

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0694

Reversed
Disqualification

PROCEDURAL HISTORY: On June 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 122402). The employer filed a timely request for hearing. On July 26, 2021 and August 12, 2021, ALJ Wyatt conducted a hearing, and on August 24, 2021 issued Order No. 21-UI-173257, affirming decision # 122402. On August 27, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Clackamas County employed claimant as a juvenile counselor from August 1, 1995 until April 21, 2021. Claimant was responsible for supervising youth who were on probation with the county's juvenile justice department.

(2) The youth under the county's jurisdiction were each assigned Juvenile Crime Prevention Risk Assessment scores ("JCP risk scores") that determined the level of intervention by the county that each individual youth needed. Transcript at 9. The JCP risk scores were calculated based on scoring a number of factors, some of which were "static" that "are never changed" during reassessments. Transcript August 12, 2021 at 31. A youth's JCP risk score was initially calculated at the time their case was initiated, and then reassessed once every six months or if a "significant event" required recalculation. Transcript July 26, 2021 at 11. Youths were placed in low, medium, or high risk categories based on their JCP scores. If a youth's JCP risk score was lower than it should have been based on the employer's established metrics, the youth could receive less support and intervention than they required. Claimant

knew and understood the employer's expectations regarding how JCP risk scores were calculated and the effect that they had on a youth's case.

(3) On July 21, 2020, two of claimant's colleagues "separately and independently" reported to the employer concerns about claimant's conduct. Exhibit 1 at 8. The first concern reported was that claimant had been inappropriately lowering JCP risk scores. The second concern reported was that claimant had engaged in a "lack of communication, collaboration, appropriate case management, and supervision" regarding a 14-year-old youth ("NHH7441") who was a victim of sex trafficking. Exhibit 1 at 9. Based on these reports, the employer placed claimant on administrative leave pending investigation.

(4) On December 22, 2020, claimant filed with the employer an ADA request for reasonable accommodation because his physician diagnosed him with mild cognitive impairment. Claimant believed that these impairments caused him to make mistakes such as entering case notes into the wrong case file. Claimant had not previously informed the employer of any such impairment.

(5) On March 1, 2021, the Clackamas County District Attorney's Office filed ten misdemeanor charges against claimant in connection with the allegations that he had lowered the JCP risk scores of youths with whom he worked.

(6) Based on the results of the investigation into claimant's conduct, the employer determined that, out of the 31 cases they audited, claimant had lowered without justification the JCP risk scores of 18 youths. In one case, claimant performed a reassessment ten minutes after an assessment had just been made for the youth. The employer concluded from this information that claimant had intentionally lowered the JCP risk scores, as lower scores—and, therefore, reduced risk categories—would result in less work for claimant. The employer also found that claimant had used an initial assessment form instead of the reassessment form, which "increased the likelihood of a lower and inaccurate risk assessment score [.]". Exhibit 1 at 9. Additionally, the employer concluded that claimant had engaged in a "pattern of non-responsiveness or delay in responsiveness and lack of collaboration in partners regarding [NHH7441's] case, minimizing the lethality of the youth's situation [.]". Exhibit 1 at 9–10. The employer also found additional concerns with claimant's work during the course of the investigation.

(7) On April 21, 2021, the employer discharged claimant based on their conclusions regarding the above allegations and the findings that resulted from the investigation.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

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) (September 22, 2020). 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).

The employer discharged claimant both because he had lowered the JCP risk scores of several youths and because of his handling of NHH7441’s case. At hearing, the employer’s witness testified that while both matters were “serious,” the lowering of the JCP risk scores was “one of the defining factors” in the decision to discharge claimant. Transcript July 26, 2021 at 8. Further, the lowering of the JCP risk scores resulted in criminal charges brought against claimant. For those reasons, it is reasonable to conclude that the main reason that the employer discharged claimant was the lowering of the JCP risk scores.

The order under review concluded that claimant’s lowering of the JCP risk scores was not misconduct because they “. . . may have resulted from claimant’s cognitive impairment diagnosed by a noted neurologist [.]” Order No. 21-UI-173257 at 3. The record does not support this conclusion. At hearing, the employer’s witness testified that “It’s not particularly easy” to change the scoring used to calculate JCP risk scores, that one would “have to have a pretty good idea of . . . which questions [in the scoring calculation] would lower a score,” and that making such changes, in the witness’s opinion, was “. . . not something that can be done haphazardly.” Transcript July 26, 2021 at 28–29.

Included in the hearing record is a letter from claimant’s neurologist dated March 25, 2021, which identifies claimant’s limitations in “. . . retaining long pieces of information, maintaining focus, and multitasking along with some memory loss.” Exhibit 4 at 3. Claimant did not testify as to whether or not

he lowered the youths' scores, though he testified generally that ". . . there was no false information and any information in error, was an error." Transcript August 12, 2021 at 16. However, claimant did not offer any specific evidence to show that the lowering of the JCP risk scores *was* an error. Further, claimant demonstrated no cognitive issues during the hearing, and, because he did not testify as to whether he had actually lowered the JCP risk scores, did not offer evidence that he had lowered the scores as a result of the cognitive issues. When viewed as a whole, including the repeated use of the wrong assessment form (which was likely to lower the resulting JCP risk score), the reassessment conducted 10 minutes after the initial assessment was completed, and the fact that claimant stood to gain a decreased workload by lowering the scores, the record does not show that claimant's conduct was the result of his cognitive impairments. Rather the record shows that, more likely than not, claimant lowered the scores intentionally. Therefore, the lowering of the scores was a willful disregard of the employer's standards of behavior.

Claimant's conduct cannot be excused as an isolated instance of poor judgement. First, the record shows that claimant's conduct occurred on multiple occasions, over time, and demonstrated a pattern of behavior, rather than an isolated or singular occurrence. Further, as the criminal charges filed against claimant show, the acts of lowering youths' JCP risk scores without justification may be unlawful conduct.¹ Finally, even if claimant's conduct was not unlawful, claimant's decision to intentionally lower JCP risk scores without justification, knowing that doing so could put the youths in question in jeopardy, indicates a level of dishonesty that would create an irreparable breach of trust in the employment relationship. Because claimant was discharged for a willful disregard of the employer's standards of behavior that was not an isolated instance of poor judgment, claimant was discharged for misconduct.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 18, 2021.

DECISION: Order No. 21-UI-173257 is set aside, as outlined above.

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

DATE of Service: October 6, 2021

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.

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

¹ Claimant was charged with multiple counts of Official Misconduct in the First Degree (ORS 162.415) and Tampering with Public Records (ORS 162.305). Exhibit 3 at 2-5.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits **for weeks ending September 4, 2021 and prior** as long as you were not eligible for other benefits during that time, and were unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA was an unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic. The program ended on September 4, 2021.

Visit <https://unemployment.oregon.gov> for more information, or to contact the Oregon Employment Department using the “Contact Us” form. You can also call 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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。

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.