

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0670

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 9, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective June 2, 2024 (decision # L0005000738).¹ Claimant filed a timely request for hearing. On August 27, 2024, ALJ S. Lee conducted a hearing, and on September 6, 2024, issued Order No. 24-UI-265247, modifying decision # L0005000738 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving benefits effective May 26, 2024.² On September 20, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant filed written arguments on September 20, 2024, and September 26, 2024. EAB did not consider claimant's September 20, 2024, argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Additionally, both arguments 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 September 26, 2024, argument to the extent it was based on the record.

¹ Decision # L0005000738 stated that claimant was denied benefits from June 2, 2024, to May 31, 2025. However, the end date of the disqualification appears to be error because disqualifications from benefits under ORS 657.176 continue until the individual has earned, subsequent to the week in which the disqualification began, four times their weekly benefit amount in subject employment. *See* ORS 657.176(2). As such, it is presumed that the Department intended to disqualify claimant from benefits beginning June 2, 2024, and until she earned four times her weekly benefit amount in subject employment.

² Although Order No. 24-UI-265247 stated that it affirmed decision # L0005000738, it modified that decision by changing the effective date of the disqualification from June 2, 2024, to May 26, 2024. Order No. 24-UI-265247 at 4.

FINDINGS OF FACT: (1) HIV Alliance, Inc. employed claimant as a qualified mental health professional (QMHP) from November 9, 2020, until May 31, 2024. Claimant provided counseling services for the employer's clients.

(2) At all times relevant to this decision, claimant was not yet licensed to individually practice as a clinician. Instead, claimant held QMHP and clinical social work associate (CSWA) certifications while she accrued the hours necessary to become a Licensed Clinical Social Worker (LCSW). The licensing board which issued these certifications required claimant to renew them annually. Claimant was aware of this requirement.

(3) The employer expected all clinical employees to hold the licenses or certifications needed to perform their work. This requirement was necessary for the employer to comply with state law. Additionally, the employer could not bill their clients' health insurance carriers for counseling services unless those services were provided by a counselor who held the necessary licenses or certifications. Claimant understood this expectation and the consequences of not meeting it.

(4) In or around October 2022, the licensing board sent claimant an e-mail reminder to renew her certifications, which were set to expire soon. That email was routed into claimant's spam folder. As a result, claimant did not initially see the email, forgot about the renewal, and allowed her certifications to lapse. Shortly after the certifications lapsed, claimant discovered the email in her spam folder. Claimant subsequently contacted the licensing board and renewed the certifications. Because of the short gap between when the certifications lapsed and when claimant renewed them, the licensing board allowed claimant to renew the certifications retroactively so that she would have no gap in certification. Claimant also apprised the employer about the issue. The employer warned claimant to make sure that she kept her certifications current in the future.

(5) On October 30, 2023, claimant's certifications expired. At the time, claimant was preoccupied with caring for her partner, who had recently been suffering from a debilitating medical issue, and claimant's mother, who had recently been diagnosed with Alzheimer's disease. Additionally, unlike in 2022, the licensing board had not sent claimant an email reminder to renew the certifications, although claimant looked in her spam folder and elsewhere for such an email. As a result of the combination of these circumstances, claimant forgot to renew her certifications.

(6) Claimant did not discover that her certifications had lapsed until May 2024. At that time, claimant attempted to enter her clinical hours into the licensing board's system, which led the licensing board to notify claimant that her certifications had lapsed in October 2023. Claimant notified the employer of this fact.

(7) The employer initially kept claimant employed while she attempted to renew her certifications, assigning her to non-clinical work or directing her to use accrued leave to take time off. However, when claimant attempted to file for the renewals, she learned that the licensing board was not willing to backdate the renewals to cover the previous six months, owing to the amount of time that had passed. As a result, the licensing board required claimant to reapply for the certifications. This process was estimated to take up to a month, as it required claimant to undergo a background check, fingerprinting, and the like. Claimant kept the employer apprised of these facts.

(8) On May 31, 2024, after having learned that claimant’s certifications would not be backdated, and that the reapplication process could take up to a month, the employer discharged claimant for having allowed her certifications to lapse.

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). Under OAR 471-030-0038(3)(c), the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual.

The employer discharged claimant because she had failed to renew her required certifications in October 2023, resulting in an approximate six-month lapse in those certifications. The certifications were required for claimant to perform her clinical work. The order under review concluded that claimant’s failure to renew her certifications constituted misconduct because the lapse was “directly attributable to her own failure to act.” Order No. 24-UI-265247 at 4. Although the lapse *was* directly attributable to claimant’s own failure to act, that alone is not sufficient to conclude that claimant’s failure to act constituted misconduct.

Importantly, OAR 471-030-0038(3)(c) requires not merely that the failure to maintain a certification be reasonably attributable to the individual, but that that failure be either willful or wantonly negligent. There is no indication in the record that claimant willfully failed to renew her certifications. Instead, she merely forgot to do so. While this was arguably negligent, the employer has not met their burden to show that it was *wantonly* negligent. Claimant was on notice from the lapse in 2022 that it was her responsibility to ensure that she kept her certifications current. However, at the time the 2023 renewals were due, claimant’s attentions were focused on caring for her partner and mother, as both had recently developed serious medical conditions. Under such circumstances, it was not unreasonable to expect that claimant might fail to attend to less pressing matters, absent reminders.

Furthermore, claimant caught the 2022 lapse early because she discovered an email from the licensing board, albeit after the lapse had occurred, reminding her to renew the certifications. The board did not send claimant such an email in 2023. The order under review suggested that claimant should have set reminders for herself to renew the certifications, rather than relying on the board or her employer to remind her. Order No. 24-UI-265247 at 4. While doing so would have been prudent, nothing in the record suggests that claimant had reason to know that the board would fail to send her an email reminder in 2023. Therefore, claimant’s apparent misplaced reliance on such a reminder, when coupled with the

distraction caused by the need to care for her partner and mother, was not the result of claimant failing to consider the consequences of her actions. As such, while claimant's failure to timely renew her certifications in 2023 was the result of ordinary negligence, it was not wantonly negligent for her to do so, and therefore not misconduct.

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

DECISION: Order No. 24-UI-265247 is set aside, as outlined above.

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

DATE of Service: October 16, 2024

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.

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.

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