EO: 200
BYE: 202344

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

409
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0137

Reversed & Remanded

PROCEDURAL HISTORY: On November 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective October 30, 2022 (decision # 140321). Claimant filed a timely request for hearing. On January 4, 2023, ALJ Ainardi conducted a hearing, and on January 6, 2023 issued Order No. 23-UI-211974, affirming decision # 140321. On January 24, 2023, Claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on January 26, 2023 and February 17, 2023. EAB did not consider claimant's January 26, 2023 written argument because claimant did not declare that he provided a copy of his argument to the opposing party 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). EAB considered claimant's February 17, 2023 written argument when reaching this decision.

On February 16, 2023, the employer submitted two written arguments. The employer's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's 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 the employer's arguments to the extent they were based on the record.

The parties may offer new information, such as the information not part of the hearing record that they included with their 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) Planet Express Shipping LLC employed claimant most recently as a warehouse manager from October 22, 2020 until October 31, 2022. The employer's business involved making international shipments.

(2) On October 26, 2022, to comply with changing federal regulations and parcel carrier policies, the employer began including the first and last name of the employee who processed the shipment on the shipping label of each international shipment the employer made.

(3) Under federal regulations, if the value of an international shipment was $2,500 or more, the employer's customers were required to declare the value of the shipment, and the parcel carriers the employer used were required to transmit that information to a federal agency electronically. On or about October 27, 2022, FedEx, one of the main parcel carriers the employer used, had a malfunction that caused it to be unable to transmit the information. This meant the employer was unable to make shipments for customers with shipments worth $2,500 or more who used FedEx.

(4) On October 27, 2022 at 2:25 p.m., the employer's operations manager sent a group chat message to employees that claimant believed encouraged employees to urge customers to under declare the value of their shipments in order to avoid triggering the reporting requirement. Specifically, the message read:

> EEI update. Email the customer and ask if they can lower the cost of $2500 USD to avoid EEI with FedEx. If it's going to China, recommend that they switch to DHL.

Transcript at 47. About twenty minutes later, the operations manager sent a second message clarifying that the operations manager meant for customers to simply split high value items into multiple individual shipments of less than $2,500, and thereby avoid the required reporting, not to under declare the value of their shipments. The second message, Transcript at 47, read:

> That way they can lower the cost if they split.

(5) Claimant was subordinate to the operations manager, and had disagreed with his decision-making in the past. The operations manager's messages bothered claimant. He thought they amounted to the operations manager telling employees to tell customers to commit fraud or lie on government paperwork. Although the operations manager had sent the second message indicating that he meant that avoiding the reporting requirement be achieved by customers splitting their shipments, rather than under declaring value, claimant believed customers would still under declare some shipments because claimant thought single high value items worth more than $2,500, like laptops, could not be split into individual shipments. Claimant did not ask for a clarification about shipment splitting in the group chat, and left work for the day about two hours after the second message was sent.

(6) On the morning of October 28, 2022, claimant called the employer's Chief Operating Officer (COO) and expressed his view that he thought the operations manager had instructed employees to engage in unlawful conduct. The COO told claimant the practice was not illegal, "[d]on't worry, we've done this before[,]" and "just continue on with mail out[.]" Transcript at 29, 35. However, claimant did not trust the COO's assurances and reiterated that he thought the operations manager's instructions were illegal.

(7) As claimant was having this phone conversation with the COO, several employees approached claimant and expressed their discomfort with placing their names on the shipping labels of the shipments they processed. This was the first claimant learned of the new procedure of including employee names on the shipping labels. The employees were concerned that if their names were on a shipping label and the customer under declared the value of the shipment, the government would hold the employees responsible. Claimant told these individuals that if they were uncomfortable, they did not have to place their names on the shipping labels and mail out the shipments. This had the effect of numerous shipments not being mailed out that day.

(8) Over the course of the day, the COO attempted to call claimant repeatedly. After working seven and a half hours that day, claimant left the warehouse for a lunch break in the early afternoon and, while driving, another driver rear-ended claimant. Shortly thereafter, claimant returned the COO's calls. During the call, claimant used profanity and mentioned to the COO that claimant would "talk to my attorney and you know, we can talk or something." Transcript at 34-35. However, claimant did not threaten legal action against the employer unless the employer discharged the operations manager.

(9) On October 31, 2022, the COO discharged claimant.

CONCLUSIONS AND REASONS: Order No. 23-UI-211974 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 order under review concluded that the employer discharged claimant for misconduct because claimant threatened legal action against the employer if the employer did not discharge the operations manager. Order No. 23-UI-211974 at 3-4. The record does not support the conclusion that this was why the employer discharged claimant.

At hearing, the COO testified that during the October 28, 2022 afternoon phone call, claimant used profanity and alleged that claimant stated he would seek legal action against the COO unless the COO

discharged the operations manager. Transcript at 13-14. However, the focus in a discharge case is on the proximate cause of the discharge. *See Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). As outlined below, the proximate cause of the COO's decision to discharge claimant was claimant's alleged insubordination for failure to require employees to mail out shipments, rather than any threat of legal action or use of profanity. In any event, the employer did not meet their burden to prove that claimant actually threatened litigation unless the COO discharged the operations manager. Claimant denied ever telling the COO to either discharge the operations manager or he would contact an attorney. Transcript at 38. Claimant testified that he merely said "I'll just talk to my attorney and you know, we can talk or something." Transcript at 34-35. To advise that one intends to consult with their attorney is not misconduct. Nor did the employer establish willful or wantonly negligent conduct regarding claimant's use of profanity during the October 28, 2022 afternoon call as the COO did not offer details at hearing regarding what words claimant used, or how he said them.

The COO testified that he decided to terminate claimant's employment because, on October 28, 2022, claimant failed to require employees to make shipments and told them to not communicate with the COO and upper management. Transcript at 7-8. The COO also testified that claimant left work without permission at 1:23 p.m. in the afternoon of October 28, 2022. Transcript at 7-8. More likely than not, these were the proximate cause of the discharge because the COO testified that "as soon as" he found out about them he "decided to terminate." Transcript at 8.

As to the latter two of these reasons for claimant's discharge, the employer failed to meet their burden to show that claimant engaged in a willful or wantonly negligent violation of the employer's expectations. At hearing, claimant repeatedly denied ever giving employees an instruction to not communicate with the COO and upper management on October 28, 2022. Transcript at 25, 30. The employer provided no evidence substantiating the COO's assertion that claimant gave such an instruction. Accordingly, the employer did not show by a preponderance of the evidence that claimant told employees to not communicate with the COO and upper management on October 28, 2022. Similarly, with respect to leaving early without permission, the COO acknowledged that claimant was "not exactly bounded to adhere to the schedule[.]" Transcript at 8. Further, claimant testified that he had been working for seven and a half hours when he left at 1:23 p.m. on October 28, 2022, and that he did so to take a lunch break. Transcript at 28-29. Thus, the employer did not establish that claimant breached any employer expectation regarding leaving work early.

However, it remains possible that the employer discharged claimant for misconduct for insubordination for failure to require employees to mail out shipments. Further development of the record is required regarding what the COO and claimant discussed during the morning phone call on October 28, 2022. On remand, the ALJ should inquire what precisely the COO told claimant to do during the call and whether claimant followed the COO's instructions. The ALJ should inquire whether the COO explicitly informed claimant that shipment splitting and placing employee names on the shipping labels was legal, whether the COO instructed claimant to proceed with mailing out shipments, and if claimant then refused to comply. To this end, the ALJ should ask whether claimant conveyed to the COO the employees' discomfort with placing their names on the shipping labels, and if so, what the COO's response was. The ALJ should inquire whether claimant informed the COO of his decision to allow employees to refrain from mailing out shipments, and when the COO first learned that shipments were not being mailed that day. The record should be developed to clarify how many times the COO attempted to call or text

claimant between the October 28, 2022 morning call and the call the two had that afternoon. The ALJ should inquire why claimant missed these attempts to reach him, whether he ignored them, and, if so, why. To the extent the record on remand shows that claimant violated an employer expectation willfully or with wanton negligence, the ALJ should ask questions to develop whether the violation was an isolated instance of poor judgment, including whether the violation exceeded mere poor judgment because it was an irreparable breach of trust or made a continued employment relationship impossible.

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. 23-UI-211974 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-211974 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 21, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-211974 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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