

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0533

Reversed & Remanded

PROCEDURAL HISTORY: On January 31, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective December 18, 2022 (decision # 144310). Claimant filed a timely request for hearing. On April 17, 2023, ALJ Sachet-Rung conducted a hearing, and on April 25, 2023 issued Order No. 23-UI-223087, affirming decision # 144310. On May 9, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. 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. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information concerning the circumstances that led to claimant's arrest into evidence at the remand hearing, such as the documents claimant attached to her written argument. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Tillamook Coast Visitors Association employed claimant as a Community and Industry Programs Manager from July 2018 until December 19, 2022. Claimant's work involved engagement with the public.

(2) The employer expected that their employees would not engage in off-duty conduct that "negatively reflects on the reputation of [the employer] such as engaging in illegal activity that directly affects [the employer.]" Transcript at 6. Claimant was aware of this expectation through being presented with a written copy of it.

(3) Sometime between December 5, 2022 and December 8, 2022, claimant was arrested and charged with “breaking and entering, burglary, and assault.” Transcript at 21. She was released from custody shortly thereafter. The arrest and the events leading to it occurred while claimant was off-duty. The employer had previously granted claimant paid leave from December 5, 2022 through December 31, 2022, and the arrest did not cause claimant to miss work.

(4) On approximately December 9, 2022, an associate of the alleged victim in the incident for which claimant was arrested began posting information about the arrest on the employer’s social media pages with demands that claimant be discharged. This negative publicity concerned the employer.

(5) On December 19, 2022, the employer discharged claimant because they felt her arrest negatively reflected on the employer’s reputation.

CONCLUSIONS AND REASONS: Order No. 23-UI-223087 is set aside and the matter remanded for further development of the record.

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, however 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 that exculpatory provision. OAR 471-030-0038(3)(b).

The order under review concluded that claimant was discharged for misconduct because her conduct in being arrested was at least wantonly negligent. Order No. 23-UI-223087. The record as developed does not support this conclusion.

The employer discharged claimant because publicity surrounding her arrest reflected negatively on the employer. The employer reasonably expected that their employees would refrain from engaging in illegal activities that could lead to such publicity. Claimant’s arrest was off-duty conduct. Off-duty conduct must affect or have a reasonable likelihood of affecting the employee’s work or the employer’s workplace in order to constitute work-connected misconduct. *Sun Veneer v. Employment Division*, 105 Or App 198, 804 P2d 1174 (1991). The record suggests that claimant’s conduct affected the employer’s workplace given that it led to social media posts for claimant to resign, the public nature of her position, and the potential for protests. However, the fact that claimant was arrested did not, in and of itself, establish by a preponderance of evidence that claimant engaged in illegal activities in violation of the employer’s expectation. The record does not show with any specificity what act or omission by

claimant, if any, led law enforcement to arrest her. While claimant was understandably reluctant to provide details of the incident given the pending criminal charges against her at the time of the hearing, inquiry must nonetheless be made into the incident itself in order to determine if claimant acted during the incident with willful or wantonly negligent violation of the employer's expectations or disregard of their interest. Claimant retains a privilege against self-incrimination that she is free to assert. The employer bears the burden of establishing what acts claimant committed that led to her arrest, and that those acts constituted misconduct. Accordingly, further development of the record is necessary regarding the incident leading to claimant's arrest, including but not limited to whether claimant initiated the incident or if claimant acted in self-defense. Such inquiry should focus on claimant's actions that led to the arrest and whether such actions constituted a willful or wantonly negligent disregard of the employer's interest, and, if claimant's conduct was an isolated instance of poor judgment, whether claimant's conduct violated the law or was tantamount to unlawful conduct.

Though the record as developed does not suggest that claimant's discharge resulted from a belief by claimant that claimant's *continued employment* would jeopardize her safety or her family's safety due to domestic violence, if such a reason for discharge is suggested by the evidence on remand, the ALJ should also inquire whether that reason constituted a "compelling family reason" as defined in OAR 471-030-0038.¹

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for misconduct, Order No. 23-UI-223087 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-223087 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 16, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-223087 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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>.

¹ OAR 471-030-0038(d) and (e) provide in relevant part that, "Discharge for "compelling family reasons," when the individual has made the attempt to maintain the employer-employee relationship, is not misconduct," and that for purposes of this rule, "'compelling family reasons' means: Domestic violence, as defined in OAR 471-030-0150, which causes the individual reasonably to believe that the individual's continued employment would jeopardize the safety of the individual or a member of the individual's immediate family."

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 الإستئناف 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.