

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0690

Reversed & Remanded

PROCEDURAL HISTORY: On June 23, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective January 19, 2020 (decision # 152520). Claimant filed a timely request for hearing. On October 20, 2020, ALJ Williams conducted a hearing, and on October 28, 2020 issued Order No. 20-UI-155845, affirming decision # 152520. On October 31, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) J&J Snack Foods Corp employed claimant as a sanitation crew member from December 6, 2016 until January 23, 2020.

(2) At the time claimant worked for the employer, it maintained a policy against harassment and creating a hostile work environment. The policy prohibited employees from using abusive or threatening language towards other employees or engaging in disruptive behavior in the workplace. On December 5, 2016, claimant signed forms acknowledging receipt of those policies. On at least three occasions between August 2017 and March 2019, the employer issued warnings to claimant regarding violations of those policies.

(3) On December 31, 2019, one of claimant's coworkers complained that claimant had been "talking bad" about them. Transcript at 6. On January 2, 2020, a production supervisor witnessed claimant complaining about the same coworker during a meeting. On January 3, 2020, another employee complained to a manager that claimant had been complaining about other employees' work habits, and had a "bad attitude" toward her coworkers and supervisors. Exhibit 1 at 3.

(4) On January 16, 2020, claimant worked her last shift for the employer. On January 17, 2020, the employer informed claimant that they had received multiple complaints about her from other employees, and suspended claimant from work while they investigated the allegations. On January 23, 2020, the employer concluded that the allegations against claimant were substantiated, and discharged her as a result.

CONCLUSIONS AND REASONS: Order No. 20-UI-155845 is set aside and this matter remanded for further development of 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) (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 concluded that due to claimant’s final written warning in March 2019 and the incidents on December 31, 2019, January 2, 2020, and January 3, 2020, “the evidence is persuasive to show that claimant willfully or with wanton negligence violated the standards of behavior which an employer has the right to expect of an employee, which is misconduct.” Order No. 20-UI-155845 at 3. The record does not support this conclusion. While the employer submitted extensive documentation of claimant’s disciplinary record (admitted as Exhibit 1), and similarly testified to claimant’s history of behavioral incidents, it is difficult to discern from this evidence precisely what claimant actually did or said in the incidents described in the record. Rather, the bulk of the evidence the employer presented either broadly characterized claimant’s behavior or focused on the subjective experiences of the coworkers who witnessed it. For instance, on January 2, 2020, a production supervisor sent an e-mail regarding a recent incident involving claimant, stating that:

At the sanitation meeting [claimant] was running her mouth in front of the crew, with me present. She was unhappy with the way [an employee] was giving her direction on 12/31/19. [The employee] came to the production office to complain about [claimant] talking about her. After the meeting with [the employee] I called [claimant] into the production office and explained to her, that it is ok [sic] to be unhappy with a situation. However, voicing her opinion in front of the crew with a supervisor present is not acceptable. It will cause crew animosity and is not the time or place to voice those type [sic] of concerns. She agreed she would be more tactful with her issues, i.e. Come to the production office or visit with HR to voice her concerns.

Please add this to [claimant’s] file. Further issues with her being a big mouth will result in disciplinary action.

Exhibit 1 at 11. On remand, the ALJ should inquire as to the specifics of what claimant did or said that the employer believed were violations of its policies, particularly in regard to the incidents that directly preceded her discharge. Claimant should be given an opportunity to rebut any such testimony.

Additionally, it appears from the record that claimant was not provided a reasonable opportunity for due process during the hearing. Much of claimant’s portion of the testimony involved claimant and the ALJ arguing or talking over one another. During the hearing, claimant expressed at least three times that she

felt that the ALJ was not listening to her. Transcript at 35. Claimant also expressed several times during her testimony that she wished to have a representative present for the hearing. Transcript at 27, 30, 31, 35. On remand, it would be advisable to assign a different ALJ to the hearing, and to take claimant's testimony as though for the first time. If claimant wishes to be represented at the hearing, she may do so, but she must secure her representative prior to the start of the hearing.

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, Order No. 20-UI-155845 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-155845 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: December 7, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-155845 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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