

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0378

Reversed & Remanded

PROCEDURAL HISTORY: On November 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective September 26, 2021 (decision # 122523). Claimant filed a timely request for hearing. On February 18, 2022, ALJ Murdock conducted a hearing, and on February 25, 2022 issued Order No. 22-UI-187371, affirming decision # 122523. On March 16, 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).

FINDINGS OF FACT: (1) Travis Electric LLC employed claimant as an electrician from April 2019 until September 29, 2021.

(2) Claimant worked for the employer in Newport, Oregon, where the vast majority of homes were built prior to 1980. Because any house built before 1980 likely contained asbestos, and because claimant's work might require him to operate in a crawl space within a home, claimant's work had the potential of exposing him to asbestos. Claimant informed the employer that he was not comfortable working around asbestos and would not perform work that might subject him to an asbestos exposure risk. Due to claimant's asbestos-related safety concerns, and the prevalence of asbestos in the homes of their clients, the employer obtained special equipment for their employees designed to mitigate the asbestos risk, and arranged for employees to take a class on asbestos safety. Notwithstanding the employer's efforts, claimant remained unwilling to work in locations he believed presented an asbestos threat.

(3) On August 31, 2021, claimant notified the employer of his intention to leave work around the second or third week of October 2021. Claimant decided to leave because a new employer had "assured" him

that he would have a job in New York, subject to his successful completion of paperwork and a background check. Claimant did not provide the employer a specific departure date because he did not know when his work for the new employer would start.

(4) Between September 1, 2021 and September 29, 2021, claimant declined to perform work “in any old house” the employer scheduled him to work in, if claimant believed the house might contain asbestos. Transcript at 19.

(5) On September 29, 2021, the employer scheduled claimant for a job that required claimant to work in a crawl space in a home that claimant believed would expose him to asbestos. Claimant told the employer that they would need to find somebody else to perform the work. In light of claimant’s work refusal, the employer determined that they would no longer schedule claimant for future work because of the difficulties caused when he declined work. Notwithstanding his unwillingness to perform the crawl space work, claimant went on to perform two or three more jobs for the employer that day. Claimant hoped to keep working for the employer into October 2021 because he believed there would be “downtime” before he started his new job in New York. Transcript at 12. The employer’s scheduler informed claimant on September 29, 2021 that there would be no more work scheduled for him to perform, despite the availability of additional electrician work.

CONCLUSIONS AND REASONS: Order No. 22-UI-187371 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. The order reached this conclusion by pointing to evidence that purportedly showed that “the employer was willing to allow claimant to continue working an additional period of time after September 29 and had work available that claimant was not willing to accept or report for.” Order No. 22-UI-187371 at 3. The order under review also determined that the employer and claimant had “mutually agreed” to accelerate claimant’s separation date to September 29 and that this mutual agreement did not operate to change claimant’s work separation from a voluntary leaving into a discharge. Order No. 22-UI-17371 at 3. The record evidence does not support these conclusions.

The record shows that after September 29, 2021, claimant remained willing to work for the employer for an additional period of time, albeit not on jobs that he perceived might place him at risk for asbestos exposure, because he believed he was facing a period of “downtime” while he awaited a start date for his new job. Meanwhile, after claimant’s asbestos-related refusal to work one of his scheduled September 29, 2021 jobs, the employer informed claimant that they would no longer schedule him for work even though they had a need for an electrician. The record therefore shows that despite claimant’s willingness to continue working for the employer after September 29, 2021, the employer stopped scheduling claimant for work and would not allow claimant to continue to work. The nature of claimant’s work separation therefore is a discharge.

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

The record shows that the employer discharged claimant because claimant refused work assignments that claimant believed risked his exposure to asbestos. However, 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 refusal to perform such work constituted misconduct connected with work. On remand, further inquiry should therefore address the employer’s expectations for claimant with respect to scheduled work assignments that might involve an exposure risk to asbestos. For example, because claimant worked for the employer for over two years but had only refused work that presented an asbestos risk “towards the end” of his employment, the record should be further developed to determine the dynamics of the work relationship between the employer and claimant prior to August 31, 2021 and *when* claimant addressed this concern. Transcript at 19.

Likewise, inquiry should include whether prior to August 31, 2021 claimant only performed work in an asbestos-free environment and, if so, whether he did so because the employer and claimant had agreed, prior to such work having even been scheduled, that a particular work environment was asbestos-free. Inquiry should be made to determine whether employer gave claimant the authority to decide whether he would work a previously scheduled job based on his comfort level with the asbestos risks of the particular assignment or whether such conduct violated the employer’s expectations. To the extent claimant only performed work in an asbestos-free environment prior to August 31, 2021, further inquiry should also address whether the employer had conveyed to claimant during the work relationship any expectation that claimant would, at some point, perform work that included possible exposure to asbestos. If the ALJ determines based on this and other questioning that claimant’s conduct was willful or wantonly negligent violation of the employer’s expectations, further inquiry is needed to determine whether claimant’s conduct was an isolated instance of poor judgment or a good faith error.

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. 22-UI-187371 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-187371 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 1, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-187371 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 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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