

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0053

Reversed & Remanded

PROCEDURAL HISTORY: On November 19, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective April 12, 2020 (decision # 105000). Claimant filed a timely request for hearing. On January 5, 2021, ALJ Snyder conducted a hearing, and on January 7, 2021 issued Order No. 21-UI-158808, affirming decision # 105000. On January 26, 2021, claimant 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 the email and text message documents the employer provided with their written argument, 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) Naegeli Reporting Corporation employed claimant from March 7, 2020, until April 13, 2020.

(2) The employer expected claimant to arrive on time for each shift, and to notify the employer prior to her shift if she expected to be unable to report to work. If claimant anticipated being late, the employer expected claimant to communicate whether and when she would arrive for the shift. Claimant was aware and understood the employer's expectations regarding attendance, and knew she could be discharged if she violated those expectations.

(3) Between March 7, 2020 and April 12, 2020, Claimant was late to work on several occasions.

(4) In early April 2020, the employer informed claimant that she was expected to report to work on Sunday April 12, 2020 at 9:00 a.m. Claimant acknowledged she would report to work that day.

(5) On April 12, 2020, claimant sent a text message to the employer at 8:41 a.m., and stated that she was running late, but would arrive by 9:15 a.m. at the latest. Claimant sent a second text message at 9:24 a.m. stating, "I am on my way." Audio Record at 21:07. Claimant sent another text message at 9:43 a.m. stating that she was late because two ride service drivers had canceled her ride requests, and that by the time she got to work by bus it "will be by approximately 12:15 p.m." Audio Record at 21:44. Claimant did not report to work on April 12, 2020, and did not send any additional messages or otherwise convey whether she would arrive for her shift.

(6) On April 13, 2020, the employer discharged claimant for failing to communicate whether and when she would arrive for her April 12, 2020 shift.

CONCLUSIONS AND REASONS: Order No. 21-UI-158808 is reversed and the 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). 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).

Order No. 21-UI-158808 concluded that claimant was discharged for misconduct because "she was wantonly negligent in failing to report to work or notify the [e]mployer that she was not going to report to work as scheduled on April 12, 2020." Order No. 21-UI-158808 at 3. The record supports that after claimant sent a text advising that taking the bus would mean she would get to work "by approximately 12:15 p.m.," she ceased any further communication, which amounted to a wantonly negligent violation of the employer's expectation that claimant would communicate whether and when she would arrive for her shift. However, remand is required because it is unknown from the record whether claimant's conduct on April 12, 2020 was an isolated instance of poor judgment.

The record shows that claimant was late to work on several occasions between March 7, 2020 and April 12, 2020. However, this evidence alone is not sufficient to determine whether claimant's previous instances of tardiness were the result of claimant's willful or wantonly negligent disregard of

the employer's expectations. The employer testified that, "we had her late four times in five weeks . . . one time she was 40 minutes late to work because her alarm didn't go off. Another time she was half an hour late for allergies. Another time is no reason, no reason." Audio Record at 23:37. No follow up inquiry was made regarding these instances of tardiness. On remand, the record should be developed as to each occasion claimant was late to or absent from work between March 7, 2020 and April 12, 2020 to determine whether claimant's previous tardiness or absences were the result of a willful or wantonly negligent disregard of the employer's expectations.

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 conduct on April 12, 2020 was excusable as an isolated instance of poor judgment, Order No. 21-UI-158808 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-158808 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: February 26, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-158808 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 desisyong ito.

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 الاستئناف 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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