

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0774

Affirmed

PROCEDURAL HISTORY: On April 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153157). The employer filed a timely request for hearing. On May 26, 2016, ALJ Seideman conducted a hearing, at which claimant failed to appear, and on June 16, 2016, ALJ Holmes-Swanson issued Hearing Decision 16-UI-61821, affirming the Department's decision. On June 27, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Westmont Living, Inc. employed claimant as a personal care attendant from November 30, 2015 to December 23, 2015.

(2) Under Oregon law, individuals with certain criminal histories are disqualified from working as personal care attendants. In order to work as a personal care attendant, claimant was required to pass a criminal background check through the Oregon Department of Human Services (DHS).

(3) The employer required claimant to complete an employment application and "confidential conviction report" before hire. The confidential conviction report required claimant to answer the following questions:

- Have you ever been convicted of any felony offense?
- Have you ever been convicted of a sex, alcohol or drug related charge?
- Are charges pending against you for a sex, alcohol or drug related incident?
- Are there any criminal charges pending against you as of this date? (Omit minor traffic violations.)

Exhibit 2. The confidential conviction report included a certification that stated, in pertinent part, "failure to complete this form or to provide the requested information may disqualify your [*sic*] from

selection or cause your dismissal from employment . . . I certify that the above is true and further understand it will be subject to proper investigation." *Id.*

(4) Claimant answered "no" to all of the questions. She signed the document to certify that her answers were true. Because claimant had answered "no" to the criminal history questions, the employer hired claimant and scheduled her to work pending completion of the criminal background check.

(5) On December 23, 2015, DHS notified the employer that claimant had not passed her criminal background check. DHS did not notify the employer why claimant had failed. Claimant's failure to pass the background check disqualified her from working as a personal care attendant for the employer.

(6) On December 23, 2015, the employer contacted claimant to notify her of the DHS decision and to terminate claimant's employment. During claimant's discharge, claimant admitted to the employer that she had an arrest in her criminal history but that she did not know she had to report that to the employer. The employer concluded on the basis of claimant's admission that she had falsified her job application materials by answering "no" to the criminal history questions on the confidential conviction report.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. OAR 471-030-0038(3)(c) provides that the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation is misconduct, so long as the failure is reasonably attributable to the individual. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

To the extent the employer discharged claimant because her failure to pass the DHS criminal background check disqualified her from working as a personal care attendant, the employer did not prove misconduct. The employer did not know what kind of criminal history disqualified claimant from employment, did not know when it occurred, what the charges were, whether claimant was convicted of the charges, or whether whatever conduct claimant was arrested for was connected with work or reasonably attributed to claimant. In the absence of that sort of information, which the employer did not have at the time of the hearing, the record fails to show that claimant's disqualification from employment was misconduct.

To the extent the employer discharged claimant for falsifying a confidential conviction report by omitting mention of an arrest, the employer also did not prove misconduct. The form only required

claimant to report if she had been convicted of a felony or any charge related to sex, alcohol or drugs, or if she had any criminal charges pending against her, other than minor traffic violations, and did not specify what type of criminal charges were considered "minor traffic violations." The record fails to show that claimant was ever asked during her application process whether she had been arrested for any reason. The record contains no evidence about the reason for claimant's arrest, such as whether it was for something other than a minor traffic violation, resulted in a conviction for a felony, sex, alcohol or drug-related charge, or resulted in any criminal charges pending against her at the time she completed the confidential conviction report. In the absence of evidence that claimant was asked to report her arrest and failed to do so, that her arrest was for criminal charges pending as of the date she completed the form, or that the arrest led to a conviction of a felony, sex, alcohol or drug-related charge, claimant's failure to disclose her arrest to the employer during the application process did not amount to a falsification of the confidential conviction report or application, and was not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-61821 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: July 11, 2016

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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