

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

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0432

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 15, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 163914). Claimant filed a timely request for hearing. On February 3, 2014, ALJ S. Lee conducted a hearing, and on February 28, 2014 issued Hearing Decision 14-UI-11401, reversing the Department's decision. On March 20, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer included new evidence that was not part of the hearing record. The evidence consisted of an e-mail from the chief enforcement officer of the Oregon Insurance Division regarding claimant's disclosures of her misdemeanor convictions. The employer should have been aware, in the advance of the hearing, that information regarding claimant's disclosures to the Insurance Division would be relevant. The employer failed to show, however, that any factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing, EAB did not consider it when reaching this decision. *See* ORS 657.275(2); OAR 471-041-0090 (October 29, 2006). EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) La Pine Insurance Center employed claimant from approximately August 15, 2012 until October 21, 2013. Claimant first worked as a receptionist and later progressed to the

position of licensed insurance agent. As a licensed agent, claimant was required to pass a background check by the Insurance Division of the Oregon Department of Consumer and Business Services.

(2) The employer expected claimant to provide honest information in response to its questions and the questions of the Insurance Division about any criminal convictions she had. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On October 4, 1991, claimant gave a false address when she was questioned by a police officer. Claimant received a citation and paid a fine and, although she was not aware of it, was convicted of the misdemeanor crime of giving false information to a police officer. Claimant was convicted under her maiden name of "Richarda Newburg." On September 12 and September 19, 2001, claimant wrote separate checks on a bank account that did not have sufficient funds to cover them. Claimant received citations and paid the funds owed on these checks. Although claimant was not aware of it, she was convicted of two second degree theft in the second misdemeanor crimes arising from negotiating these bad checks. Claimant was convicted of these two misdemeanor crimes under her married name of "Richarda Clinkscales." On May 20, 2002, claimant used her roommate's identity, and was later convicted of the felony crime of identity theft. Claimant was convicted of this crime under a variation of her married name, "Kara Clinkscales." Sometime before August 2012, claimant obtained a court judgment expunging the felony crime of identity theft from her criminal history.

(4) In August 2012, claimant applied for a position with the employer and gave her name as "Cara Tapken," which was the name she had assumed after her divorce. The employer did not ask claimant to complete an application form and relied on claimant's resume and its interview of her to make a hiring decision. At claimant's interview in August 2012, the employer's co-owner told claimant that the employer wanted to train her to become a licensed insurance agent and asked her if there was anything in her background that would pose a problem during the Insurance Division's licensing investigation. Claimant told the co-owner there was not. The co-owner conducted a check of claimant's background using the name "Cara Tapken" and did not discover any criminal convictions. Claimant gave her formal name as "Richarda Tapken" when she completed various tax forms for the employer after she was hired.

(5) In December 2012, the employer decided it would pay for classes to enable claimant to train to become a licensed property and casualty insurance agent. On December 31, 2012, one of the employer's co-owners sent claimant an email about the Insurance Division's licensing process and in that email stated that a criminal background check was required before licensing. The email referred to the employer's financial commitment if it paid for claimant's training, and stated, "I want to be sure that there is nothing in your background that will be a stumbling block in your licensing process." Exhibit 1 at 3. Claimant did not indicate that she thought that anything in her background might interfere with her ability to become licensed.

(6) Sometime after December 31, 2012, claimant started training for the examination she needed to take to become a licensed insurance agent. Claimant also filed an application to obtain her license with the National Insurance Producer Registry (NIPR), which is the clearinghouse agency that processes applications for insurance licenses for the Oregon Insurance Division. One of the questions on the application that claimant completed asked her "Have you ever been convicted of or currently charged with committing a misdemeanor or felony?" and claimant wrote "No." Transcript at 6, 47. However, claimant attached an explanation page to the application disclosing that she had been convicted of

misdemeanor crimes in 1991 and 2001 and describing the circumstances under which those convictions occurred. Exhibit 2 at 3; Transcript at 46, 47, 48. In August 2013, claimant had gone to the local courthouse to review information about herself in the Oregon Judicial Information Network (OJIN) and had discovered that these convictions appeared as part of her criminal background. Exhibit 2 at 3; Transcript at 53. On September 3, 2013, the Oregon Insurance Division issued claimant a license as an insurance agent.

(7) Sometime in October 2013, one of the employer's insurance customers contacted the employer to inform it that claimant was a "convicted felon" and enclosed an article from a local newspaper describing the arrest of a "Richarda Clinksdale." Transcript at 8. The employer immediately commissioned a background report on Richarda Clinksdale from an online company. The report showed that claimant had been known by various names since 1990 and had been cited or arrested on a number of occasions for various crimes, including the felony crime from 2002 she had expunged, the misdemeanor crimes from 2001 she had disclosed in the addendum to the application submitted to NIPR and miscellaneous other misdemeanor crimes and traffic infractions. Exhibit 3 at 7-12. The report did not indicate if claimant was convicted of any of the crimes and infractions which it listed. The employer's co-owner called the Oregon Insurance Division to inform it of what the co-owner had learned about claimant's background. On October 17, 2013, an enforcement officer with the Insurance Division conducted a background investigation of claimant using OJIN and determined that claimant had three misdemeanor convictions, one from 1991 and two from 2001.

(8) On October 21, 2013, the chief enforcement officer from the Oregon Insurance Division met with claimant and one of the employer's co-owners. Claimant explained that she had assumed different names because of her changing marital status. Claimant explained that her felony conviction had been expunged and that she had disclosed her misdemeanor convictions in the attachment to her application to become a licensed insurance agent.

(9) On October 21, 2013, the employer discharged claimant for failing to disclose to the employer that she had criminal convictions and for failing to disclose those convictions in her application to the Oregon Insurance Division. On approximately November 27, 2013, claimant surrendered her insurance license to the Insurance Division.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant knew as a matter of common sense that the employer expected her to refrain from intentionally concealing information about her criminal background in response to direct inquiries from the employer or the Oregon Insurance Division. The issue is whether claimant's failure to disclose her criminal convictions was accompanied by the requisite state of mind. With respect to claimant's expunged felony

conviction, she was entitled by law not to disclose it even if directly asked. *See* ORS 137.225(3) (once a crime is expunged, the person shall be deemed not to have been previously convicted of it); *Bahr v. Statesman Journal*, 51 Or App 177, 624 P2d 664 (1981) (once a crime is expunged, a person is entitled by law to deny that the conviction occurred). Because claimant was authorized by statute not to reveal her felony conviction, her failure to disclose it either to the employer or the Insurance Division was not misconduct.

Claimant's misdemeanor convictions, which were not expunged, stand on a different footing. ORS 744.013(1)(e) and ORS 744.074(f) state that the Insurance Division may refuse to issue or suspend an insurance agent's license if the applicant or agent has been convicted of a misdemeanor crime involving dishonesty or a breach of trust. The only evidence in the record is that the employer asked claimant if there were "stumbling blocks" to her licensing. Transcript at 7, Exhibit 1 at 1, 3. It cannot be assumed that, when the employer made its inquiry of her, claimant was aware that the checks she bounced in 2001 would be "stumbling blocks" to the licencing process. Moreover, claimant's testimony appeared sincere that she did not think the bounced checks from ten years before had resulted in criminal convictions or that giving false information to a police officer over twenty years before had resulted in a criminal conviction. Transcript at 45, 50. Because there is no evidence in the record showing that, more likely than not, claimant was aware that these incidents had resulted in misdemeanor convictions at the time the employer made its inquiry of her, her failure to disclose those convictions at that time was not intentional concealment.

Although claimant answered "no" to the question on the Insurance Division's application asking whether she had ever been convicted of any crimes, she included with that application a separate addendum listing and explaining the circumstances of the misdemeanor convictions from 1991 and 2001 that she had discovered on OJIN in August 2013. *See* Exhibit 2 at 3. This disclosure suggests that claimant was not intentionally concealing the existence of these convictions, but trying to minimize them. While the manner in which claimant answered the question might on superficial review appear to have been dishonest, the attached addendum demonstrates that claimant was in fact disclosing these convictions as part of that application. Given the disclosure in the addendum, the employer did not meet its burden to show that claimant intentionally concealed her misdemeanor convictions from the Insurance Division.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-11401 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: April 18, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.