EO: 200
BYE: 202218

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

363
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0048

Late Request for Hearing Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On May 26, 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 May 9, 2021 (decision # 144923). On June 15, 2021, decision # 144923 became final without claimant having filed a request for hearing. On June 29, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on July 27, 2021 issued Order No. 21-UI-171110, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by August 10, 2021. On July 29, 2021, claimant filed a timely response to the appellant questionnaire. On October 6, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-171110 was vacated and that a new hearing would be scheduled to determine if claimant's late request for hearing should be allowed and, if so, the merits of decision # 144923. On December 16, 2021, ALJ Frank conducted a hearing, and on December 17, 2021 issued Order No. 21-UI-182132, allowing claimant's late request for hearing and affirming decision # 144923. On January 4, 2022, claimant filed an application for review of Order No. 21-UI-182132 with the Employment Appeals Board (EAB).

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 information contained in claimant's 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.

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 concluding that claimant had good cause to file the late request for hearing is **adopted.** The remainder of this decision addresses the merits of Order No. 21-UI-182132.

FINDINGS OF FACT: (1) Western Mercantile Agency, Inc. employed claimant as a collections floor supervisor from March 2015 until May 13, 2021.

(2) As part of their collections duties, employees would use their personal Facebook accounts to skip-trace debtors and collect on debts.

(3) The employer recorded all calls made on or to the work phones used by claimant and her coworkers, including calls between employees.

(4) Around the first week of May 2021, claimant's coworker and friend quit working for the employer. Thereafter, the employer reviewed the coworker's work computer, including messages that the coworker and claimant had exchanged on Facebook. Although claimant and the coworker had exchanged the Facebook messages on their own time outside of work, the employer was able to access the messages because the coworker had saved her Facebook password on her work computer. Those messages included calling the assistant managers and consumers "names," which the employer alleged was a violation of their policy that people be treated with "dignity and respect." Transcript at 23–24. The employer's human resources assistant also reviewed recorded phone calls between claimant and the coworker. From those conversations, the employer concluded both that the two employees had been violating the employer's "dignity and respect" policy by calling consumers "names," and the "appropriate use" policy by using background and criminal records check applications for reasons unrelated to the work they had been assigned. Transcript at 22, 24. Because of those discoveries, the employer suspended claimant for a total of five days while they investigated.

(5) On May 12, 2021, claimant was asked to come to the office on May 13, 2021 an hour later than her typical start time in order to meet with the owner of the company. The owner intended to discuss the findings regarding claimant's conversations with the former coworker and claimant's alleged policy violations. Before the meeting, the employer moved the meeting back an hour in order to prepare for three possible outcomes for the meeting: to issue claimant a written warning only; to issue claimant a written warning and demote her; or to discharge her. The employer intended that the outcome would depend on how much responsibility claimant accepted for the alleged policy violations.

(6) On the morning of May 13, 2021, claimant messaged the owner and notified her that she would not be attending the meeting. Claimant was concerned that she would be "parad[ed] around the office for everyone to see [she] was in trouble," and also felt that she was "being punished for [the employer] going through [claimant's] personal messages[.]" Transcript at 12, 17. The owner responded to claimant's message with the message, "That's unfortunate," to which claimant responded with a message that she agreed. Transcript at 18. Later that day, the owner sent claimant a text message stating that her belongings and final check were ready to be picked up. From that message, claimant believed that the employer had discharged her. Claimant did not further respond to the employer's message because she was concerned that doing so might "make the situation worse." Transcript at 18.

(7) At the time that she was messaging the owner on May 13, 2021, claimant did not intend to quit work, and had hoped that she and the owner could resolve the issue ". . . in a different manner maybe after work." Transcript at 18. Nevertheless, the owner notified other employees that claimant had quit work.

CONCLUSIONS AND REASONS: Order No. 21-UI-182132 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).

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). "'[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 are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The order under review concluded that "while claimant did not tender a notice of resignation in this case, she clearly conveyed an unwillingness to remain employed" because she declined to attend the meeting on May 13, 2021, "registered various complaints and made no reference whatsoever to an alternative to the meeting," and "thereafter made no attempt to report to work or express an interest in remaining employed," despite the fact that "continuing work was available." Order No. 21-UI-182132 at 4. However, the record shows the claimant was discharged by the employer, and did not voluntarily leave work.

As a preliminary matter, claimant's refusal to attend the meeting on May 13, 2021 did not show that claimant was unwilling to work for the employer. Although her actions might have, in the absence of other evidence, suggested that she was no longer willing to do so, the record contains evidence that directly contradicts that conclusion. In particular, claimant testified both that she did not intend to quit and had hoped to resolve the matter with the owner at a later time, and that she did not wish to attend the meeting specifically because she was concerned about being "paraded" in front of other employees. Additionally, the record shows that the employer was already prepared to potentially discharge claimant at the May 13, 2021 meeting, depending on claimant's response to the allegations against her and how much responsibility she took for her actions. While the employer may have been willing to allow claimant to continue working prior to the exchange of messages on May 13, 2021, the record as developed does not show that the employer remained willing to do so after claimant refused to attend the meeting. Rather, the preponderance of the evidence shows that the employer was *not* willing to allow claimant to continue working for them for any additional period of time after she refused to do so. For that reason, the record shows that claimant was discharged on May 13, 2021.

However, further development of the record is needed to determine whether her claimant's refusal to attend the meeting constituted misconduct under OAR 471-030-0038(3)(a). The record shows that claimant's refusal was a willful violation of the standards of behavior that the employer had the right to expect of her, as an employer has the right to expect that an employee will attend a meeting to discuss allegations of policy violations. However, further inquiry is needed to determine whether claimant's conduct was an isolated instance of poor judgment. The owner called the May 13, 2021 meeting to discuss the allegations that claimant had violated the employer's "appropriate use" and "dignity and respect" policies. At hearing, the employer's witness described claimant's alleged violations of the "dignity and respect" policy as "concerning" and consisted of calling consumers and other employees "names." Transcript at 22. The employer's witness was unable to provide more details about the alleged behavior or the policy that claimant allegedly violated, and did not offer evidence that claimant had been given a copy of that policy. Additionally, while claimant admitted at hearing to having stated in a Facebook message that an assistant manager had been "being a jerk to everyone," she also testified that the messages were exchanged on her private account, while claimant was neither at work or using a work computer. Transcript at 16, 15. The employer did not meet their burden of proof to show that knew or had reason to know that her conduct probably violated the employer's expectations regarding workplace behavior, or, therefore, that claimant's alleged violations of the "dignity and respect" policy were willful or wantonly negligent violations of the employer's standards of behavior.

However, testimony was not taken on the substance of the allegation that claimant violated the "appropriate use" policy by using background and criminal records check applications for reasons unrelated to the work she had been assigned. Such testimony is necessary for a determination of whether claimant's discharge for failing to attend to attend the meeting on May 13, 2021 was a discharge for misconduct, or merely an isolated instance of poor judgment. On remand, inquiry should be made to determine whether claimant actually engaged in any of the behaviors that the employer alleged violated that policy, and, if so, when those behaviors occurred, what they consisted of, and whether they constituted willful or wantonly negligent violations of the employer's standards of behavior.

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 was discharged for misconduct, or an isolated instance of poor judgment, Order No. 21-UI-182132 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-182132 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: February 15, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-182132 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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