand) that the employer expected him to report to work on time and nevertheless consciously engaged in conduct that he knew or should have known would probably result in his being late for work.

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 the employer discharged claimant for misconduct on January 17, 2020, Order No. 20-UI-153739 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-153739 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: October 16, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-153739 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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