

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0749

Reversed & Remanded

PROCEDURAL HISTORY: On October 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct, and was not disqualified from receiving unemployment insurance benefits (decision # 115942). The employer filed a timely request for hearing. On November 19, 2020, ALJ M. Davis conducted a hearing, and on November 25, 2020 issued Order No. 20-UI-156905, affirming decision # 115942. On November 30, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument 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. 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.

The parties may offer new information such as additional witness testimony, written witness statements, or other documents into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Osprey Point RV Resort employed claimant as a server, bartender, and cook from approximately April 2019 until May 22, 2020.

(2) On May 22, 2020, claimant was working a shift in the kitchen when a customer approached the front counter, told her that he had been waiting an hour for his order, and requested a refund. Claimant began processing the refund, using foul language towards or around the customer while doing so. At the time, claimant was frustrated because the restaurant was understaffed on a holiday weekend, and she blamed the delayed order on a new employee. Claimant subsequently became involved in a verbal altercation involving the customer and her coworkers.

(3) As a result of the incident on May 22, 2020, claimant left her shift and went home. Claimant did not return to work after May 22, 2020.

CONCLUSIONS AND REASONS: Order No. 20-UI-156905 is set aside and this matter remanded for further development of the record.

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) (September 22, 2020). 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 nature of the work separation was disputed at hearing. The employer's witness, who was also one of the owners of the business, testified that claimant "quit on the spot" after she "got into an argument with a customer" on May 22, 2020. Transcript at 5. By contrast, claimant testified that the employer's witness discharged her during a discussion about the incident after the owner suggested that claimant go outside and call her manager. Transcript at 14 to 16. The order under review concluded that, because digital video provided by the employer (marked as Exhibit 1¹) "did not clearly establish whether claimant quit work or whether the owner discharged her," and because "claimant testified that she did not quit her position and had no plans to quit that day," the preponderance of the evidence showed that, more likely than not, the employer discharged claimant. Order No. 20-UI-156905 at 2 to 3. The order under review notes that the video showed the owner² telling the customer that claimant was leaving, and that the owner did not state that claimant quit. Order No. 20-UI-156905 at 2. However, the record lacks conclusive evidence to support a finding either that claimant quit or that she was discharged.

There was additional evidence available that could clarify whether claimant quit or was discharged on May 22, 2020. At hearing, the employer offered to produce additional witnesses to the incident on May 22, 2020. Transcript at 12, 33. Similarly, claimant offered to produce copies of text messages from another witness to the incident, which purportedly corroborated her claim that the employer discharged her. Transcript at 36 to 37. Because the evidence regarding the nature of this separation was equally balanced, on remand, the parties should be permitted to produce additional evidence to support their conflicting assertions about whether claimant quit or was discharged. Further, because the timing of events and the identities of the individuals portrayed in Exhibit 1 are somewhat unclear, the ALJ should develop the record to resolve the ambiguities in the videos and allow the parties to explain, elaborate on, or provide context for the videos.

Additionally, the record should be sufficiently developed to determine whether the separation disqualified claimant from receiving unemployment insurance benefits. The employer's witness testified

¹ Exhibit 1 consists of four videos: zeh56v2hc00n64y_1590441194446.mp4, herein "Video 1"; zdz56v2j2002d3z_1590442031639.mp4, herein "Video 2"; zeh56v2hc00n64y_1590441393893.mp4, herein "Video 3"; and zeh56v2hc00n64y_1590441354946.mp4, herein "Video 4."

² Exhibit 1, Video 3 at 00:01. Note that while the order under review identifies the man at the counter who states that "She's leaving" as "the owner," the record does not clearly show that the person identified was actually the owner. Order No. 20-UI-156905 at 2. The owner testified at hearing that he believed he was wearing "shorts and a white shirt," which does not obviously match the description of the person in the video. Transcript at 34.

at hearing that claimant had most recently been issued a warning “probably two weeks prior” to the May 22, 2020 incident, but his testimony indicated that he did not personally issue that warning, and he did not confirm either the substance of the warning or exactly when it was issued. Transcript at 30 to 31. On remand, the ALJ should inquire as to the precise dates of all warnings that the employer issued to claimant about her behavior, and the reason those warnings were issued, and claimant’s response regarding those warnings. Because the parties testified that claimant had worked for the employer for multiple distinct periods of time, the ALJ should also develop the record to include claimant’s previous dates of employment and whether any of the warnings the employer allegedly issued to claimant were issued during a prior period of employment.

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 quit or was discharged, and in either case, whether the separation was disqualifying, Order No. 20-UI-156905 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-156905 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: January 4, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-156905 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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