

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0073

Reversed & Remanded

PROCEDURAL HISTORY: On December 22, 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 July 12, 2020 (decision # 102230). Claimant filed a timely request for hearing. On January 26, 2021, ALJ Snyder conducted a hearing, and on January 28, 2021 issued Order No. 21-UI-160006, concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits. On February 1, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's written 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 at least some of that 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.

However, the parties may offer new information, such as that contained in their written argument or other documents not considered in this decision, 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) PNW Metal Recycling Inc. employed claimant from July 13, 2011 to July 16, 2020.

(2) The employer expected claimant to report for work as scheduled or notify his supervisor or the employer's human resources department at least one hour in advance of his shift that he would be absent. On July 7, 2019, the employer gave claimant a written warning for not following the employer's expectation that he notify the employer at least one hour in advance of his shift that he would be absent

from work. Claimant was aware of the employer's expectations regarding attendance and notification of impending absence from work.

(3) On July 13, 2020, claimant was prepared to go to work as scheduled but received a call that his son who lived in Florida had contracted "the coronavirus" and was ill. Audio Record at 20:40 to 21:50. While on his way to work, claimant became worried about his son, decided to not report for work, and notified his supervisor that he would be absent and the reason, 26 minutes prior to his shift. Claimant's supervisor notified claimant that he had not followed the employer's notification procedure requiring at least one-hour notice of absence prior to his shift.

(4) Also on July 13, 2020, claimant was stopped while driving his motor vehicle and subsequently arrested and incarcerated. Claimant texted his supervisor that he would not be at work on July 14, 2020.

(5) On July 15, 2020, claimant remained incarcerated and did not report for work as scheduled or notify the employer in advance that he would be absent. When claimant was released later that day, he sent his supervisor a text message but received no response.

(6) On July 16, 2020, the employer discharged claimant for being a "no call, no show" on July 15, 2020 and violating its absence notification procedure.

CONCLUSIONS AND REASONS: Order No. 21-UI-160006 is reversed and this matter is 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).

Order No. 21-UI-160006 concluded the employer discharged claimant, but not for misconduct, reasoning,

Claimant was discharged for being a no-call no-show on July 15, 2020. Claimant did not report to work or contact the Employer on July 15, 2020 because he was incarcerated. Claimant testified that he was arrested while not at work on July 13, 2020, and notified the Employer that he would not be at work due to incarceration on July 14, 2020, but did not expect to remain incarcerated on July 15, 2020. The evidence in this record does not establish that Claimant willfully created the situation that made it impossible for him to comply with the call out policy on July 15, 2020.

Order No. 21-UI-160006 at 3. However, the record was insufficiently developed to support the order's conclusion.

Where, as here, the employer discharged claimant because his incarceration left him unable to report to work for a scheduled shift or notify the employer in advance that he would be absent, the relevant inquiry is not whether claimant was arrested while off work, whether he attempted to notify the employer of his impending absence, or whether he expected his incarceration to prevent him from reporting for work as scheduled. Rather, the relevant inquiry is whether claimant willfully or consciously engaged in conduct he knew or should have known would probably result in his incarceration and resultant inability to report to work or notify the employer of his absence. *See, Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991) (where off-duty conduct makes it impossible for an individual to comply with the employer's attendance requirements, the relevant question is whether claimant willfully created the situation that made it impossible for him to attend work or to comply with the policy); *Dawson v Employment Department*, 251 Or App 379, 283 P3d 434 (2012) (claimant's wantonly negligent decision to drink and drive resulted in his incarceration and made it impossible for claimant to comply with the employer's requirement that he remain available for work).

On remand, the record needs to be developed to determine the specific conduct which led to claimant's arrest on July 13, 2020, why he engaged in that conduct, what his mental state was at the time, whether he thought his conduct might cause him to be arrested or incarcerated, whether he has been convicted of a crime in connection to the conduct that led to his arrest, and whether any such conviction was the result of a guilty or no contest plea. The record also fails to show the hours of claimant's scheduled shifts on July 13, 14 and 15, 2020, the time of claimant's arrest on July 13, 2020, whether he planned to travel to Florida to see his son who had contracted the coronavirus, and if not, why claimant concluded that he was unable to work that day. The ALJ should follow up on any other matters deemed necessary to the relevant inquiry, allow the parties to present relevant testimonial or documentary evidence, including matters of public record, on those matters, and allow the parties to respond to any evidence the other party provides.

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 21-UI-160006 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-160006 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: March 10, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-160006 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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