

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0750

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 7, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 75940). The employer filed a timely request for hearing. On June 1 and June 15, 2022, ALJ Blam-Linville conducted a hearing, and on June 16, 2022 issued Order No. 22-UI-196311, reversing decision # 75940 by concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective March 13, 2022. On July 1, 2022, claimant 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) Oregon Department of Justice employed claimant as a child support case manager from May 1, 2007 to March 15, 2022. Claimant's work was a position of public trust that involved enforcing child support orders, which entailed access to confidential financial information, location and paternity data, and sometimes involved serving as a witness in court proceedings.

(2) The employer expected claimant to notify her supervisor within 24 hours or as soon as practicable of any arrest, charge, or conviction of any misdemeanor, felony, or criminal drug statute. The employer also expected claimant to be forthcoming and honest in her communications with her supervisors and human resources (H.R.) personnel. Claimant understood that she was expected to be forthcoming and honest as part of the standards of professionalism of her job.

(3) On October 23, 2021, claimant was arrested for and charged with driving under the influence of intoxicants (DUII). In November 2021, claimant was arraigned on the DUII charge. Claimant did not immediately notify the employer of the DUII arrest or charge. On January 11, 2022, claimant was arrested for a second DUII. Claimant did not immediately notify the employer of her January 11, 2022 arrest for DUII.

(4) In mid-January 2022, claimant received a written copy of the employer's workplace policies to sign and return to the employer. While reviewing the policies, claimant read and understood that the employer expected her to notify her supervisor within 24 hours or as soon as practicable of any arrest, charge, or conviction of any misdemeanor, felony, or criminal drug statute. Claimant did not recall seeing the notification policy previously, although she had signed and acknowledged receipt of the policy during the onboarding process and each year she had worked for the employer. After reading the policy, claimant decided to inform her supervisor of her DUII arrest and charge from late 2021.

(5) On January 27, 2022, claimant told her supervisor about the DUII arrest and charge from late 2021 but did not inform the supervisor of her January 11, 2022 arrest for DUII. She did not inform the supervisor of the January 11, 2022 DUII arrest because she believed she had not yet been formally charged with DUII and thought there were some errors on the ticket she received relating to her street address and the like. However, as of the date claimant read the employer's notification policy, which was before January 27, 2022, claimant knew and understood that the employer expected her to report any arrests as well as any charges to her supervisor as soon as practicable.

(6) Claimant's supervisor asked claimant to report the DUII arrest and charge from late 2021 to claimant's H.R. business partner. Claimant did so, but again did not report the January 11, 2022 DUII arrest. The H.R. partner then held a brief call with claimant in which the two discussed some details of the DUII arrest and charge from late 2021. During the call, claimant did not report the January 11, 2022 DUII arrest. The H.R. partner requested claimant send an email outlining the incident to himself and the employer's H.R. director. Claimant then sent an email to the H.R. partner and H.R. director with an outline of the DUII arrest and charge from late 2021 but again failed to mention the January 11, 2022 DUII arrest.

(7) On February 10, 2022 claimant had a court hearing stemming from the January 11, 2022 DUII arrest. Claimant thought the hearing was scheduled for February 11, 2022 and, as a result, missed the February 10, 2022 hearing. Shortly after missing the hearing, claimant's attorney called claimant and informed her that a warrant for her arrest had issued for failure to appear. Later that day on February 10, 2022, claimant went to the courthouse, explained the situation, and the warrant was canceled. Claimant did not inform the employer that a warrant had been issued for her arrest.

(8) On February 18, 2022, the employer held an investigatory meeting with claimant regarding the DUII arrest and charge from late 2021. Minutes before the meeting began, claimant called her senior H.R. partner and disclosed the January 11, 2022 DUII arrest. Claimant did not disclose the February 10, 2022 warrant for her arrest for failure to appear.

(9) On March 1, 2022, the employer placed claimant on paid administrative leave. On March 3, 2022, the employer held a second investigatory meeting. Claimant's January 11, 2022 DUII arrest, which claimant did not disclose until minutes before the first investigatory meeting, was the focus of the

second investigatory meeting. The employer also raised in the second investigatory meeting the February 10, 2022 warrant for claimant's arrest for failure to appear, which the employer learned about through reviewing public records, and which claimant had never disclosed.

(10) On March 15, 2022, the employer discharged claimant for violating their notification policy and failing to be forthcoming and honest in her communications with her supervisors and H.R. personnel about the DUII matters and arrest warrant.

CONCLUSIONS AND REASONS: The employer discharged claimant 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 record shows that claimant's conduct in failing to notify the employer of her January 11, 2022 DUII arrest was a wantonly negligent violation of the employer's reasonable expectations. The employer expected claimant to notify her supervisor within 24 hours or as soon as practicable of any arrest, charge, or conviction of any misdemeanor, felony, or criminal drug statute. The record shows that although claimant had signed and acknowledged receipt of this policy during the onboarding process and each year she had worked for the employer since 2007, claimant did not know and understand this expectation until mid-January 2022 when she read a copy of the employer's workplace policies. At that point, claimant understood that the notification policy applied to arrests. *See* June 15, 2022 Transcript at 13 (Q: And the policy does reference arrests. So did you understand that in the policy? A: After I read it, yes.). Nevertheless, claimant failed to notify her supervisor of her January 11, 2022 arrest for DUII on January 27, 2022, the date on which she disclosed the DUII arrest and charge from late 2021. Claimant could have disclosed the January 11, 2022 arrest at least as soon as January 27, 2022, because claimant reported the DUII arrest and charge from late 2021 on that date. While claimant may have believed she had not yet been formally charged following the January 11, 2022 arrest, and thought there were some errors on the ticket she received relating to her street, it is evident that claimant knew she was expected to report the arrest but consciously neglected to do so. For these reasons, the record evidence is sufficient to conclude that claimant's failure to notify her supervisor of the January 11, 2022 arrest on January 27, 2022 was at least a wantonly negligent violation of the employer's expectations.

In her written argument, claimant argued that the employer's expectation was impermissible or illegal because it required disclosure of arrests unrelated to the work claimant performed. Written Argument at 1. Where a claimant's policy violation implicates off-premises conduct, the employer must show that the policy breach has a reasonable relation to the conduct of the employer's business. *Geise v. Employment Division*, 557 P.2d 1354, 1357 (Or. App. 1976). Here, claimant was a child support case manager for the

Oregon Department of Justice. The record shows that claimant held a position of public trust that involved having access to confidential financial information, location and paternity data, and sometimes serving as a witness in court proceedings. At hearing, the employer's witness testified that because the employer works with federal tax information, they are required to report to the federal government when case managers violate their policies, and that claimant's policy violation was "high level" and could affect federal funding levels or lead to an audit. June 1, 2022 Transcript at 17. Given that claimant's job was a position of public trust and her policy violation for failure to notify suggests a lack of trustworthiness that could complicate the employer's relationship with the federal government, the record shows that claimant's policy violation had a reasonable relation to the conduct of the employer's business. The employer therefore had a right to expect claimant to report the January 11, 2022 arrest when she reported the first DUII arrest and charge on January 27, 2022, and the fact that claimant's DUII arrest occurred off-premises did not make the employer's expectation unreasonable.

Claimant's wantonly negligent violation of the employer's expectations relating to her failure to notify the employer of her January 11, 2022 DUII arrest was not an isolated instance of poor judgment. 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).

OAR 471-030-0038(1)(d).

Applying these standards, the record shows that claimant's wantonly negligent violation of the employer's expectations was not isolated. Claimant understood that the employer expected her to be forthcoming and honest in her communications with her supervisors and H.R. personnel. Claimant was also aware, after having read the employer's notification policy in mid-January 2022, that the employer was interested in learning of arrests, charges, and convictions that involved their employees. Nevertheless, in a series of communications after claimant told her supervisor about the DUII arrest and charge from late 2021, claimant failed to mention the January 11, 2022 arrest for DUII to H.R.

personnel. Specifically, claimant failed to be forthcoming and honest about the January 11, 2022 arrest in an email and in a telephone conversation with her H.R. partner. Claimant also omitted any mention of the January 11, 2022 arrest in a separate email she sent to the H.R. partner and the employer's H.R. director. The failure to report criminal arrest information that claimant knew the employer required disclosing were conscious omissions and amounted to wantonly negligent violations of the employer's expectation that claimant be forthcoming and honest in her communications.

Likewise, claimant both failed to notify the employer as soon as practicable and was not forthcoming and honest regarding the warrant for her arrest that was issued for claimant's failure to appear on February 10, 2022. The record shows that claimant became aware of the arrest warrant on February 10, 2022 and, although the warrant was quickly canceled, claimant failed to advise the employer of the existence of the warrant at either the February 18, 2022 or March 3, 2022 investigatory meetings. Instead, the employer learned that the warrant had been issued via review of public records. The failure to inform the employer of the arrest warrant was also a conscious omission and a wantonly negligent breach of the employer's expectations. Accordingly, the record shows that claimant's wantonly negligent failure to notify the employer of her January 11, 2022 DUII arrest occurred in the context of a repeated act or pattern of other wantonly negligent behavior, and therefore was not isolated.

Further, claimant's wantonly negligent failure to notify the employer of her January 11, 2022 DUII arrest was not an isolated instance of poor judgment for the additional reason that it exceeded mere poor judgment because it made a continued employment relationship impossible. As discussed above, claimant's job was a position of public trust and involved having access to confidential financial information, location and paternity data, and sometimes serving as a witness in court proceedings. Claimant's omission of her January 11, 2022 DUII arrest until February 18, 2022, which she understood as of mid-January 2022 that she was expected to report, was a "high level" violation that implicated the employer's obligations to report policy violations to the federal government and had the potential to affect the employer's funding levels or lead to an audit. Transcript at 17. Given the trustworthiness required for claimant's position, the lack of candor inherent in claimant's wantonly negligent conduct, and the resulting potential claimant's conduct had to complicate the employer's relationship with the federal government, the record shows that claimant's policy violation was an irreparable breach of trust that made a continued employment relationship impossible.

Claimant's conduct also was not a good faith error. The record fails to show that claimant believed in good faith that her failure to notify her supervisor of her January 11, 2022 arrest for DUII was conduct the employer would find acceptable because claimant knew and understood the notification policy applied to arrests, as well as charges and convictions. *See* June 15, 2022 Transcript at 13 (Q: And the policy does reference arrests. So did you understand that in the policy? A: After I read it, yes.).

Thus, for the above reasons, the employer discharged claimant for misconduct connected with work. Claimant is disqualified from receiving unemployment insurance benefits effective March 13, 2022.

DECISION: Order No. 22-UI-196311 is affirmed.

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

DATE of Service: October 7, 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.

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.