

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1273

Reversed & Remanded

PROCEDURAL HISTORY: On October 13, 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 July 16, 2023 (decision # 145634). Claimant filed a timely request for hearing. On November 1, 2023, ALJ Goodrich conducted a hearing, and on November 9, 2023, issued Order No. 23-UI-240868, affirming decision # 145634. On November 17, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), other than EAB Exhibit 1, which, as indicated below, is being received into evidence because it is necessary to complete the record, EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the evidence in the record.

At the remand hearing, the parties may seek to offer testimonial evidence from additional witnesses not present at the first hearing, such as coworkers of claimant who may offer evidence material to the disputed factual issues in this case. The parties may also offer new documentary information into evidence at the remand hearing, such as documents attached to claimant's written argument but not contained in EAB Exhibit 1. 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.

EVIDENTIARY MATTER: At hearing, the employer sought to admit into evidence a 117-page packet consisting of letters and notices from the employer to claimant relating to claimant's discharge and investigative materials prepared and compiled by the employer's Office of Inspector General. Audio

Record at 6:02, 8:48 to 16:08. The employer's representative explained that due to having received the notice scheduling the November 1, 2023, hearing only the day prior, the employer had not served the packet on claimant specific to that hearing, but that all the documents in the packet had been provided to claimant in a separate forum. Audio Record at 6:42 to 8:38.

Claimant objected to admission of the packet based on not having been served with them prior to the start of the hearing. Audio Record at 16:11, 25:36. Claimant did not dispute that he had received the documents in a separate forum and described them as being "in the file for my MSPD appeal." Audio Record at 16:47. The ALJ marked the packet as Exhibit 1 and excluded it because the employer did not serve the documents on claimant prior to the hearing. 17:50, 26:10, 27:22.

During his testimony, claimant repeatedly referenced and at times quoted from the investigative materials contained in Exhibit 1. Transcript at 31, 45, 46, 56, 57, 58-59, 60-61. A review of the documents show that they contain relevant and material information and may be necessary to resolve disputed issues in this case. Given that the documents may be needed for resolution of the issues in this case, as well as that claimant did not dispute receiving the documents in a separate forum and referred to them frequently in his testimony, the documents are necessary to complete the record. As such, EAB is receiving the documents contained in Exhibit 1 into evidence as necessary to complete the record pursuant to OAR 471-041-0090(1)(a).

The additional evidence contained in Exhibit 1 is being marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) The United States Postal Service employed claimant, most recently as a labor relations specialist for the Idaho-Montana-Oregon district, from August 1994 until July 21, 2023.

(2) The employer expected their employees to be honest and truthful in the workplace and to conduct themselves in a manner that reflected favorably on the employer. Claimant understood this expectation. The employer also expected employees to use Family and Medical Leave Act (FMLA) sick leave and ordinary sick leave to cover absences from work as prescribed by the employer's policies governing those types of leave.

(3) On December 31, 2022, the police arrested claimant for domestic violence in connection with an incident between claimant and his wife. The police charged claimant with a crime related to the incident and placed him in jail.

(4) Claimant spent the remainder of Saturday December 31, 2022, in jail. Claimant also spent Sunday January 1, 2023, and Monday January 2, 2023, in jail. January 2, 2023, was a holiday and claimant was not required to work that day.

(5) Claimant was required to work on Tuesday January 3, 2023. However, claimant could not work that day because he was still in jail. Claimant told his brother to call claimant's coworker, S.N., and advise that he was okay, but he would not be coming in to work on January 3, 2023. At some point on January

3, 2023, claimant's brother called S.N. and did as claimant instructed. S.N. did not notify claimant's manager, K.K., of the message conveyed by claimant's brother. On the evening of January 3, 2023, claimant was released from jail.

(6) On January 4, 2023, claimant returned to work. On that day, claimant's manager, K.K., believed that claimant told K.K. and another of claimant's coworkers, M.T., that he was hospitalized on January 3, 2023, and could not call the employer that day because he did not have his phone. K.K. believed that during the conversation, claimant verbally requested FMLA sick leave to cover his January 3, 2023, absence. Claimant did not believe he told K.K. and M.T. that he had been hospitalized on January 3, 2023.

(7) On January 4, 2023, per K.K.'s belief that claimant had verbally requested to take FMLA sick leave for January 3, 2023, K.K. filled out and gave claimant a notification of absence form requesting FMLA sick leave for that date. Claimant did not take any action with the form.

(8) On January 23, 2023, K.K. prepared the notification of absence form for claimant again. Claimant signed and submitted the document requesting FMLA sick leave for January 3, 2023. Also, on or about January 23, 2023, a communication was sent to the employer that caused the employer's Office of Inspector General to begin investigating, among other things, whether claimant had falsely represented to the employer that he had been hospitalized on January 3, 2023, when in fact he was in jail.

(9) Claimant had a court hearing related to the incident in which he was arrested for domestic violence scheduled for February 7, 2023. Claimant also had an appointment with his veteran's service officer to seek an increase in his disability rating scheduled for that day. Prior to February 7, 2023, claimant requested ordinary sick leave to cover an absence for February 7, 2023, the day on which the court hearing and veteran's service office appointment were scheduled.

(10) On February 7, 2023, claimant attended his court hearing via a teleconferencing platform while he was absent from work on sick leave. Claimant did not feel well, so he canceled his appointment with the veterans' service officer. Claimant later formed the belief that he had a COVID-19 infection on February 7, 2023.

(11) On July 17, 2023, the employer provided claimant a letter of decision, which informed claimant that the employer had decided to discharge him effective July 21, 2023. On July 21, 2023, the employer discharged claimant. The employer discharged claimant for reasons relating to alleged dishonesty and failure to follow leave policies for requesting FMLA sick leave for January 3, 2023, and ordinary sick leave for February 7, 2023, and dishonesty for allegedly telling K.K. and M.T. that he had been hospitalized on January 3, 2023.

CONCLUSIONS AND REASONS: Order No. 23-UI-240868 is reversed, 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 claimant was discharged for misconduct for violating the employer’s policy requiring honesty because claimant: (1) on January 4, 2023 told K.K. and M.T. a falsehood that he was hospitalized on January 3, 2023 when in fact he was in jail on that date, and (2) on January 23, 2023 made a request for FMLA sick leave to cover his absence on January 3, 2023 that was false because his absence on January 3, 2023 was due to being in jail. Order No. 23-UI-240868 at 4-5. The record as developed does not support these conclusions. At hearing, the full nature and scope of the workplace expectations the employer discharged claimant for allegedly violating were not developed sufficiently. Further development of the record is also needed to determine whether or not claimant falsely told K.K. and M.T. that he was hospitalized on January 3, 2023, when in fact he was in jail on that date.

Regarding the workplace policies upon which the employer based their decision to discharge claimant, at hearing, claimant’s manager, K.K. served as the employer’s witness. K.K. testified regarding a “Labor Relations Manual” and mentioned some workplace policies listed in the manual by number and title, such as “66516 . . . behavior and personal habits,” as well as “513.11: Sick leave for employee[] incapacitation”, and “4515: Eligibility for absence covered in FMLA.” Transcript at 24. The employer’s witness testified that claimant had been provided these policies, been trained on them extensively, and was “charged” with violating them in the documentation that notified claimant of his discharge. Transcript at 24, 25. From this account, as well as the testimony detailed below, it is possible to parse from the record the following alleged violations of the employer’s expectations:

- Use of FMLA sick leave to cover claimant’s January 3, 2023, absence when claimant was absent on that date because he was in jail;
- Use of ordinary sick leave to cover claimant’s February 7, 2023, absence during which he spent part of the day at a court hearing; and
- Violating an expectation to be honest and truthful by claimant falsely stating that he was hospitalized on January 3, 2023

First, with respect to claimant’s use of FMLA sick leave to cover his January 3, 2023 absence when he was absent on that date because he was in jail, the employer’s witness testified, referencing the FMLA sick leave for the January 3, 2023 date as well as ordinary sick leave for the February 7, 2023 date claimant spent part of the day appearing at a court hearing, that sick leave “would be [for] incapacitation” and that “for both of the dates in question” claimant “wasn’t incapacitated” because “[b]eing incarcerated is not . . . incapacitated due to a medical condition” and “neither is appearing in court . . . incapacitated due to a medical condition.” Transcript at 22. The witness described claimant as having violated policy 4515 relating to eligibility for absence covered in FMLA because “he was falsely saying that he was getting . . . protection . . . for the FMLA” when he was actually incarcerated. Transcript at 24.

For his part, claimant testified that he had “an FMLA condition,” hypoglycemia, while he was in jail on January 3, 2023, and stated that “just because you’re incarcerated does not prohibit you from being able to utilize FMLA.” Transcript at 35. Claimant also testified, “I never requested sick leave to serve a (sic) incarceration. I requested the FMLA protective sick leave under the federal protection law while I was incarcerated due to my FMLA condition.” Transcript at 42. This testimony suggests that claimant was asserting it was possible for him to use FMLA sick leave to cover the absence simply because he had hypoglycemia, even though his hypoglycemia was not responsible for the absence from work, rather his presence in jail was. However, claimant further stated, “I filed the medical documentation from the jail records that also supports that had a medical condition and I was getting treatment for my FMLA, uh, condition.” Transcript at 35. This suggests that claimant was asserting that jail officials treated claimant’s hypoglycemia while he was in jail on January 3, 2023, and that, even though it was claimant’s presence in jail that caused him to be absent from work on January 3, 2023, the fact that claimant received treatment while he was in jail was sufficient under the employer’s policy for him to use FMLA sick leave to cover the absence.

On remand, the ALJ should ask questions of the parties to develop the scope of the employer’s FMLA sick leave policy and determine whether there existed any aspect of the policy allowing a person to use FMLA sick leave to cover an absence where their medical condition is not responsible for why they were absent. To this end, it may be useful to consult the eligibility for absence covered in FMLA policy referenced by the employer’s witness at hearing and cited in documentation contained in EAB Exhibit 1. To the extent claimant asserts on remand that an employee who is absent from work because they are in jail may use FMLA sick leave to cover the absence because they also have a medical condition, the ALJ should ask where that aspect of the policy is specified in the employer’s Labor Relations Manual or other written training materials. If conveyed to claimant verbally, the ALJ should ask who told claimant that he could use FMLA sick leave to cover an absence when his medical condition was not responsible for the absence and when and where such conversations occurred. To the extent claimant asserts that he received hypoglycemia treatments while in jail on January 3, 2023, the ALJ should ask claimant about the nature and extent of those treatments, how they differed (if at all) from the treatments claimant ordinarily received to address his hypoglycemia condition, who administered any hypoglycemia treatments claimant received on January 3, 2023, and how frequently they did so.

Next, with respect to claimant’s use of ordinary sick leave to cover his February 7, 2023, absence during which he spent part of the day at a court hearing, the employer’s witness described policy 513.11 relating to sick leave for employee incapacitation as “ensur[ing]” against “a loss” of “pay if [the employee is] incapacitated for performance of duties” because of such circumstances such as injury or illness. Transcript at 24. The witness further commented “that to me, um, would not be sick leave” in reference to claimant’s use of sick leave intending to see a veteran’s service officer about his disability rating because “sick leave is to attend a medical appointment for incapacitation or if you are ill.” Transcript at 52.

By contrast, claimant testified, “our sick leave policy goes beyond just being incapacitated” and further stated that “VA appointments you can use sick leave.” Transcript at 44, 37. Claimant also opined, in response to a hypothetical question regarding whether an employee who took a week of vacation could convert two of the days to sick leave, that “you would think” the employee would have to actually be sick to use the sick leave, but the employer’s “policy doesn’t confirm they have to.” Transcript at 43-44.

On remand, the ALJ should ask questions of the parties to develop the scope of the employer's ordinary sick leave policy and determine whether there existed any aspect of the policy allowing a person to use sick leave to cover an absence during which the person spent part of the day appearing in court. To this end, it may be useful to consult the sick leave for employee incapacitation policy referenced by the employer's witness at hearing and cited in documentation contained in EAB Exhibit 1. The ALJ should ask questions to determine when claimant made the sick leave request for February 7, 2023; what time on February 7, 2023 claimant's court appearance occurred versus when on that date claimant's appointment with the veteran's service officer was scheduled; how much time claimant dedicated to the court hearing that day including preparation and waiting for his case to be heard; why claimant took the entire day off on February 7, 2023 to cover the court hearing and veteran's service officer appointment; whether the court hearing was scheduled for February 7, 2023 first and claimant made the veteran's service officer appointment for the same day afterward; whether claimant ever rescheduled the appointment with the veteran's service officer; and why claimant did not use a different type of leave, such as vacation leave or personal time, to cover either the court hearing or veteran's service officer appointment on February 7, 2023. Moreover, at hearing, the employer's witness testified that the employer's Office of Inspector General contacted the VA and learned that claimant had never received treatment there. Transcript at 18. On remand, the ALJ should ask questions to develop this testimony further, and to that end, it may be helpful to consult any relevant investigative materials contained in EAB Exhibit 1.

Third, with respect to whether claimant violated an expectation to be honest and truthful by falsely stating to K.K. and M.T. that he was hospitalized on January 3, 2023, at hearing, when asked if claimant violated an employer expectation to be honest at all times, K.K. testified "that's part of it." Transcript at 23. K.K. also described policy 66516 relating to behavior and personal habits as imposing a duty to conduct oneself in "a manner that reflects . . . favorably on . . . the Postal Service" and that "when [claimant] requested leave and was incarcerated" that was "reflecting unfavorably." Transcript at 24. Claimant expressed apparent agreement that the employer expected employees to be honest and engage in conduct that reflected favorably on the employer. Transcript at 40.

However, the parties disagreed as to whether claimant violated this expectation. K.K. testified that when claimant returned to work on January 4, 2023, claimant falsely told her and M.T. that he was hospitalized on January 3, 2023, could not call the employer that day because he did not have his phone, and verbally requested FMLA sick leave to cover the absence. Transcript at 11-12, 50-51. Conversely, claimant testified that he did not recall telling K.K. and M.T. that he had been hospitalized on January 3, 2023. Transcript at 31. Claimant testified that he had not talked with them on that occasion about his mid-December 2022 hospitalization either, but posited that K.K. and M.T. must have been remembering a time claimant had a conversation with M.T. and S.N. shortly after mid-December 2022 about a time he was hospitalized on December 18, 2022. Transcript at 32-33, 56-57.

On remand, the ALJ should develop the record on these points and evaluate the contrasting accounts in light of any substantiating testimony offered by additional witnesses at the remand hearing as well as any relevant investigative materials contained in EAB Exhibit 1, which includes interview accounts of K.K., M.T., and S.N. regarding what claimant allegedly stated or was overheard stating when he returned to work on January 4, 2023.

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 connected with work, Order No. 23-UI-240868 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-240868 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: January 5, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-240868 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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