EO: Intrastate
BYE: 01-Feb-2025

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0184

Reversed & Remanded

PROCEDURAL HISTORY: On December 17, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving benefits from November 17, 2024, through February 1, 2025 (decision # L0007906996). Claimant filed a timely request for hearing. On February 24, 2025, ALJ Murray conducted a telephone hearing at which claimant initially appeared but was disconnected before the close of testimony. On February 27, 2025, ALJ Murray issued Order No. 25-UI-284415, modifying decision # L0007906996 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective September 29, 2024. On March 19, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of the statement claimant included with his application for review, has been marked as EAB Exhibit 1, and provided to the parties with this decision. Any party that objects to EAB taking notice of this information must send their objection to EAB in writing, stating why they object, within ten days of EAB mailing this decision. OAR 471-041-0090(2). Unless EAB receives and agrees with the objection, the exhibit will remain in the record.

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record. Claimant was unable to offer this information during the hearing because he was disconnected from the hearing and unable to reconnect. However, because this matter is being remanded for another hearing, claimant may offer the information into evidence at the remand hearing. EAB therefore did not consider the new information. EAB considered any parts of claimant's argument that were based on the hearing record.

The parties may offer new information, such as the additional information in claimant's written argument, 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) Boardman Foods, Inc. employed claimant as a warehouse worker in their onion-processing facility from February 8, 2024, through early October 2024. Claimant's shifts were typically scheduled to start at 4:30 a.m.

(2) The employer maintained an attendance policy that required employees to notify the employer prior to the start of a scheduled shift if they were going to be absent or late for that shift. Claimant was aware of this requirement. The policy also considered an employee to have quit if an employee had more than two consecutive days in which they failed to report for their shift or notify the employer of the absences.

(3) On September 28, 2024, claimant was scheduled to work at 4:30 a.m. but missed his shift because he was ill and had taken cold medicine the night before that caused him to oversleep. When he woke up at approximately 7:00 a.m. that day, claimant contacted the employer and notified them that he would be absent.

(4) On October 1, 2024, one of the employer's human resources (HR) representatives called claimant into the HR office to discuss six alleged attendance violations that had appeared on claimant's time records for August 2024. The meeting was disciplinary in nature, and was intended to reiterate to claimant that he was required to adhere to the employer's attendance policy. During the meeting, claimant took issue with two of the alleged attendance violations, occurring on August 24 and 25, 2024. Claimant therefore refused to sign the written discipline form that the employer had prepared for the meeting. In response, the HR representative told claimant to go home early for the day and report to a meeting with the HR manager at noon the following day instead of reporting for his regular shift at 4:30 a.m. Claimant did not work another shift for the employer after October 1, 2024.

(5) Claimant did not appear for the October 2, 2024, meeting. On October 4, 2024, claimant arrived at the employer's HR offices to speak to the HR manager. Based on what transpired that day, the employer determined that claimant had separated from employment.

(6) On February 24, 2025, ALJ Murray convened a telephone hearing on decision # L0007906996. Claimant and witnesses for the employer appeared and testified. However, while claimant was able to provide testimony during direct examination, he was not able to either cross-examine the employer's witnesses or provide rebuttal testimony because he was disconnected from the hearing before the close of testimony. Transcript at 21. After waiting approximately 10 minutes for claimant to reconnect, the ALJ proceeded with taking testimony from the employer's witnesses without claimant present. Transcript at 22.

(7) After being disconnected from the hearing, claimant tried to call back into the hearing line "several times," but was "not able to reenter the hearing [because he] was put on hold every time." EAB Exhibit 1 at 1.

CONCLUSIONS AND REASONS: Order No. 25-UI-284415 is set aside and this matter remanded for further development of the record.

Claimant's appearance at hearing. Although claimant initially appeared at the hearing and gave testimony on direct examination, he was disconnected without being able to cross-examine the employer's witnesses or provide rebuttal testimony. Additionally, the statement claimant included with his application for review shows that he made a good-faith effort to rejoin the hearing, but was unable to do so because he was "put on hold every time." EAB Exhibit 1 at 1. Because claimant was not able to fully present his case at hearing, he was not given a reasonable opportunity for a fair hearing, and there was not a full and fair inquiry into the facts necessary for consideration of whether claimant work separation from the employer was disqualifying. Order No. 25-UI-284415 therefore is set aside and this matter remanded for further development of the record, as set for below.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The parties offered conflicting accounts regarding the nature of the work separation. At hearing, claimant testified that he was discharged, and that the employer gave him paperwork indicating that they had discharged him due to violations of their attendance policy. Transcript at 5–6. The employer's witnesses, however, offered varying accounts of the work separation, at times characterizing it as either a discharge or a voluntary quit. For instance, the employer's HR manager testified that "the official document that we processed states termination, involuntary due to attendance." Transcript at 12. The same witness then testified that the final incident leading to the discharge was a meeting on October 4, 2024, but that claimant said during that meeting "that he was not interested in working with [the employer]. And that he was leaving and quitting." Transcript at 12. She also testified that claimant had been expected to come to the meeting scheduled for October 2, 2024, but had failed to appear for the meeting, and that, as a result, the employer "assumed" claimant was quitting. Transcript at 14.

Further, in response to the question of whether the employer would have allowed claimant to continue working if he had not told them that he was quitting on October 4, 2024, the HR manager first testified that such a decision would be upper management's to make, and then testified that the employer would *not* have allowed claimant to return to work "if [they] have evidence and facts that he was quitting and processed termination." Transcript at 22–23. In response to the question of whether the employer would have allowed claimant to continue working if he had appeared for the October 2, 2024, meeting, the HR manager testified that they most likely would not have discharged him in such an instance because the purpose of that meeting was merely to review the disciplinary action of the previous day. Transcript at 25.

Despite the above testimony, the order under review reasoned that if claimant had attempted to return to work "it would have been a decision for management and the employer would likely not have allowed him to continue working for an additional period of time," and that the employer therefore discharged claimant. Order No. 25-UI-284415 at 3. The record as developed does not support this conclusion, and further inquiry is necessary to determine whether claimant was discharged or voluntarily quit.

On remand, the record first should be developed to determine when the work separation actually occurred. Given all of the above testimony, it appears that it most likely occurred either on October 2,

2024, when claimant did not appear at the meeting scheduled for that day, or October 4, 2024, when claimant arrived to speak to the HR manager. Regardless, the relevant inquiry here is which party first decided that they were no longer willing to continue the employment relationship for an additional period of time, and when that occurred. For instance, the record on remand could show that claimant failed to appear for the October 2, 2024 meeting because he had decided that he was no longer interested in working for the employer, that he made that decision upon arrival on October 4, 2024 when he spoke to the HR manager, that he never made any such decision and the employer merely assumed that he had decided to quit based on his failure to appear at the earlier scheduled meeting, or that the employer discharged claimant for failing to appear at that meeting.

To support the determination of whether claimant quit or was discharged, inquiry should focus on actions and statements of the individuals involved at the time the relevant events occurred, as necessary to determine each individual's intent. For example, given the HR manager's testimony that claimant had told her that he was quitting, claimant should be given the opportunity to rebut this testimony. Another of the employer's witnesses, an HR representative, testified that claimant had returned to the office after their initial meeting on October 1, 2024, returned his keys to her, and told her that he was not interested in returning to work. Transcript at 28. Claimant should likewise be given the opportunity to rebut this testimony. The record should also be developed to determine why claimant did not appear for the October 2, 2024, meeting, what led claimant to believe that the employer had discharged him, and any other factors that influenced either of the parties to either conclude that the employment relationship had been severed or to decide that they were no longer willing to continue the employment relationship.

Discharge. 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). "'[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 because he failed to appear at the scheduled meeting on October 2, 2024. Order No. 25-UI-284415 at 5. This, admittedly, appears to be the most likely reason for discharge if the record on remand shows that the employer actually did discharge claimant. However, in light of the considerable ambiguity in the record, as discussed above, further inquiry is necessary to determine what in particular caused the employer to become unwilling to employ claimant for an additional period of time—i.e., the proximate cause of the employer's decision to discharge claimant.

Further inquiry is also necessary to determine whether the proximate cause of claimant's discharge was a willful or wantonly negligent violation of the employer's standards of behavior, and, if so, whether it

was an isolated instance of poor judgment.[1] The order under review concluded that claimant's failure to report to the October 2, 2024 meeting was a willful violation of the employer's attendance policy, and that it was not an isolated instance of poor judgment, since "his August 2024 timecard showed him having been regularly late or absent without permission nearly every day he was scheduled[.]" Order No. 25-UI-284415 at 5.

Regardless of what the final incident leading to discharge was, however, a finding that claimant had engaged in similar previous behavior is insufficient to determine that the final incident was not an isolated instance of poor judgment. Rather, the record must show that such prior instances were themselves willful or wantonly negligent violations of the employer's standards of behavior, or that claimant had otherwise engaged in a pattern of other willful or wantonly negligent behavior. Therefore, the record on remand should be developed to show, for each prior alleged violation of the employer's policy or expectations, whether such alleged violation was done willfully or with wanton negligence.

Voluntary Quit. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Because claimant was not present for all of the hearing, claimant was unable to provide a rebuttal to the employer's assertions that he quit or, if he did quit, give an explanation as to why he quit. Therefore, if the record on remand shows that claimant quit, inquiry should be made as to why claimant chose to do so, and whether it was the result of a situation of such gravity that he had no reasonable alternative but to quit.

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's work separation was disqualifying, Order No. 25-UI-284415 is reversed, and this matter is remanded.[2]

DECISION: Order No. 25-UI-284415 is set aside, and this matter remanded for further proceedings consistent with this order.

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[1] *See* OAR 471-030-0038(3)(b); OAR 471-030-0038(1)(d).

[2] Department records show that on March 3, 2025, following the issuance of Order No. 25-UI-284415, the Department issued decision # L0009551769, seemingly addressing the same work separation already adjudicated in decision # L0007906996. Claimant filed a request for hearing on decision # L0009551769. While a hearing was initially convened on decision # L0009551769, the ALJ determined that decision # L0009551769 was issued due to agency error, declined to hear the matter further, and noted that the appeal on decision # L0007906996 was currently before EAB.

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

DATE of Service: April 23, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 25-UI-284415 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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