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

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0867

Reversed & Remanded

PROCEDURAL HISTORY: On November 7, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct, disqualifying claimant from receiving benefits effective October 13, 2024 (decision # L0007112424).[1] Claimant filed a timely request for hearing. On December 16, 2024, ALJ Ensign conducted a hearing, and on December 19, 2024, issued Order No. 24-UI-277385, affirming decision # L0007112424.[2] On December 23, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on December 23 and 26, 2024. EAB did not consider claimant's December 23, 2024, argument when reaching this decision because he did not include a statement declaring that he provided a copy of the argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Additionally, both arguments 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 December 26, 2024, argument to the extent it was based on the record.

The parties may offer new information, such as the new information contained in claimant's 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

[1] Decision # L0007112424 stated that claimant was denied benefits from October 27, 2024, to October 25, 2025. However, as decision # L0007112424 found that claimant was discharged on October 17, 2024, the decision should have stated that claimant was disqualified from receiving benefits beginning Sunday, October 13, 2024, and until he earned four times his weekly benefit amount. *See* ORS 657.176.

[2] Order No. 24-UI-277385 stated that claimant was disqualified from receiving benefits effective October 27, 2024. Order No. 24-UI-277385 at 4. However, as the order under review found that claimant was discharged on October 17, 2024, the October 27, 2024, date is presumed to be an error.

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) Organic Materials Review Institute employed claimant as their marketing manager from October 2021 through October 17, 2024. Claimant reported directly to the employer's deputy director.

(2) The employer expected claimant to keep his supervisor updated on all of claimant's projects and to notify the supervisor (the deputy director) if any emergencies relating to claimant's projects arose. Additionally, the employer expected claimant to submit drafts of the organization's general-audience newsletters to the supervisor for review prior to publication. Claimant understood these expectations. Claimant typically kept his supervisor updated on the progress of his projects via his weekly meetings with her, and by sending her emails with updates.

(3) In February, March, August, and September 2024, the employer had discussions with claimant regarding the quality of his work. On October 3, 2024, the employer placed claimant on a performance improvement plan (PIP) that required claimant to improve on a number of areas of his performance, including his "technical skills and ability, quality of work, and decision making." Transcript at 6. The PIP required claimant to make these improvements between October 3 and December 2, 2024. On October 7, 2024, claimant signed an acknowledgement of the PIP's requirements.

(4) Prior to October 2024, claimant began working with another organization (CABI) on the launch of a website that would function as a collaborative effort between the two organizations. By October 2024, the project was progressing as planned, and claimant felt confident that the website would be able to launch on time. Based on this understanding, claimant drafted a newsletter that was "very upbeat and very positive announcing [the] CABI partnership," and submitted it to his supervisor for review. Transcript at 20. As drafted, the newsletter contained information about the launch that claimant knew to be incorrect at the time, as it did not acknowledge issues that remained to be solved prior to launch. However, based on his assessment of how the launch was progressing, claimant was confident that the issues would be solved within 48 hours of when he drafted the newsletter, and that the information would therefore be correct at the time of publication. Because of how busy the employer's organization was at the time, claimant believed that it would be preferable to submit the newsletter draft as written, as opposed to omitting the information and then adding it back in once it proved to be correct. Claimant also believed that, should the information in the draft prove incorrect, there would be enough time prior to launch to correct the information in the newsletter.

(5) Around the same time that claimant completed the newsletter draft and submitted it for review, CABI launched the website without consulting claimant or anyone else at the employer's organization. At launch, the website contained significant errors. On the morning of October 8, 2024, claimant learned of the unexpected launch and discovered the errors on the website and notified the employer's executive director, director of technical services, and manager of the information technology (IT) department of what had occurred. Claimant did not notify his supervisor at that time, or at the weekly check-in meeting scheduled for that afternoon, because she was not particularly involved in the project, and claimant therefore believed that she would not be able to help address the issues with the launch. Nevertheless, shortly after the check-in meeting, claimant's supervisor learned of these issues from the executive

director. After learning of the issues with the website launch, claimant's supervisor instructed claimant to take down the website, which he did later that afternoon. Claimant also made sure that the newsletter was not published with the now-inaccurate information, and contacted the press to notify them of a delay in the launch of the website.

(6) On October 17, 2024, the employer discharged claimant because he had failed to notify his supervisor of the issues with the website launch, and because he had included information in the newsletter that proved to be inaccurate, both of which the employer felt violated the terms of the PIP.

CONCLUSIONS AND REASONS: Order No. 24-UI-277385 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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant because he had failed to notify his supervisor of the issues with the website launch, and because he had included information in the newsletter that proved to be inaccurate, both of which the employer felt violated the terms of the PIP. The order under review determined that in addition to these reasons, the employer also discharged claimant because he "did not follow his supervisor's directions on how to address the situation." Order No. 24-UI-277385 at 3. This determination was based on the following finding:

> When claimant's supervisor found out about the issues, she directed claimant to shut down the website and project launch immediately. Claimant did not immediately shut the launch down as he had been directed. Claimant waited several hours, as he felt that he would be able to correct the situation. Claimant hoped to have the launch go through as planned. When that was not possible, he shut down the site and the launch.

Order No. 24-UI-277385 at 2. This finding is not supported by the record as developed, which shows only that claimant's supervisor asked him to take down the website on the afternoon of October 8, 2024, and that he did so during the same afternoon. *See* Transcript at 14. Likewise, the record as developed shows only that the employer discharged for the draft newsletter with incorrect information and the failure to notify his supervisor about the issues with the website launch. *See* Transcript at 5, 18–19. On remand, the ALJ should inquire as to whether claimant failed to take down the website in a timely manner after being instructed to do so; if so, whether this was a reason for discharge; and, if so, whether claimant's conduct here constituted a willful or wantonly negligent violation of the employer's expectations.[3]

Regarding claimant's inclusion of incorrect information in the newsletter draft, the order under review concluded that claimant "submitted a draft of an internet newsletter to be published that day which included information which he knew to be incorrect at that time," and that claimant's actions in doing so were at least wantonly negligent. Order No. 24-UI-277385 at 3. The record does not support these findings and conclusion. Instead, the record shows that claimant included information in the newsletter draft which he had reason to believe would be accurate at the time that it was published, that he submitted the draft for review with sufficient time to revise or correct it if the information proved to be inaccurate, and that he acted as such because he believed that doing so would most likely be the most efficient way of proceeding. As such, the employer has not met their burden to show that claimant's inclusion of potentially-incorrect information in the newsletter draft constituted a willful or wantonly negligent violation of their expectations.

However, claimant's failure to notify his supervisor of the issues with the website constituted a willful or wantonly negligent violation of the employer's expectations. At hearing, claimant testified that he understood that the employer expected him to keep his supervisor updated on his projects, and that the employer expected him to notify his supervisor "if there was an emergency." Transcript at 22. Claimant

[3] To the extent that claimant failed to timely take down the website and was discharged, in part, for this reason, the record indicates that any such failure should be considered part of the same occurrence as claimant's failure to notify his supervisor of the issues with the website. *See Perez v. Employment Dept.*, 164 Or. App. 356, 365, 992 P2d 460 (1999); *MacKillop v. Employment Dept*., 172 Or App 207, 18 P3d 461 (2001).

suggested in his testimony that the website launch was not an emergency. Transcript at 22. Claimant also testified that he did not initially notify his supervisor about the issue because he was too busy trying to manage the situation, and because he felt that, as she was not particularly involved in the project, she "could not give [claimant] direction or advice" on how to proceed. Transcript at 21–23. Claimant's explanation here is unconvincing.

Although the record does not define what would have constituted an "emergency" in the context of claimant's work, it is reasonable to infer that a situation like the website launch, which apparently required an expedited response and notice to several members of upper management, was sufficiently urgent that claimant either knew or should have known that the employer would have expected him to notify his supervisor. Thus, claimant's failure to notify his supervisor of the website issue violated the employer's expectations. Further, while claimant suggested that he was unable to notify his supervisor because of how busy he was, the record shows that claimant regularly kept his supervisor updated on his projects, including via email, and that he also participated in a meeting with her that afternoon. The record also shows that claimant had time to notify the employer's executive director, director of technical services, the manager of IT department of what had occurred. Therefore, claimant more likely than not had sufficient opportunity to notify his supervisor of the website issues, and knew that he was expected to do so, but chose not to because he felt, essentially, that she would not be helpful in the matter. Claimant therefore violated the employer's expectation with at least wanton negligence.

While claimant's failure to notify his supervisor of the issue with the website was a willful or wantonly negligent violation of the employer's expectations, the record does not show that claimant's failure to do so exceeded mere poor judgement under the provisions of OAR 471-030-0038(1)(d)(D). As such, claimant's conduct here may have been an isolated instance of poor judgment. However, further information is necessary to determine whether claimant's conduct was isolated, and not a repeated act or pattern of other willful or wantonly negligent behavior. While the employer's witness outlined at hearing the broad bases for the issuance of the PIP that they felt claimant's conduct had violated, the record lacks any information regarding claimant's conduct that led to the issuance of the PIP or any other related disciplinary proceedings. On remand, the ALJ should develop the record to show what specific conduct led to the issuance of the PIP, how, if at all, such conduct violated the employer's expectations, and, if so, whether claimant's prior violations of the employer's expectations were done willfully or with wanton negligence.

Finally, the record as developed lacks sufficient detail as to both the technical nature of the work that claimant performed for the employer, and a clear timeline of the events that led directly to claimant's discharge. On remand, the ALJ is advised to obtain a foundational context for these events, and to determine, to a reasonable degree of specificity, when the events material to this work separation occurred.

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, or an isolated instance of poor judgment, Order No. 24-UI-277385 is reversed, and this matter is remanded.

DECISION: Order No. 24-UI-277385 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: January 24, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-277385 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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