

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0083

Reversed & Remanded

PROCEDURAL HISTORY: On November 23, 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 7, 2021 (decision # 94925). Claimant filed a timely request for hearing. On December 23, 2021, ALJ Lucas conducted a hearing, and on December 28, 2021 issued Order No. 21-UI-182798, affirming decision # 94925 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective November 7, 2021.¹ On January 8, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his 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 him 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.

FINDINGS OF FACT: (1) STA of Oregon Inc. employed claimant as a school bus driver from August 2021 to November 12, 2021.

¹ The order under review characterized its disposition as modifying decision # 94925. Order No. 21-UI-182798 at 3. However, the order affirmed the administrative decision because the effect of the order was to change the nature of the work separation, but not the disqualifying result of the administrative decision.

(2) On November 4, 2021, claimant was involved in an accident while driving the employer's school bus. Claimant backed the bus into a mailbox while trying to turn the bus around. Claimant was unaware at the time he had backed into the mailbox because he did not hear or feel any impact. Claimant subsequently learned of the accident, but forgot to inform the employer of the accident at the conclusion of his workday. The employer suspended claimant without pay to investigate the circumstances surrounding the accident.

(3) On November 12, 2021, claimant emailed the employer about the status of the accident investigation and asking when he might be able to return to work because the suspension without pay was causing his family financial hardship. At the time of claimant's email, the employer had already decided to discharge claimant based on the outcome of their investigation, but had not had a chance to "sum up all of the paperwork" or inform claimant of their decision. Audio Record at 20:30. The employer's intent was to discharge claimant that day and provide him his final paycheck. The employer responded to claimant's email by requesting that claimant come to the workplace to sign additional documents for the investigation. Claimant later responded to the employer that he was leaving work due to his uncertainty about the status of the investigation, the financial hardship caused by his suspension without pay, and due to his need to find employment starting the following week as the sole source of income for his family. The employer never notified claimant that he was discharged because "he quit before [they] could fire him." Audio Record at 23:19.

CONCLUSIONS AND REASONS: Order No. 21-UI-182798 is reversed and the matter remanded for further development of the record.

Nature of the work separation. 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).

The order under review determined that claimant voluntarily left work. Order No. 21-UI-182798 at 5. The order reasoned that when claimant informed the employer by email on November 12, 2021 that he was leaving work, the employer had not informed claimant that he had been fired. Order No. 21-UI-182798 at 3. Thus, the order under review concluded claimant could have continued working for the employer for an additional period of time, but elected instead to end the work relationship. Order No. 21-UI-182798 at 3. The record does not support the conclusion that claimant voluntarily left work.

The record shows that prior to claimant submitting the November 12, 2021 email, the employer had already decided to discharge claimant, notwithstanding the employer's need to finalize investigative paperwork and inform claimant of the discharge. By making their decision to discharge claimant when they did, the employer necessarily determined that they would not allow claimant to continue working for the employer as of the time of their discharge decision. Claimant's lack of knowledge of the employer's discharge decision, and his subsequent decision to email an attempted resignation, did not change the fact that the employer had already discharged claimant and would not allow him to continue working for them. As such, the nature of the work separation is a discharge because the employer was not willing to allow claimant to continue working for them prior to claimant's decision to quit.

Discharge. 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, good faith errors, unavoidable accidents, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

Because the order under review determined that claimant had voluntarily left his employment when he had, in fact, been discharged by the employer, the order under review did not address whether claimant’s discharge was for misconduct connected with work. On remand, further inquiry is therefore necessary to determine whether claimant was discharged for a willful or wantonly negligent violation of the standards of behavior that the employer had a right to expect such that his conduct constituted misconduct disqualifying him from benefits.

Here, the record indicates that claimant was discharged due to “[a bus] accident that he did not report.” Audio Record at 20:56. However, further inquiry is needed to establish the circumstances and timing surrounding claimant’s purported failure to report the accident, including how and when the employer actually learned of the accident, and who it received this information from. In addition, further inquiry should explore the employer’s expectations with regard to accident reporting, and whether claimant had been specifically made aware of these expectations, or otherwise should have known of the employer’s expectations. If the ALJ determines based on this and other questioning that claimant’s conduct was willful or wantonly negligent, further inquiry is needed to determine whether claimant’s conduct was an isolated instance of poor judgment, a good faith error, an unavoidable accident, or the result of mere inefficiency resulting from lack of job skills or experience, such that his conduct met an exception to misconduct. In this regard, because the record suggests that claimant might suffer from a long-term physical impairment, the ALJ should also direct inquiry into the circumstances surrounding any such impairment and, should it be determined that the impairment exists, what impact (if any) the impairment might have had on claimant’s conduct leading to his discharge. Exhibit 1 at 2.

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-182798 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-182798 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 18, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-182798 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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