

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0837**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 17, 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 August 25, 2024 (decision # L0006654226).<sup>1</sup> Claimant filed a timely request for hearing. On November 21, 2024, ALJ Parnell conducted a hearing at which the employer failed to appear, and on December 4, 2024, issued Order No. 24-UI-275518, affirming decision # L0006654226. On December 9, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider claimant's written 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).

**FINDINGS OF FACT:** (1) Callahan MC, LLC employed claimant as a caregiver from January 11, 2022, until August 26, 2024.

(2) The employer expected that their employees would not engage in conduct that would subject them to arrest, thereby negatively impacting the employer's business. Claimant understood this expectation.

(3) At some point during claimant's employment, prior to August 14, 2024, claimant was arrested for or charged with one or more crimes and ordered to appear in court. Claimant "took extra shifts" on or around the court date and "totally forgot" to appear in court as required. Transcript at 20-21. A warrant was therefore issued for claimant's arrest.

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<sup>1</sup> Decision # L0006654226 stated that claimant was denied benefits from August 25, 2024 to August 30, 2025. However, decision # L0006654226 should have stated that claimant was disqualified from receiving benefits beginning Sunday, August 25, 2024 and until she earned four times her weekly benefit amount. *See* ORS 657.176.

(4) On August 14, 2024, claimant was arrested on the outstanding warrant as well as for possessing fentanyl at the time of her arrest. Claimant had been scheduled to work for the employer from at least August 14, 2024, through August 17, 2024. Claimant remained in jail through approximately August 24, 2024.

(5) Claimant's boyfriend telephoned the employer beginning on August 14, 2024, and each day thereafter, telling them that claimant would be absent from work due to illness. On August 17, 2024, claimant's boyfriend told the employer that claimant was in jail.

(6) On August 23, 2024, while in jail, claimant spoke with one of the employer's managers by telephone. The manager told claimant that her continued employment would depend on the outcome of the criminal charges and her release from jail.

(7) On approximately August 24, 2024, claimant was released from jail after having been convicted of failing to appear in court and possibly other charges predating that offense, and after having served the custodial portion of the sentence for those matters. Claimant's new fentanyl possession charge had not been resolved.

(8) On August 26, 2024, claimant met with another of the employer's managers about returning to work. One of the employer's managers informed claimant that she was discharged due to the pending fentanyl possession charge and its negative impact on the business and their ability to utilize claimant as a caregiver. However, the manager stated that they were willing to rehire claimant if she were to be acquitted of the drug charge. Claimant understood the reason for the discharge to be that she "had a case pending and it doesn't look good on them." Transcript at 14.

**CONCLUSIONS AND REASONS:** Claimant was discharged 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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). 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 of her actions leading to arrest, incarceration, and pending prosecution for possession of fentanyl. The employer expected that their employees would not engage in conduct that would subject them to arrest, thereby negatively impacting the employer's business. Claimant understood this expectation.

Claimant testified that on August 14, 2024, she was arrested for failing to appear in court in connection with one or more criminal cases and, "[T]he arresting officer. . . had been told. . . some stuff about me that I had. . . some narcotics on me. . . and I was. . . using. . . some fentanyl and [it] ended up being in there." Transcript at 20. Claimant further testified that she "had to do 10 days" in jail as a result of the failure to appear and perhaps the underlying case or cases for which the appearance was required, and that the fentanyl case was "open right now still." Transcript at 20-21. Claimant missed work from at least August 14, 2024, through August 17, 2024, due to her incarceration, and likely missed additional days of work prior to her release on or around August 24, 2024.

Claimant spoke with different managers on August 23, 2024, and August 26, 2024, who expressed differing views on whether and why the employer was unwilling to permit claimant to continue working. *See* Transcript at 22-24. The reasons for discharge suggested by these conversations included being provided false information about why claimant was absent for several days, the absences themselves, and the nature of the criminal charges that claimant faced. Claimant believed that the ultimate reason for her discharge was the pending fentanyl possession charge, given the nature of the employer's caregiving business and the employer's offer to rehire claimant "as long as it came back 'not guilty.'" Transcript at 14. The record supports that the pending fentanyl charge was a proximate cause of claimant's discharge.

Though the record shows that claimant expected to stand trial on that charge, and had not been convicted as of the time of the hearing, claimant's testimony did not suggest that she disputed a police officer's contention that they discovered fentanyl in her possession when arresting her on an outstanding warrant.

See Transcript at 20. It is therefore likely that claimant unlawfully possessed fentanyl.<sup>2</sup> Claimant did not suggest that her actions were other than the result of a conscious decision to possess an illegal drug, and indifference to the consequences of her actions can reasonably be inferred. Claimant testified, “I realize that the charges I had would affect my company. So I get why she had to let me go.” Transcript at 24. Claimant therefore knew or should have known that possessing an illegal drug would probably result in a violation of the employer’s expectations, since such conduct could result in her arrest and negatively affect the employer’s business. Accordingly, claimant willfully or with at least wanton negligence violated the employer’s expectation that she not engage in conduct that would subject her to arrest.

This violation of the employer’s reasonable expectation was connected with work. “Under ORS 657.176(2)(a) and OAR 471-30-038(3), 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.” *Erne v. Employment Div.*, 109 Or. App. 629, 633, 820 P.2d 875 (1991). It can reasonably be inferred that at least some of the employer’s customers would not want the services of a caregiver under prosecution for, or recently convicted of, possessing fentanyl. The employer’s offer to rehire claimant only if she were acquitted of the charge supports this inference. Claimant’s arrest and her actions leading to that arrest therefore affected the employer’s workplace, and were work-connected.

Further, claimant’s actions cannot be excused as an isolated instance of poor judgment because they violated the law or were at least tantamount to unlawful conduct. Accordingly, claimant’s actions exceeded mere poor judgment, and constituted misconduct.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving benefits effective August 25, 2024.

**DECISION:** Order No. 24-UI-275518 is affirmed.

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

**DATE of Service:** January 6, 2025

**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 stated above**. See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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<sup>2</sup> See, e.g. ORS 475.752(8)(a).



# 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**

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