

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0716

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 23, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective July 14, 2024 (decision # L0005740151).¹ Claimant filed a timely request for hearing. On October 8, 2024, ALJ Chiller conducted a hearing, and on October 9, 2024, issued Order No. 24-UI-268837, affirming decision # L0005740151. On October 12, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on October 12 and 26, 2024. EAB did not consider claimant's October 12, 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). Claimant's October 26, 2024, 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). EAB considered claimant's October 26, 2024, argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Peace Health Networks on Demand, LLC employed claimant as an ultrasound technician from February 7, 2022, until July 19, 2024.

(2) The employer required each of their ultrasound technicians to be a licensed sonographer by holding an Oregon Board of Medical Imaging (OBMI) license. Under state law, should one of the employer's

¹ Decision # L0005740151 stated that claimant was disqualified from receiving benefits from July 14, 2024 through July 12, 2025. However, decision # L00057740151 should have stated that claimant was disqualified from receiving benefits beginning July 14, 2024 and until she earned four times her weekly benefit amount. *See* ORS 657.176.

technicians provide sonographic services without holding a valid OBMI license, the employer was subject to being fined. Claimant understood that she was required to hold and maintain an OBMI license to work as an ultrasound technician for the employer.

(3) In 2021, shortly after completing her education and training, claimant worked as a sonographer for an employer in Oregon without holding an OBMI license. Claimant had been unaware that she had to hold an OBMI license. After claimant and this previous employer discovered the issue, claimant completed the necessary steps and obtained an OBMI license.

(4) On February 7, 2022, claimant began working for the employer.

(5) In December 2023, claimant received an email from the OBMI advising her that her OBMI license was due to expire in January 2024, and that she needed to renew it. Claimant opened the email and saw the reminder, but did not renew her OBMI license at that time.

(6) On January 1, 2024, claimant's OBMI license expired. Claimant did not realize that her OBMI license had expired and continued to perform ultrasound scans on the employer's patients without a valid license.

(7) The employer periodically checked whether their ultrasound technicians were properly licensed. On or about July 12, 2024, the employer discovered that claimant's OBMI license had expired. On July 12, 2024, claimant's manager called claimant and told her that her license had expired on January 1, 2024. That day, the employer placed claimant on administrative leave pending an investigation into the matter.

(8) Claimant was surprised to learn that her license had expired. She looked through her email and found the email reminder that she had opened from December 2023. Claimant called the OBMI and confirmed that her license had expired. Claimant then renewed the license, which consisted of filling out a form and paying a fee. The process took only a few minutes to complete.

(9) On July 18, 2024, the employer had a "seek to understand" meeting with claimant, at which time claimant explained that she had received and opened the reminder email in December 2023, but took no action, allowing her license to expire on January 1, 2024. Audio Record at 11:15.

(10) On July 19, 2024, claimant had a virtual meeting with her manager, who informed her that the employer had decided to discharge her for failing to maintain her OBMI license. The employer discharged claimant on that date for that reason.

(11) The OBMI subsequently advised the employer that the employer would receive a fine for each patient claimant scanned while unlicensed between January 1 through July 12, 2024. The OBMI also advised claimant that she would be fined \$500 a month for each month she practiced while her license was expired.

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). 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 for her failure to maintain her OBMI license. Applying OAR 471-030-0038(3)(c), the record shows that the employer discharged claimant for misconduct. Claimant’s OBMI license was necessary to the performance of claimant’s occupation as an ultrasound technician because under state law, providing unlicensed sonographic services to patients, as claimant did, was prohibited. After claimant’s discharge, the OBMI subjected both the employer and claimant to substantial fines because of claimant’s performance of unlicensed sonographic services.

Claimant’s failure to maintain the license was reasonably attributable to claimant. At hearing, although claimant noted that she would have appreciated being reminded by the employer to renew, she acknowledged that it was her responsibility to maintain her OBMI license. Audio Record at 24:52 to 26:02. Indeed, the reason claimant’s OBMI license lapsed was because claimant did not renew it despite receiving a reminder email in December 2023. Renewing the license was a simple process that consisted of filling out a form and paying a fee and took only a few minutes to complete. Claimant undertook the process of renewing the license while she was on administrative leave in July 2024, and the record does not evince any reason why she could not similarly have done so prior to the expiration of her license on January 1, 2024.

Claimant’s failure to maintain the OBMI license was wantonly negligent. Claimant understood that she was required to hold and maintain an OBMI license to work as an ultrasound technician for the employer. Further, the record shows that, in 2021, before her employment with the employer in this matter, claimant worked as a sonographer for another employer in Oregon without holding an OBMI license. Claimant had been previously unaware that she had to hold an OBMI license, but after the issue was discovered, completed the necessary steps and obtained her license. That claimant had previously performed sonographic services without a license, learned that maintaining a license was required, took the steps to obtain a license at that time, but then allowed her license to expire on January 1, 2024, suggests that claimant was indifferent to the consequences of her actions in failing to maintain her license.

More significantly, in December 2023, claimant received an email from the OBMI advising her that her OBMI license was due to expire in January 2024, and that she needed to renew it. Claimant opened the email and saw the reminder, but did not renew her OBMI license at that time. On January 1, 2024, the

license expired. Later, in July 2024, when claimant learned that her license had expired, she searched her email, and found the email reminder that she had opened. Claimant testified at hearing that the “email saying to renew” was “vaguely familiar” to her at that time. Audio Record at 22:15.

That claimant had opened the email in December 2023 but took no action distinguishes this case from a factual scenario in which an individual receives an email reminder to renew a license in their email inbox, but never becomes aware of it because, for example, the reminder is routed to a spam folder or the like. Here, claimant’s failure to take action to renew her OBMI license after opening and reading the email reminding her to do so, is sufficient to conclude that claimant was conscious of her conduct in failing to maintain her license. Claimant’s failure to take action after opening and reading the email is also an additional factor that weighs in favor of concluding that claimant acted with indifference to the consequences of her actions in failing to maintain her license.

Accordingly, claimant knew that she was required to maintain an OBMI license, and was conscious of her conduct in failing to do so and indifferent to the consequences of her actions. Claimant therefore failed to maintain her license with wanton negligence. Since, as discussed above, claimant’s circumstances also met the other conditions of OAR 471-030-0038(3)(c), claimant’s discharge was for misconduct pursuant to that provision.

Note that in the typical discharge case, isolated instances of poor judgment and good faith errors are not misconduct under OAR 471-030-0038(3)(b). However, since 2004, the Department has interpreted OAR 471-030-0038(3)(c) to define the loss of the legal authority to perform an occupation as a type of misconduct *per se* that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). *See* December 27, 2004, letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling under OAR 471-030-0038(3)(c)). Since the exculpatory provisions cannot be applied in this case, claimant’s behavior may not be excused from constituting misconduct as an isolated instance of poor judgment or a good faith error.²

For these reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits effective July 14, 2024.

DECISION: Order No. 24-UI-268837 is affirmed.

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

DATE of Service: November 5, 2024

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

² *See also* EAB Decision 2023-EAB-1172 (so stating and referring to the Byerley letter); Employment Appeals Board, 05-AB-0049, January 4, 2005 (same); Employment Appeals Board, 05-AB-0050, February 7, 2005 (same); Employment Appeals Board, 05-AB-0500, April 11, 2005; Employment Appeals Board, 07-AB-0405, March 8, 2007; Employment Appeals Board, 08-AB-0580, April 10, 2008; Employment Appeals Board, 09-AB-2437, August 11, 2009; Employment Appeals Board, 11-AB-0602, March 10, 2011.

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 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.

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