

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0640

*Late Request for Hearing Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On January 11, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective November 8, 2020 (decision # 175854). On February 1, 2021, decision # 175854 became final without claimant having filed a timely request for hearing. On February 2, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on March 15, 2021 issued Order No. 21-UI-162700, dismissing claimant's request as late without a showing of good cause, subject to claimant's right to renew the request by responding to an appellant questionnaire by March 29, 2021. On March 22, 2021, claimant filed a timely response to the appellant questionnaire.

On June 9, 2021, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 21-UI-162700 was vacated and that a hearing would be scheduled to address whether claimant had good cause to file the late request for hearing on decision # 175854 and, if so, the merits of that decision. On July 8, 2021, OAH served notice of a hearing scheduled for July 19, 2021 to consider claimant's late request for hearing and if allowed, the merits of decision # 175854. On July 19, 2021, ALJ Micheletti conducted a hearing, and on July 27, 2021 issued Order No. 21-UI-171168, allowing claimant's late request for hearing and reversing decision # 175854 by concluding that the employer discharged claimant, not for misconduct, and that claimant was not disqualified from receiving benefits.¹ On August 5, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The remainder of this decision addresses the portions of the order concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits.

¹ Order No. 21-UI-171168 stated that the employer failed to appear at the hearing. Order No. 21-UI-171168 at 1. Because the audio record of the hearing shows that the employer did appear at the hearing, this reference is assumed to be a typographical error. Audio Record at 00:23.

FINDINGS OF FACT: (1) Senior Haven RCF employed claimant as a medication aide in a residential care facility beginning in early 2019.

(2) On November 8, 2020, claimant's supervisor informed claimant that the employer was suspending her with pay pending an investigation of all of the employer's medical technicians, including claimant. At the time of her suspension, claimant's supervisor did not elaborate on the reason for the investigation or her suspension; however, claimant received a call from Adult Protective Services (APS) approximately two weeks later and was told that it was conducting an investigation regarding narcotics tampering, and that claimant and other coworkers were the subjects of the investigation. The APS worker also told claimant that "basically [she] was no longer employed [with the employer] because of the investigation." Transcript at 19.

(3) From late November 2020 until January 2021, claimant made unsuccessful attempts to call her supervisor to address her employment status. The employer contacted claimant on at least one occasion during this period to ask her to come to the employer's workplace for her weekly COVID-19 testing. Claimant did not report for the COVID-19 testing because she assumed she had been discharged due to the APS worker's statement that she was no longer employed and the employer's failure to contact her. As other employees were cleared of narcotics tampering during the investigation, the employer allowed them to return to work. Claimant never returned to work after the employer suspended her on November 8, 2020.

(4) In March 2021, the employer received the findings of the APS investigation.

CONCLUSIONS AND REASONS: The portion of Order No. 21-UI-171168 concluding that claimant was discharged, not for misconduct, is reversed, and this matter is remanded for further proceedings.

The first issue in this case is the nature of claimant's work separation. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Order No. 21-UI-171168 concluded, without providing the reasoning for the conclusion, that claimant's work separation was a discharge due to the APS investigation. Order No. 21-UI-171168 at 4. However, additional information is needed to determine the nature of the work separation. The record shows that claimant believed the employer had discharged her based on an APS employee's statement to her that she was "no longer employed" due to the APS investigation. Transcript at 19. This information, along with her supervisor's failure to contact her at any point after the suspension began, caused claimant to understand she had been discharged. However, the record also shows, somewhat inconsistently, that the employer would have asked claimant to return to work had the investigation exonerated her. Transcript at 25. In addition, the employer contacted claimant after the suspension began, to have claimant appear at the workplace for COVID-19 testing and the record suggests that the employer's COVID-19 testing may have been a weekly requirement. On remand, further development of the record is necessary regarding any contacts between claimant and the employer after claimant's suspension began, when

each contact occurred, and the circumstances surrounding each contact, including what was stated and claimant's response to each contact.

Likewise, when the supervisor told claimant she was suspended, the supervisor told claimant it was a suspension with pay. However, the record does not show whether the employer actually paid claimant during her suspension and, if so, whether she received full or partial pay, and if she received continuing benefits during her suspension. Because claimant's pay and benefits status is relevant to a determination of the nature of her work separation, further inquiry on this topic is necessary upon remand.

If the record on remand shows that the employer discharged claimant, further development of the record is necessary to determine if the employer discharged claimant for misconduct. 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).

If the inquiry shows that the work separation was a quit, then additional inquiry is needed to determine whether claimant quit with good cause. OAR 471-030-0038(4) provides that good cause for voluntarily leaving work under ORS 657.176(2) is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). In cases involving a claimant who quits work, the burden is on the claimant to establish, by a preponderance of the evidence that good cause exists. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

On remand, information regarding whether the employer continued to pay claimant her full salary, or some portion thereof, and whether claimant continued to accrue any benefits after her suspension started is also necessary to determine whether claimant quit work with good cause. *See, e.g., Young v. Employment Dep't*, 170 Or. App. 752, 13 P.3d 1027, 1030 (2000) ("[C]laimant failed to prove that remaining on medical leave was not a reasonable alternative to receiving unemployment benefits. Claimant was not on a protracted unpaid leave of absence."). In addition, on remand, the record should be developed to determine the reasonableness of claimant's belief that the employer had discharged her.

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 to determine the nature of the work separation and whether claimant's work separation was disqualifying for purposes of unemployment insurance benefits,

the portion of Order No. 21-UI-171168 concluding that the employer discharged claimant, not for misconduct, is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 21-UI-171168 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and A. Steger-Bentz;
D. Hettle, not participating.

DATE of Service: September 10, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-171168 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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