

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0682**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 3, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 83610). The employer filed a timely request for hearing. On November 21, 2022, ALJ Nyberg conducted a hearing at which claimant failed to appear, and on November 23, 2022 issued Order No. 22-UI-208187, affirming decision # 83610. On December 13, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Community Services, Inc. employed claimant as a lead direct support professional (DSP) from 2013 until January 7, 2022.

(2) Under applicable state administrative rules and the employer's internal policy, claimant and other DSPs were required to be able to pass a state background check in order to be permitted to work in that role. Claimant was aware of this requirement and had passed background checks for most of his employment.

(3) Claimant last performed work for the employer on November 21, 2021. On or around that date, claimant's then-girlfriend, who also worked for the employer, informed the employer that claimant had been arrested for having assaulted her. Claimant's supervisor subsequently contacted claimant, who confirmed that he had been arrested. Claimant was charged with strangulation, assault in the fourth degree, and three counts of harassment.

(4) After confirming that claimant had been arrested, the employer placed claimant on unpaid leave while they ordered, and awaited the results of, a new background check.

(5) On December 29, 2021, the Oregon Department of Human Services (DHS) informed the employer that claimant had not passed his background check and “must be removed from [his] position or placement immediately” due to the charges pending against him. Exhibit 2 at 53.

(6) On January 7, 2022, the employer discharged claimant because he failed his background check.

(7) On August 17, 2022, claimant pled guilty to and was convicted of the crimes of strangulation and assault in the fourth degree.

**CONCLUSIONS AND REASONS:** Claimant was discharged for misconduct and is disqualified from receiving benefits effective January 2, 2022.

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). 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).

The employer discharged claimant because, following his arrest for the alleged assault of his then-girlfriend, claimant failed a background check and therefore was no longer eligible to work as a DSP. The order under review concluded that this did not constitute misconduct because “at the time of discharge, the evidence was equally balanced... as to whether the claimant actually carried out the act(s) in question,” and the employer therefore did not meet their burden to prove that claimant committed the assault that led to his failing the background check. Order No. 22-UI-208187 at 3. The record does not support this conclusion.

As a preliminary matter, the order under review explained that its conclusion was “...based on the facts known to the employer at the time they made the decision to discharge the claimant rather than the facts known to the employer at the time of hearing,” and that “any developments after the discharge decision was made lie outside the jurisdiction of the ALJ.” Order No. 22-UI-208187 at 3.

The order under review appears to refer here to the fact that claimant was, in August 2022, ultimately convicted of two charges related to the alleged assault, well after the employer discharged him in January 2022. In so asserting, the order under review misapplies the Department’s general principle that a discharge analysis must be premised on the final incident that led the employer to discharge the individual.<sup>1</sup> One effect of this principle is that other incidents of behavior that might be considered misconduct, but which the employer does not learn about until after they have already discharged the individual, generally cannot be retroactively considered as a basis for disqualification, because those incidents did not lead the employer to make the decision to discharge the individual. However, this principle does not preclude the consideration of evidence that has arisen after the discharge occurred, for purposes of determining whether the final incident itself was misconduct.

Here, the record unequivocally shows that the final incident which led the employer to discharge claimant was his failure of the background check that the employer ordered after claimant allegedly assaulted his then-girlfriend. Whether this constituted misconduct, however, requires a finding as to whether claimant actually committed the crimes for which he was arrested. The record contains no first-hand account of the events that led to claimant’s arrest. In the absence of such evidence, the best evidence in the record is claimant’s guilty plea and conviction in August 2022. Because claimant pled guilty to the charges of strangulation and assault in the fourth degree, it is reasonable to conclude, in the absence of other evidence, that claimant more likely than not committed these crimes. Accordingly, this analysis is premised on the inference that claimant committed the crimes for which he was convicted.

The record shows that claimant was aware that, by law, the employer required him to be able to pass a background check in order to perform his job. Furthermore, a reasonable person would conclude that perpetrating domestic violence would result in their failing a criminal records check, which would bar them from continuing to perform their job. Therefore, claimant either knew or should have known that

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<sup>1</sup> 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).

his decision to engage in such behavior would violate the employer's standards of behavior. As a result, his conduct was a willful or wantonly negligent disregard of the employer's standards of behavior.

Additionally, claimant's conduct cannot be excused as an isolated instance of poor judgment. Claimant was required to be able to pass a background check and could not, by law, continue to work as a DSP for the employer if he was not able to do so. By engaging in conduct that led to his failure of a background check, claimant made a continuing employment relationship impossible. Because claimant's conduct which led to his discharge was a willful or wantonly negligent disregard of the employer's standards of behavior (and therefore not a good faith error), and was not an isolated instance of poor judgment, it constituted misconduct. Because claimant was discharged for misconduct, he is disqualified from receiving benefits effective January 2, 2022.

**DECISION:** Order No. 22-UI-208187 is set aside, as outlined above.

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

**DATE of Service: June 30, 2023**

**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](https://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 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  
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