

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0365

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective September 26, 2021 (decision # 175339). Claimant filed a timely request for hearing. On March 10, 2022, ALJ Roberts conducted a hearing, and on March 11, 2022 issued Order No. 22-UI-188437, reversing decision # 175339 by concluding that claimant's discharge was not for misconduct, and did not disqualify claimant from receiving benefits. On March 14, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that the information was material to EAB's determination. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

At hearing, the employer sought to introduce the same information—a ten-page document consisting of claimant's employment records—into the hearing record. Although the employer's representative confirmed that he had provided a copy of the document to claimant ten days prior to the hearing date, claimant stated that she had not received the documents despite checking for mail on a daily basis. Transcript at 38, 40. As such, the ALJ excluded the document from the hearing record over the employer's objection. Transcript at 39. However, the employer's representative stated that the employer's witnesses had covered in their testimony the material contained within the document, and the representative declined to ask further questions of either party's witnesses based on the contents of the document. Transcript at 38, 41.

EAB reviewed the contents of the employer's document. Because the information contained in the document was immaterial or unduly repetitious of evidence already in the record, the ALJ properly excluded the document under OAR 471-040-0025(5) (August 1, 2004). Further, even if the ALJ erred in excluding the document, because the ALJ provided the employer with an opportunity to testify as to the

contents of the document, the exclusion did not substantially prejudice the employer's rights. As such, to the extent that the ALJ erred in excluding the document, it did not, under OAR 471-0040-0025(5), preclude the ALJ from entering a decision in this matter.

FINDINGS OF FACT: (1) St. Mary's High School employed claimant as a residential administrator for the school's dormitory from August 7, 2021 until September 30, 2021.

(2) In 2003, when claimant was under the age of 18, claimant was charged with possession and delivery of a controlled substance. Claimant was later convicted of the charges as an adult, and served probation for the offenses. While claimant was eventually able to expunge the possession charge from her record, she was not able to expunge the delivery charge. Claimant disclosed these convictions on her pre-employment background check when she applied to work for the employer.

(3) Immediately prior to working for the employer, claimant worked as a residential counselor for a program funded by the Oregon Department of Human Services (DHS). As part of her work duties for that employer, claimant was required to drive clients to and from medical appointments.

(4) The required duties of the employer's residential administrator position included driving students between the dormitory, medical appointments, sports meets, and similar. Claimant was aware of this requirement at the time she applied and interviewed for the position, and believed that she would be eligible to drive students because she fulfilled similar duties in her previous position. However, on August 12, 2021, shortly after claimant began working for the employer, the employer received notice from the Oregon Department of Education (ODE) that based on the results of claimant's pre-employment background check, claimant's prior conviction barred her from driving students for the employer.

(5) After receiving the news that claimant would not be permitted to drive students for the employer, the employer met with claimant to discuss her position. The employer told claimant that they would change the requirements of the job to no longer require her to drive, and would instead assign another employee to work while claimant was on-shift and drive the students as needed. That arrangement persisted for about a month, during which time claimant continued her duties, and the other employee drove students as needed.

(6) On September 12, 2021, the other employee was injured in an on-the-job accident, and as a result could no longer drive. Thereafter, the employer assigned yet another employee to cover driving duties while claimant was on-shift. However, continuing to pay three employees to cover the duties of a single shift became cost-prohibitive for the employer. As a result, the employer discharged claimant on September 30, 2021 because she was not able to drive students. If the first replacement employee had not been injured on September 12, 2021, the employer "probably" would not have discharged claimant at that time. Transcript at 12.

CONCLUSIONS AND REASONS: Claimant was discharged, but 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. "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).

The employer discharged claimant because of a prior conviction that barred her from driving students and made her unable to perform the essential duties of the job. That bar notwithstanding, the employer permitted claimant to work for them in that role for nearly two months, accommodating her inability to drive students by assigning other employees to complete that duty. At hearing, one of the employer’s witnesses testified that they “probably” would not have discharged claimant on September 30, 2021 if not for the fact that the first employee they had assigned to drive for claimant was injured on the job. Transcript at 12. The same witness also testified that, following that injury, it became an “undue hardship” on the employer to have “multiple staff on duty at a time” in order to cover the school’s driving needs. Transcript at 8.

That testimony implied that, from September 12, 2021 through September 30, 2021, the employer kept all three employees—claimant, the injured employee, and the third employee who took over driving duties—on shift simultaneously, though only one of them could drive. It is not clear from the record why the employer was required to keep all three employees on shift at once, but regardless, the record shows that doing so put the employer in an untenable financial position. Thus, the actual cause that led the employer to discharge claimant was this change in fortune, set in motion by the other employee’s injury, which was not attributable to claimant. Therefore, to the extent that the employer discharged claimant because they could no longer afford to continue paying other employees to drive for claimant while she was on shift, the employer did not meet their burden to show that claimant was discharged for a willful or wantonly negligent disregard of the employer’s standards of behavior.

Further, to the extent that claimant’s prior conviction, which barred her from driving for the employer, was the proximate cause of her discharge, the employer has also not met their burden to show that the conviction constituted misconduct as that term is defined by applicable statute and rules. In order for a discharge to disqualify an individual from receiving benefits, the discharge must, per ORS 657.176(2)(a), be for misconduct connected with work. The conviction itself occurred many years before claimant ever established an employment relationship with the employer, and therefore was not “connected with work.”

Similarly, in order for an act or omission to be considered “misconduct,” it must be a willful or wantonly negligent violation of the standards of behavior, which an employer has the right to expect of an employee, or a willful or wantonly negligent disregard of an employer's interest. At the time that the conviction occurred, no employment relationship existed between claimant and the employer. Because the conviction did not take place during the course of the employment relationship, it was not a violation of the employer’s reasonable expectations. Likewise, because it can reasonably be inferred that claimant had no knowledge at the time of her conviction that she might one day work for the employer, the record

fails to show that the conduct leading to the conviction was a willful or wantonly negligent disregard of the employer's interests.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-188437 is affirmed.

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

DATE of Service: May 27, 2022

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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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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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