EO: 700
BYE: 202141

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

733
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0218

Reversed & Remanded

PROCEDURAL HISTORY: On January 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 103329). The employer filed a timely request for hearing. On February 2, 2022, ALJ Amesbury conducted a hearing, and on February 3, 2022 issued Order No. 22-UI-185531, affirming decision # 103329. On February 10, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both claimant's and the employer's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the respective parties' reasonable control prevented them from offering the 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. EAB considered each party's argument to the extent it was based on the record.

The parties may offer new information, such as the new information contained within the respective parties' written arguments, 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) Upper Snake River Tribes employed claimant as their fish and wildlife director from October 28, 2019 until December 14, 2020.

(2) The employer hired claimant to work full time, but with the understanding that claimant was pregnant at the time of hire and intended to take a three-month maternity leave of absence starting in April 2020. On April 19, 2020, claimant left for her maternity leave as planned, with an estimated return-to-work date of July 11, 2020. At the time, claimant planned to place her infant daughter in daycare during work hours after claimant's maternity leave ended.

(3) In late June 2020, claimant notified the employer's executive director that she would not be able to return to full time work as planned because of a lack of available childcare due to the COVID-19 pandemic. For several months thereafter, claimant worked part time from home, which the executive director permitted claimant to do. However, the fact that claimant was working part time meant that the executive director and other employees were required to handle some of claimant's duties, which caused difficulties for the employer.

(4) On December 3, 2020, the executive director sent claimant a memorandum that outlined four options for claimant's work arrangements, of which claimant was required to choose one. Those options were for claimant to return to work full time; become an independent contractor and continue working part-time; voluntarily resign; or be discharged by the employer. The memorandum requested that claimant notify the employer which of the four options she had chosen by December 11, 2020.

(5) On December 11, 2020, claimant responded in writing to the December 3, 2020 memorandum. In her response, claimant explained that she was still unable to obtain suitable childcare for her daughter and that she was unable to return to work full time at that time. Claimant also suggested in her response that there was a "fifth option" in which she could continue to work part time until the end of the pandemic and the employer could hire a contractor to take over any duties she would be unable to perform in her part-time role. Transcript at 22.

(6) The employer considered claimant's suggestion of the "fifth option," rather than having accepted one of the four outlined in the December 3, 2020 memo, to be "insubordinate." Transcript at 22. As such, the employer discharged claimant on December 14, 2020.

CONCLUSIONS AND REASONS: Order No. 22-UI-185531 is set aside 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).

The employer discharged claimant because she rejected the options offered to her in the December 3, 2020 memorandum —return to full time work, become an independent contractor working part time, quit, or be discharged—and instead offered to continue working part time. The order under review concluded that claimant's rejection of the employer's options and countering with her own option did not constitute misconduct because the record did not "establish that [the] employer had any right to expect claimant to choose from among the options it offered her." Order No. 22-UI-185531 at 4. The record as developed does not support this conclusion.

As a preliminary matter, the record shows that three of the options offered to claimant—becoming an independent contractor, quitting, or being discharged—would have resulted in a severance of the employment relationship. Claimant's rejection of those options did not amount to misconduct because an employer does not have the right to expect that an employee will agree to sever the employment relationship. Therefore, whether claimant's rejection of the employer's options (and her counteroffer to continue working for the employer part time) constituted misconduct turns on whether claimant's refusal to return to full time work was a willful or wantonly negligent violation of the standards of behavior that the employer had a right to expect of her.

At hearing, claimant testified that she was unable to return to full time work in December 2020 because she was unable to find "safe" childcare. Transcript at 37. Claimant further testified that she and her husband had contacted a local daycare prior to the start of the pandemic with the intent of placing their daughter in that daycare after claimant's maternity leave expired. Transcript at 37–38. Additionally, claimant indicated in her December 11, 2020 response to the employer's December 3, 2020 memorandum that she did not have childcare at the time because "either 1) local facilities have closed during the pandemic or 2) those that remain open are not following state guidelines for social distancing and masks to protect the children in their care, and as a result are medically unsafe for an infant." Exhibit 2 at 30. If claimant had no childcare options available to her which would have allowed her to return to work full time, the employer's expectation that claimant return to work full time, while leaving her infant daughter unattended, would not have been reasonable, and claimant's failure to comply with that expectation would therefore not have been misconduct. However, the record does not show what steps claimant took in order to conclude that no childcare was available to her in December 2020 (including, but not limited to daycare facilities, nannies, or use of family or friends), or how she determined that the remaining open childcare facilities in her area were not following COVID-19 safety protocols or were medically unsafe for an infant. On remand, the ALJ should inquire as to the nature and extent of claimant's efforts to find childcare around the time that the employer discharged her, such that she might have been able to return to work full time for the employer.

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, Order No. 22-UI-185531 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-185531 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: April 20, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-185531 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab