

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1696

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 15348). Claimant filed a timely request for hearing. On October 14, 2014, ALJ Wiperman conducted a hearing, and on October 15, 2014 issued Hearing Decision 14-UI-26391, affirming the Department's decision. On October 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sometime before February 2014, claimant began performing home services for adult clients through a program sponsored by the Oregon Department of Human Resources (DHS).

(2) As a condition of claimant's continued work as a provider through the DHS program, state law required claimant to maintain the necessary legal authority to work for DHS clients, which included passing a criminal history background check and being approved as fit to provide services by the DHS Background Check Unit (BCU). These requirements were published in Oregon statutes and regulations and claimant was reasonably aware of them.

(3) On February 17, 2014, claimant was providing in-home care services for a DHS client when he and the client had a loud argument. The client wanted claimant to leave her apartment and discontinue working. One of the client's neighbors called the police to investigate the altercation. When the police arrived, an officer instructed claimant to leave the premises. As a result of claimant's interactions that day, the police arrested claimant and charged him with the crimes of criminal trespass and resisting arrest. On March 14 or 15, 2014, claimant appeared in court and entered a plea of no contest to the charge of resisting arrest in return for which the charge of criminal trespass was dismissed.

(4) Sometime before July 3, 2014, DHS learned that claimant had been convicted of resisting arrest. Shortly thereafter, a DHS representative asked claimant to authorize a criminal history background check and claimant did so. On July 3, 2014, BCU notified DHS that claimant had not passed the criminal history background check and was not authorized to provide homecare services to DHS clients. At some later time, claimant was discharged as a DHS homecare worker because he no longer had the legal authorization to work through the DHS program.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment if claimant was discharged for misconduct. OAR 471-030-0038(3)(c) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved, so long as such failure is reasonable attributable to claimant. In this context, "wanton negligence" 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 his or her failure to maintain a necessary license, certification or other similar authority. OAR 471-030-0038(1)(c).

ORS 443.004 states, among other things, that DHS must complete a criminal records background check on all individuals who provide homecare to clients through a DHS program and sets out the crimes for which convictions will automatically disqualify an individual from working in such a program. DHS has delegated the responsibility to conduct such background checks to BCU. OAR 411-007-0210(9) (August 1, 2013). OAR 411-031-0040(8)(a)(B) (February 15, 2013) states that a homecare provider may only work through a DHS program if BCU has approved the worker after a background check, and OAR 411-031-0040(8)(a)(D) states that BCU may deny such approval if it determines that the worker has an "unacceptable criminal background." OAR 407-007-0280(2)(v) (August 1, 2011) states that a conviction for the crime of resisting arrest within ten years of the date that BCU conducts a background check may disqualify an a homecare worker from working through a DHS sponsored program if BCU determines, after performing a weighing test, that the worker is not fit to provide services through a DHS program. This statutory and regulatory framework establishes that maintaining authorization from BCU was necessary for claimant to continue working as a homecare provider, and that his failure to maintain this authority is properly adjudicated under OAR 471-030-0038(1)(c). Although claimant contended at hearing that he was not aware that a criminal history check would be performed or that a criminal conviction could result in the loss of his authority to perform homecare work through DHS, these requirements are clearly set out in Oregon statutes and regulations that are published and publicly available. It is reasonable to impute to claimant an awareness of them.

At hearing, claimant asserted that his actions on February 17, 2014 did not constitute resisting arrest or criminal trespass and that the police overreacted in arresting him for, and charging him with these crimes. Audio at ~14:33, ~16:05. However, claimant's plea of no contest to the charge of resisting arrest was sufficient to establish, more likely than not, that he committed that crime. ORS 135.345 (plea of no contest treated as a conviction of the offense to which the plea was entered); *Jacqueline A. Linville* (Employment Appeals Board, 12-AB-2665, October 23, 2012) (although claimant disputed at hearing that she was driving under the influence of intoxicants, her plea of no contest to the charge of DUII established more likely than not that she had driven while intoxicated). Claimant knew or should have

known that his behavior that gave rise to the criminal charge of resisting arrest, and his subsequent plea of no contest to that charge, would probably result in his failure to maintain the legal authority necessary to work as a homecare provider through a DHS sponsored program. Claimant's failure to maintain the legal authority to continue to work as a DHS homecare worker was reasonable attributable to his behavior. Because claimant was aware of his behavior when he took the actions that ultimately led to his plea to the crime of resisting arrest, claimant acted with a conscious indifference to the consequences of his actions. Claimant's behavior was wantonly negligent.

Claimant's loss of the authority to provider services as a homecare provider cannot be excused from constituting misconduct under OAR 471-30-0038(3)(b) as an "isolated instance of poor judgment" or as a "good faith error." Since 2004, the Department has consistently interpreted OAR 471-030-0038(3)(c) to define the loss of the legal authority to perform an occupation as a type of misconduct per se that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). See December 27, 2004 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling under OAR 471-030-0038(3)(c). Since the exculpatory provisions cannot be applied to excuse claimant's behavior, it was misconduct¹.

Claimant was discharged for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-26931 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: December 8, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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¹ See also *Matthew B. Freeman* (Employment Appeals Board, 05-AB-0049, January 4, 2005) (so stating and referring to Byerley letter); *Shannon M. Picklesimer* (Employment Appeals Board, 05-AB-0050, February 7, 2005 (same)); *Cassie D. Ardito* (Employment Appeals Board, 05-AB-0500, April 11, 2005); *Michael E. Heilbrun* (Employment Appeals Board, 07-AB-0405, March 8, 2007); *Dennis L. Orr* (Employment Appeals Board, 08-AB-0580, April 10, 2008); *Ronald D. Lapp* (Employment Appeals Board, 09-AB-2437, August 11, 2009); *Steven A. Simpson* (Employment Appeals Board, 11-AB-0602, March 10, 2011).