

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0877

Reversed & Remanded

PROCEDURAL HISTORY: On June 9, 2023, 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 April 30, 2023 (decision # 150905). Claimant filed a timely request for hearing. On July 14, 2023, ALJ Sachet-Rung conducted a hearing, and on July 19, 2023 issued Order No. 23-UI-230773, affirming decision # 150905. On August 7, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Rogue Valley Door employed claimant as a door frame builder from August 9, 2019 until May 5, 2023.

(2) The employer required their employees to work their scheduled shifts and report to their scheduled shifts on time. The employer also expected employees who must be absent or who cannot report to work on time to call in at least 30 minutes before their scheduled shift. The employer assessed violations of their attendance rules progressively, with the first violation resulting in a written warning, the next violation resulting in a final written warning, and the next violation resulting in a suspension or termination. The employer informed claimant of these expectations at her orientation when she was hired.

(3) On or about June 1, 2022, claimant was either late for or absent from her scheduled shift. On June 9, 2022, the employer gave claimant a written warning for this attendance policy violation.

(4) On February 24, 2023, claimant was absent from one of her scheduled shifts. Claimant called in to inform the employer she would be absent. On February 27, 2023, the employer gave claimant a final written warning because of the February 24, 2023 absence.

(5) On April 20, 2023, claimant was 45 minutes late for a scheduled shift. Claimant called in to inform the employer she would be late. Because of the late arrival, the employer suspended claimant for the remainder of her April 20, 2023 shift, and for her shifts on April 21, 2023 and April 24, 2023. The employer advised that the next time claimant was late for work, the employer would discharge her. To help address claimant's attendance difficulties, the employer and claimant agreed to change the start time of her shifts from 5:00 a.m. to 6:00 a.m.

(6) On May 4, 2023, claimant called out her scheduled shift due to illness.

(7) On May 5, 2023, claimant was an hour and 30 minutes late for a scheduled shift. Claimant did not call in to inform the employer she would be late. On May 5, 2023, the employer discharged claimant for arriving late to her scheduled shift on May 5, 2023.

CONCLUSIONS AND REASONS: Order No. 23-UI-230773 is set aside, and this matter remanded for further proceedings consistent with this order.

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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant's failure to call in to inform the employer she would be late on May 5, 2023 was the "but for" cause of the discharge, and that that conduct was a willful or wantonly negligent violation of the employer's standards of behavior, therefore constituting misconduct. Order No. 23-UI-230773 at 3. The record as developed does not support these conclusions.

The focus of a discharge analysis is on the proximate cause of the discharge, that is, the incident without which the discharge would not have occurred when it did. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *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). The employer's human resources manager testified that claimant would have been discharged on May 5, 2023 for being late that day, even if she had notified the employer of her lateness in advance. Transcript at 8. Further, the employer's May 5, 2023 Separation Report mentioned only claimant's late arrival that day as the basis for her discharge, not the failure to inform the employer she would be late. Exhibit 1 at 16. Therefore, more likely than not, the determining factor in the employer's decision to discharge claimant on May 5, 2023 was her late arrival that day, not her failure to call in that morning to inform the employer she would be late. The

May 5, 2023 late arrival was therefore the proximate cause of the discharge and the focus of the analysis.

Accordingly, it is necessary to determine whether claimant's late arrival on May 5, 2023 was a willful or wantonly negligent violation of the employer's expectations. The record was not sufficiently developed to make this determination. At hearing, when asked what happened on May 5, 2023, claimant stated that she "woke up late" that morning and mentioned that she had been dealing with issues related to caring for her mother. Transcript at 23. The employer's senior production manager testified that when he met with claimant on May 5, 2023, claimant told him that she had slept through her alarm. Transcript at 18. The record also shows that the previous day, May 4, 2023, claimant called out sick.

On remand, the ALJ should ask questions to develop the record regarding why claimant woke up late on May 5, 2023 including the extent to which, if any, caring for her mother or claimant's own illness contributed to claimant's having woken up late. The ALJ should inquire about what precautions, if any, claimant took to avoid waking up late, and whether waking up late had happened previously such that claimant was aware it was an ongoing issue and could have reasonably anticipated the need to mitigate the issue.

To the extent the record on remand shows that claimant's late arrival on May 5, 2023 was a willful or wantonly negligent violation, the ALJ must then inquire as to whether claimant's immediate past attendance policy violations were also willful or wantonly negligent. This is necessary in order to assess whether the May 5, 2023 late arrival was an isolated instance of poor judgment, which requires that the exercise of poor judgment not be a repeated act or pattern of other willful or wantonly negligent behavior. This will require inquiry into the circumstances surrounding claimant's failure to call in to inform the employer she would be late on May 5, 2023, claimant's April 20, 2023 late arrival, claimant's February 24, 2023 absence, and the absence or late arrival that occurred on or about June 1, 2022. The ALJ should ask questions about these incidents to determine whether they violated the employer's expectations, and, if they did, whether the violations were willful or wantonly negligent.

To this end, the record regarding the effect of claimant's use of paid time off also requires further development. The tenor of claimant's testimony was that the employer allowed claimant to negate attendance policy violations by enabling her to use her accrued paid time off to undo an attendance violation after she was absent or late. Transcript at 20-23. Under this theory, claimant appeared to argue that the April 20, 2023 late arrival should not have counted as a breach of the employer's expectations. Transcript at 20-23. The employer's witness cast the use of paid time off as a way for employees to regain lost work time but did not specifically rebut claimant's characterization, and at one point seemed to concede that paid time off could be used to prevent "an attendance infraction" from occurring. Transcript at 32. The ALJ should ask questions to clarify whether the employer's expectations were such that employees could prevent or undo an attendance violation by assigning paid time off to the shift for which they were late or absent, or, instead, if the attendance violations remained and assigning paid time off merely ensured employees were paid for the work time they missed.

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-230773 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-230773 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: September 19, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-230773 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

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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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