

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0403

Reversed & Remanded

PROCEDURAL HISTORY: On January 13, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective January 1, 2023 (decision # 145257). Claimant filed a timely request for hearing. On March 24, 2023, ALJ Scott conducted a hearing and issued Order No. 23-UI-220113, affirming decision # 145257. On April 4, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her 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 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 why claimant's background check was not approved, 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) Living Opportunities Inc. employed claimant as a direct support provider at their facility, which provides care for individuals with intellectual and developmental disabilities, from 2019 until January 6, 2023.

(2) Upon hire, claimant was legally required to pass a background investigation conducted under the supervision of the Department of Human Services and the Oregon Health Authority. The check focused on criminal history and warrants, registry as a sex offender, and reports of child or adult abuse. Claimant

was subject to reinvestigation at any time during her employment if new or additional information bearing on her suitability for employment came to light.

(3) From October 15, 2021 until August 2022, claimant worked for the employer only on an as-needed basis, substituting occasionally for absent employees. During this period, claimant worked full-time at another employer's drug and alcohol counseling facility.

(4) In approximately August 2022, claimant was discharged by the other employer's counseling facility and resumed full-time work for Living Opportunities Inc.

(5) On November 10, 2022, the employer was alerted that new information received about claimant required reinvestigation of her background. Claimant submitted to a new background investigation.

(6) On approximately December 9, 2022, the employer suspended claimant from work while the investigation continued.

(7) On January 6, 2023, the state agencies concluded the background check. They notified the employer via a letter that claimant was not approved to continue working and directed the employer to discharge her immediately. The employer discharged her accordingly.

CONCLUSIONS AND REASONS: Order No. 23-UI-220113 is set aside and the 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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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 willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c).

The order under review concluded that claimant was discharged for misconduct because she failed to "maintain the authority necessary" to perform her occupation. Order No. 23-UI-220113. The record is insufficient to conclude that claimant "willfully or with wanton negligence" failed to maintain such authority, or that such authority was necessary to the performance of her occupation.

The record does not suggest that a “license or certification” was needed to engage in the occupation of direct support provider. However, the parties did not dispute that for claimant’s particular role with the employer, background approval was necessary from the state agencies that exercise oversight of the employer’s operations in order for claimant to obtain and maintain such employment. Transcript at 9, 22. The record is insufficient to conclude whether claimant must therefore maintain authority “similar” to a license or certification to engage in the profession of direct support provider, as opposed to merely needing that authority to work for this employer in this role, when such background clearance might not be needed to perform the occupation for other employers or with other clients. Further development of the record is needed to determine if the authority needed to engage in the occupation of direct support provider, if any, falls within the provisions of OAR 471-030-0038(3)(c).

Further, the record does not show whether claimant’s failure to maintain any needed authority to engage in her occupation was “willful or wantonly negligent.” The January 6, 2023 letter detailing the result of claimant’s background check did not specify why she was denied approval to continue in her job, but cited the criteria that are considered in making that decision, which involve either allegations of criminal behavior or abuse of others. Exhibit 1 at 5-6. Claimant’s testimony indicated that she disputed at least some of the allegations made against her, though the nature of those allegations are not in the record. Transcript at 27-28. The employer must prove by a preponderance of evidence that the allegations of misconduct leading to the background check failure were true. Accordingly, the record must be further developed as to the specific cause of the background check result, and whether the preponderance of evidence establishes that claimant’s conduct leading to that result was willful or wantonly negligent.

Even if the requirements to engage in claimant’s occupation are found to fall outside of the provisions of OAR 471-030-0038(3)(c), the alleged misconduct which indirectly led to claimant’s discharge by way of the background check failure must be analyzed under ORS 657.176(2)(a). Such potential misconduct must also be evaluated under the exculpatory provisions of OAR 471-030-0038(3)(b), excluding some types of conduct from the definition of “misconduct.”

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. 23-UI-220113 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-220113 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: May 10, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-220113 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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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