

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0216

Reversed & Remanded

PROCEDURAL HISTORY: On January 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective November 8, 2020 (decision # 134445). Claimant filed a timely request for hearing. On March 15, 2021, ALJ Moskowitz conducted a hearing, and on March 23, 2021 issued Order No. 21-UI-163269, modifying decision # 134445 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective November 1, 2020. On March 28, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: With her application for review, claimant submitted a document that appears to list rules for sanitizing face coverings. To the extent claimant intended this document to be a written argument, claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information, such as the document claimant submitted with her application for review, 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) Hearthside Rehab employed claimant as a certified medication assistant at the employer's nursing and residential facility until November 6, 2020.

(2) The employer had a policy regarding proper use of personal protective equipment (PPE). Under this policy, the employer expected each employee at the facility to wear masks such that their nose and mouth were fully covered and to wear goggles such that their eyes were fully covered. Employees were expected to wear these face coverings while in common areas, even during their breaks. Employees were also expected to wash or sanitize their hands each time they touched their masks or goggles.

(3) On October 7, 2020 and October 14, 2020, the employer observed claimant wearing her mask improperly and touching her mask without washing or sanitizing her hands afterward. The employer did not inform claimant that they had observed these violations.

(4) On October 30, 2020, the employer observed claimant touching her goggles multiple times without washing or sanitizing her hands afterward.

(5) Later on October 30, 2020, the employer conducted a meeting with claimant, in which the employer informed claimant of the violations observed on October 7, 14, and 30, 2020 and presented claimant with a written warning that listed the violations and suggested corrective actions. The written warning advised that claimant's violations of the employer's expectations had created an "egregious risk" to the health and safety of residents and staff. Exhibit 1 at 1. It also stated that it was a "Final Warning" and that if claimant did not improve adherence to the PPE policy, the employer could terminate her for future violations. Exhibit 1 at 1.

(6) On October 31, 2020, the employer observed claimant walking in a common area with her goggles pulled above her eyes and with her mask pulled down below her chin. Claimant was not wearing her face coverings properly because she was having lunch and had walked from a break room into the common area during her lunch break so she could retrieve an earpiece that had dropped out of her ear in the common area. Claimant knew and understood that the employer expected her to wear her face coverings properly in the common area, but failed to do so because she "must have been in the habit to not pull [her] mask up as [she] was finishing [her] lunch," and she "wanted to get her earpiece before somebody ran it over with a wheelchair, or before it got stepped on." Transcript at 21.

(7) On November 4, 2020, the employer suspended claimant for violating their expectations regarding proper use of PPE. On November 6, 2020, the employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: Order No. 21-UI-163269 is reversed 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant's violation of the employer's expectations regarding proper use of PPE on October 31, 2020 was not an isolated instance of poor judgment and constituted misconduct. Order No. 21-UI-163269 at 3-4. The evidence in the record is sufficient to conclude that claimant violated the employer's expectations with at least wanton negligence during the final incident that occurred on October 31, 2020. As for incident, the employer had a right to expect claimant to wear her face coverings properly in common areas. Claimant conceded that she knew and understood this expectation, although she asserted that "a lot of people" did not wear masks "out of habit," and implied that the employer condoned non-compliance. Transcript at 21. However, claimant received a written warning the day before the final incident, which listed her violations stemming from October 7, 14, and 30, 2020, described those incidents as creating an "egregious risk" to residents and staff, and advised claimant that she could be terminated for future violations. The record therefore shows that claimant understood that the employer expected claimant to comply with those expectations, and that claimant knew or should have known that failing to wear her face coverings properly in the common area that day would probably violated those expectations. For these reasons, claimant's behavior on October 31, 2020 violated the employer's expectations with at least wanton negligence.

Nevertheless, the record as developed does not show that claimant's conduct during the incidents that occurred on October 7, 14, and 30, 2020, were such that claimant violated the employer's expectations willfully or with wanton negligence on those dates. Remand is necessary to develop the record regarding whether claimant knew and understood the employer's expectations regarding proper use of PPE at the time of the incidents, and whether claimant was conscious of her conduct in committing those violations. Only if the record establishes that claimant's conduct on those prior occasions was willful or wantonly negligent is it possible to conclude, as Order No. 21-UI-163269 did, that the October 31, 2020 incident was not an isolated instance of poor judgment. Order No. 21-UI-163269 at 4.

On remand, the record must be developed to show if and when, prior to receiving the employer's written warning on October 30, 2020, claimant learned of the employer's expectations regarding proper use of PPE. The record does not show what expectations were communicated to claimant, how they were conveyed to claimant (whether in writing or otherwise), whether those expectations changed over the course of claimant's employment, or whether claimant received any training on proper use of PPE prior to receiving the employer's written warning on October 30, 2020. The ALJ should also ask any other questions about whether claimant knew or should have known that her conduct on October 7, 14, and 30, 2021 would probably violated the employer's expectations, as well as any other questions necessary to determine whether claimant's conduct on October 31, 2020 was an isolated instance of poor judgment or misconduct.

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 constituted misconduct, Order No. 21-UI-163269 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-163269 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: April 29, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-163269 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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