

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0436

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 19, 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 # 103752). Claimant filed a timely request for hearing. On March 11, 2022, ALJ Scott conducted a hearing, and on March 17, 2022 issued Order No. 22-UI-189026, affirming decision # 103752. On April 4, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Josephine County employed claimant as a Community Corrections Case Specialist lead from May 10, 2010 until October 1, 2021.

(2) As a result of claimant's job duties, claimant had access to information and databases that the general public could not access through the employer. Much of the information was confidential and was to be accessed and viewed only on a need-to-know, legitimate business reason, basis. Claimant was aware of the policy and understood it. Transcript at 21, 32.

(3) In the course of claimant's work, claimant was called upon to check the records of persons who were under supervision on parole or probation, including offenders that were not on her caseload, and relay that information to the requesting officers in the field. Claimant could be called upon to look this information up as part of her front office phone or window shifts. Claimant would also receive "hits" from law enforcement that would indicate a person was contacted in the field and, as part of her duties, claimant would pass those "hits" along to the appropriate parole or probation officer. If the person was supervised at another location, claimant would review the "hits" and then look the person up in the computer system to determine whether the parole or probation officers in that location had been notified or not. Transcript at 17-18, 32.

(4) Prior to events leading to claimant's discharge, claimant had no disciplinary or corrective actions in her record.

(5) Sometime shortly before September 13, 2021, the county district attorney interviewed an arrested person who allegedly was the head of an organized crime gang that regularly engaged in organized criminal activity. That person told the district attorney that claimant had provided privileged, confidential information to him through a third party. That person had a criminal record prior to this arrest. Claimant had been friends with that person's older brother for years. Transcript at 5, 19-20.

(6) The district attorney reported this allegation to the Deputy Director of the Community Corrections Department, who then placed claimant on administrative leave while the allegation was investigated.

(7) During the course of the investigation, claimant's computer was searched and it was discovered that claimant had accessed information consistent with the arrested person's allegation.

(8) During the course of the investigation, claimant indicated she had looked up the arrested person in the course of her job duties multiple times, including for a parole or probation officer and as a result of "hits" from law enforcement. She also indicated she accessed information about him through the computer system out of curiosity as a result of his arrest and surrounding media coverage. Claimant also indicated she looked up other individuals in the course of her front office job duties, including looking up information for claimants that were known to the office as having warrants out for their arrest if they came in, or if there were clerical issues about whether or not a case was closed. Claimant denied providing any information, directly or indirectly, to the arrested person. Claimant was not charged criminally. Transcript at 8, 20-21, 29, 32-33.

(9) Claimant also admitted to accessing the record of her brother-in-law, who had been released from prison and was on supervision, because she was concerned her children would come into contact with him, and wanted to determine if he was doing what he was supposed to be doing on supervision.

(10) The investigator provided the employer a report in which he concluded that claimant likely had provided the information to the arrested person, which he reported to the district attorney.

(11) The employer decided claimant should be discharged due to the seriousness of the alleged breach and because they could no longer trust the claimant.

(12) On October 1, 2021 the employer discharged claimant.

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).

Order No. 22-UI-189026 concluded that claimant was discharged by the employer for misconduct because, although the employer did not establish that claimant passed information to a criminal element, she accessed information she was not permitted to access for her own personal reasons. The order under review further reasoned that claimant’s conduct could not be excused as an isolated instance of poor judgment, and therefore not misconduct, because her conduct was a repeated act, and exceeded mere poor judgment since her employer could no longer trust her, thereby making a continued employment relationship impossible. Order No. 22-UI-189026 at 4-5. However, the record does not support the order’s conclusion or reasoning.

The record shows that the final incident which led the employer to discharge claimant on October 1, 2021 was the employer’s acceptance of the investigator’s determination that claimant likely provided privileged, confidential information through a third party to an arrested person who was part of a gang that regularly engaged in organized criminal activity. Therefore, despite the fact that the employer had other concerns regarding claimant’s access of computer records that arose during the course of the investigation, such as looking up information on her brother-in-law, the determination of whether claimant was discharged for misconduct must be premised on this final incident.¹

In order to support a conclusion that claimant was discharged for misconduct, it is the employer’s burden to show that claimant willfully, or with wanton negligence, provided privileged, confidential information through a third party to an arrested person. On this record, the employer did not meet that burden. At hearing, the employer relied heavily on a report that concluded that claimant likely provided confidential information to an arrested person that was the head of a criminal enterprise. The report was largely based on records showing that claimant accessed computer records of individuals on probation or parole, to whom claimant was not assigned. However, the employer did not provide specific testimony regarding which records claimant looked up or how the timing of claimant’s access to the records indicated claimant was passing along the information to a third party. Likewise, the employer provided no witnesses that testified claimant provided them confidential information or asked them to pass such information onto third parties.

Claimant did not deny that she had accessed the information of individuals not on her caseload, but indicated she had done so in the course of her job duties. It was uncontroverted that during the course of claimant’s job duties in the front office, whether “on phones” or “on windows,” claimant was required to access computer records and relay that information to the requesting officers in the field. Claimant also would receive “hits” from law enforcement indicating a person was contacted in the field. Claimant would pass the information along to the appropriate parole or probation officer regardless of whether the person was assigned to her or not. Likewise, if a person was supervised at another location, claimant would review the “hits” and look the person up in the computer system to determine whether the parole

¹ See e.g. *Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

or probation officers in that location had been notified or not. Transcript at 17-18, 32. In one instance, claimant accessed information on a person not on her caseload who was on supervision from drug court. Claimant testified the person had a history of non-compliance with supervision and, on multiple occasions, had warrants out for their arrest so claimant would routinely look her up when she came into the office. In another instance, claimant accessed records for was someone whose case had been closed, but whom the office received a judgment indicating that the case was not closed. Claimant testified that as a result, she had to access the record to resolve those issues. Transcript at 32-33.

Based on this record, the employer did not meet its burden that claimant accessed records of individuals outside the scope of her job duties and provided that information through a third party to an arrested person part of a criminal enterprise. The record therefore fails to show that claimant engaged in the conduct for which she was discharged. Absent such a showing, the record fails to establish that the employer discharged claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Order No. 22-UI-189026 is set aside, as outlined above.

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

DATE of Service: June 16, 2022

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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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