

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-17-11

(MANAGEMENT SERVICE - REMOVAL & DISMISSAL)

KARLA KELLER,)	
)	
Appellant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
STATE OF OREGON,)	AND ORDER
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

On May 3, 2013, the Board heard oral argument on Appellant's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Peter A. Rader on March 7, 2013, after a hearing held on March 7 and 8 and May 30 and 31, 2012, in Salem, Oregon. The record closed on July 9, 2012, following receipt of the parties' post-hearing briefs.

Judy D. Snyder, Attorney at Law, Law Offices of Judy Snyder, Portland, Oregon, represented Appellant.

Tessa Sugahara, Attorney-in-Charge, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent at hearing. Stephen Krohn, Acting Attorney-in-Charge, Department of Justice, Salem, Oregon, represented Respondent at oral argument.

Appellant Karla Keller appeals her removal from management service as a Principal Executive Manager (PEM) G for the State of Oregon, Department of Transportation (ODOT) and her dismissal from state service, effective September 19, 2011.

The issue is:

Was Appellant Keller's removal from management service and dismissal from state service in violation of ORS 240.570(3), 240.570(5), or 240.555?

For the following reasons, we conclude that Keller's removal from management service and dismissal from state service did not violate ORS 240.570(3), 240.570(5), or ORS 240.555.

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. ODOT is responsible for constructing, maintaining, and regulating the state's transportation system, including highways, bridges, railways, public transportation, and bikeways. It employs approximately 4,500 people.

2. ODOT's highway division is divided into five regions, each with its own manager. Region 1 encompasses five counties in the metropolitan Portland area. Region 2 is geographically much larger, including nine counties, and ranging from Wilsonville in the north to Cottage Grove in the south, and from Astoria to the Cascade foothills. Region 2 is based in Salem and has four district offices located in Corvallis, Eugene, Astoria, and Salem.

3. The highway division's management structure, referred to as its leadership team, is comprised of the deputy division administrator, five region managers, and two region maintenance and operations managers (RMOM).

4. Regions 1 and 2 each have an RMOM position, which is a PEM G classification that reports directly to the region manager. The RMOM oversees the delivery of multi-million dollar maintenance and operational programs in the region; supervises, directs, and mentors the operations staff; and has direct input on budget and policy-making decisions. The position also responds to, and manages, emergencies affecting the region's highway system, including accidents, floods, slides, fires, earthquakes, and terrorist attacks. In the event of an emergency, the RMOM may act as the on-scene incident commander. The Region 2 RMOM supervises approximately 275 to 330 employees.

5. In 1986, Keller was hired by ODOT as a highway engineer 2, a classified position. In 1992, she was promoted into management service. In 1998, she became the Region 1 RMOM based in Portland.

6. In 1988, Keller was arrested for driving under the influence of intoxicants (DUII). In 2008, she was again arrested for DUII, and her driver's license was suspended for 90 days following her entry into a diversion program. ODOT accommodated Keller during the suspension by allowing her to continue working, which she did by taking public transportation, accepting rides with friends or colleagues, and using nearly a month's worth of leave options.

7. Following her 2008 DUII conviction, Keller assured her manager at the time, Jason Tell, that she would not engage in that behavior again. Keller's longevity and position with

ODOT factored into the decision not to impose discipline. On November 26, 2008, Tell sent Keller a letter setting out certain expectations.

“My expectations of you and your position are as follows:

- “• You are expected to perform all of the essential duties as detailed in your position description.
- “• You are expected to perform your normal work duties - including travel - to perform work that is assigned to you.
- “• For the duration of your suspension which prevents you from driving a state assigned vehicle or personal vehicle during work hours, it will be your responsibility to find acceptable and alternate transportation to perform your duties requiring travel to field locations.

“* * * * *

“I would also like to remind you of the availability of the confidential Employee Assistance Program (EAP) to help you with workplace stress and other issues * * * .

“Please understand that failure to meet these expectations can initiate a disciplinary process * * * .”

8. ODOT has a policy called Principles of Public Service Ethics that requires ODOT employees to “conduct themselves and Department business according to the highest ethical standards,” and expects employees “to set a positive example of public service and good citizenship by following both the letter and the spirit of laws, rules, policies, and procedures.” It also has a policy called “Maintaining a Professional Workplace” that encourages professionalism and addresses inappropriate workplace behavior. ODOT does not have a written policy requiring employees to report a DUII arrest.

9. As part of its mission, ODOT underwrites a statewide safe driving campaign to discourage people from driving while intoxicated.

10. In November 2009, Keller was involuntarily reassigned to special projects in Region 2 for the good of the service arising from an ongoing conflict with a coworker.¹ During the pendency of Keller’s appeal of that decision to this Board, she was permitted to use a state car to commute to Salem from her Portland-area home. She was also permitted to flex her work schedule and telecommute when appropriate. Following the denial of her appeal, Keller’s temporary reassignment became permanent and she was appointed Region 2 RMOM in 2010. She continued to reside in the Portland area.

¹Keller’s appeal of that decision, which was the subject of *Keller v. State of Oregon, Department of Transportation*, Case No. MA-007-10 (December 2010), was denied by this Board.

11. Keller reported to Region 2 Manager Jane Lee. In February 2010, in accordance with ODOT policy, Lee presented Keller with a position description to review and sign. It was based on the RMOM position description for Region 1 that Keller had signed in 2007. Under **“SECTION 4. WORKING CONDITIONS,”** it states:

“This position is on call 24 hour/day 7 days per week, including holidays. Work is performed in both an office and field environments. Field work is on rough terrain, hard surfaced pavements, and slide or rock fall areas where extreme caution needs to be exercised * * *.

“ * * * * *

“Regular travel within the Region is expected, and at least monthly statewide travel is required. Must have a valid Oregon driver’s license, or be able to provide an acceptable alternative method of transportation.”

Under **“SECTION 10. ADDITIONAL POSITION-RELATED INFORMATION,”** it lists additional requirements, including “[m]odel and uphold ODOT values and hold subordinate managers and employees accountable,” and “[m]aintain a valid Oregon Drivers License.”

12. Several management-level position descriptions, including those for previous RMOMs, had the same language regarding the requirement of a valid driver’s license or an acceptable alternative method of transportation.

13. Keller’s performance evaluations from 2008 to 2010 indicate that she either met or exceeded expectations. On September 7, 2010, however, Lee wrote a letter of concern, which was revised following Keller’s input, regarding her communication style to subordinates, which could come across as abrupt, aggressive, demeaning, or disrespectful.² The letter suggested classes that Keller could take to improve her communication skills.

14. In November 2010, Lee left her position to become ODOT’s Director of Human Resources and was replaced by Interim Region Manager Eryca McCartin, who became Keller’s supervisor. Around this time, Keller learned from a former Region 2 RMOM that ODOT planned to take her state car away. At the time, Keller was parking it overnight at her daughter’s school.

15. On February 22, 2011, McCartin issued a non-disciplinary letter of concern arising from an incident in which Keller worked on her BlackBerry throughout a job interview.³ The candidate took offense and withdrew his name from consideration, and Keller was advised that her professionalism needed improvement.

²Keller argues that the complaint was filed in retaliation for her investigation of the employee for violating ODOT’s procurement policies. She does not recall seeing the letter, but Lee credibly testified that they met to discuss the incident and that Keller’s suggestions were incorporated into the revisions.

³Unless indicated otherwise, all remaining dates occurred in 2011.

16. On March 31, Keller was informed that she was no longer assigned a state car to commute to work. Keller's use of a state car was scheduled to expire in June. She later asked McCartin to reconsider that decision, but McCartin declined to do so.

17. Around 1:00 a.m. on April 1, Keller was pulled over for speeding while driving her own car. She was arrested and subsequently charged with DUII. She was released a few hours later and attended a previously-scheduled business meeting at the Baldock rest area near Wilsonville. She did not inform McCartin or anyone else at ODOT of her arrest at that time.

18. On April 4, the following Monday, Keller sent an e-mail to McCartin stating that her physician had placed her off work under the Family Medical Leave Act (FMLA) for two weeks, but she did not provide a reason or disclose her arrest. The next day, Keller met with McCartin to give her the FMLA paperwork, which stated that she would be off work for two to three months. Keller did not explain the reason for the leave, other than to say that she was unhappy about the decision to take her state car away and that she was experiencing psychological stress. On April 19, Keller returned her state car, but did not disclose her arrest.

19. On April 21, Keller informed McCartin about her arrest in a telephone call. Keller had been contacted by a reporter and was aware of potential press coverage. That day, the online version of *The Oregonian* newspaper, OregonLive.com, published an article that identified Keller as an ODOT manager, included her DUII arrest record, a mug shot, and other unflattering details. Keller implied to McCartin that ODOT was behind the posting. An ODOT spokesman provided a statement for the article.

20. On or about April 30, Keller telephoned McCartin to tell her that her license suspension was for one year beginning May 1.

21. On May 24, Keller filed paperwork with ODOT's Equal Employment Opportunities (EEO)/ADA coordinator Marsha Smith for accommodation under the Americans with Disabilities Act (ADA) based on Keller's alcoholism. Smith administers: (1) internal complaints under Title 7 (hostile actions regarding a protected status); (2) affirmative action goals; and (3) consults with HR regarding ADA accommodation claims. She also processes EEO claims that involve: (1) workplace issues arising from harassment or discrimination issues in a protected class; and (2) workplace behavior not related to a protected class. Smith assigned two investigators to gather facts and review Keller's claim.

22. On June 8, Keller was released for partial duty from her FMLA leave and returned to work in Salem. She was met by McCartin and HR manager Jon Hills who informed her that she was being placed on paid administrative leave, effective immediately. She turned in her keys and later lost access to her state-issued BlackBerry cell phone and was directed not to contact ODOT personnel or conduct business related to her job.

23. On July 5, Keller and her attorney attended an investigatory interview with Hills, who had been assigned to investigate the circumstances surrounding her arrest and license suspension. Also present were McCartin and an attorney from Department of Justice. She was asked about her duties, the driving requirements of her job, cell phone usage during her FMLA leave, and other related questions. When asked how she would drive throughout the region without a valid Oregon driver's license, Keller responded that she rarely needed to drive, but that if she did, she could find someone to drive her, including possibly her mother or teenage nephew.

24. On July 13, Keller sent an e-mail to McCartin alleging that Hills was retaliating against her because he initiated the removal of access to her BlackBerry. McCartin denied the allegation, but forwarded Keller's complaint to HR Manager April Makalea.

25. On August 4, Keller sent an e-mail to Makalea complaining of discrimination and retaliation, and informing her that she had filed a complaint with Highway Administrator Paul Mather and HR Manager Clyde Saiki. Keller believed that McCartin had ignored her complaints about Hills and a revised position description. Ultimately, Keller filed internal EEO complaints on July 19 and August 4 and 24 against Hills, McCartin, and Lee based on what she believed was discriminatory and retaliatory conduct. These complaints were in addition to a complaint filed with the Bureau of Labor and Industries (BOLI) arising from her transfer, a tort claim notice, and the ADA and FMLA claims.

26. On September 8, a pre-dismissal meeting was held with Keller, her attorney, Hills, McCartin, and a DOJ attorney. Keller and her attorney had been provided a notice of pre-removal and pre-dismissal that listed misconduct, malfeasance, and other unfitness to render effective service under ORS 240.555 and ORS 240.570(5) as the basis for the decision. The reasons for the proposed discipline included:

(A) Keller's behavior (*i.e.*, the repeat DUII violations) was contrary to ODOT's mission, goals, and values and damaging to ODOT's public image. Specifically, it cited her arrest and the delay in notifying management for three weeks, even though she was performing limited duties. It also referred to the publication of her arrest.

(B) The loss of trust in her ability to model appropriate behavior, including compliance with agency policies and applicable laws, and inability to acknowledge the impact of conduct on her leadership role in the organization. The document emphasized that Keller did not seem aware of what impact her arrest might have on ODOT.

(C) The suspension of her driver's license for one year and its effect on performing the duties of the position.

27. As part of his investigation, Hills researched whether there were any available classified service positions for which Keller might be qualified. Ultimately, however, Mather determined that dismissal from state service was warranted and no classified position was offered to Keller.

28. On September 19, Keller was sent a notice of removal and dismissal signed by Mather. Many of the same facts and concerns raised in the pre-removal notice were reiterated, and the notice explained why both removal and dismissal were warranted.

29. On September 28, following a jury trial, Keller was convicted of DUII. On October 17, the Circuit Court imposed a lifetime suspension of her driver's license. A 90-day jail sentence was changed to home detention.

30. After EEO/ADA coordinator Smith's investigation was completed in January 2012, Smith determined that there was no evidence of retaliation or harassment and the internal complaints were not sustained. Although Keller was dismissed in September 2011, Smith's investigation process was parallel to the employment process and required independent resolution.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Keller's removal from management service did not violate ORS 240.570(3).
3. Keller's dismissal from state service did not violate ORS 240.570(5) and 240.555.⁴

Legal Standards

ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." *Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 at 22 (July 2010).

Under ORS 240.570(5), a management service employee with immediate prior status as a classified employee "may be dismissed from state service only for reasons specified by ORS 240.555 and pursuant to the appeal procedures provided by ORS 240.560." *Id.* at 22. The reasons for discipline or dismissal under ORS 240.555 are: "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service."

Under this statutory scheme and because Keller had status as a classified service employee before she was promoted to the management service, we must consider two separate

⁴Keller also alleges that her dismissal violated ORS 659A.112, *et seq.* (disability discrimination), 659A.183 (retaliation for use of or denial of family leave), and 659A.865 (retaliation for filing a BOLI complaint). These matters are outside the jurisdiction of this Board and will not be considered further. *Phillips v. Dept. of Rev.*, 23 Or App 748 at 751, 544 P2d 196 (1975) (the Board is a statutory body that can only decide matters that the legislature has authorized it to determine).

personnel actions: (1) her removal from management service under ORS 240.570(3); and (2) her dismissal from state service under ORS 240.570(5) and 240.555. ODOT has the burden of proving that both actions were lawful. OAR 115-045-0030(6).

Removal from Management Service

We first address the removal from management service under ORS 240.570(3). The employer meets its burden of proof if this Board determines, under all of the circumstances, that the employer's actions were "objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981); *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011). In applying the "objectively reasonable" standard to management service cases, an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Lucht* at 23; *Heifer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the "management team." *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013); *Lucht* at 24. In addition, our precedent gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Salchenberger* at 11; *Lucht* at 24. We have stated that "[t]he employer's burden in justifying a removal from management service is relatively minor." *Zaman v. State of Oregon, Department of Human Resources*, Case No. MA-21-12 at 15 (April 2013) (quoting *Plank v. Department of Transportation*, Case No. MA-17-90 at 29 (March 1992)).

Here, there is no dispute that Keller engaged in the conduct that formed the basis of her removal from management service—namely, driving while under the influence of intoxicants in violation of Oregon law. Moreover, this was the second such offense during Keller's tenure as a management service employee, with the prior offense occurring in 2008. At the time of the 2008 offense, ODOT accommodated Keller's 90-day suspension of her driver's license and elected not to discipline Keller due to the remorse that she expressed and her pledge that such conduct would not recur. As set forth above, that pledge was not met.

Additionally, Keller's conduct was contrary to a core mission of the agency—namely, to provide a safe transportation system for Oregon. Her conduct also was contrary to the agency's statewide safe-driving campaign of discouraging people from driving while intoxicated. Her failure to report her *repeat* DUII violation to ODOT in a timely manner also resulted in a loss of trust in her as a management service employee, notwithstanding that the agency had no written policy requiring a manager to report a DUII violation. As set forth above, at the time of her first DUII violation, Keller committed to not engaging in such conduct in the future. Her failure to keep that commitment further eroded ODOT's trust in her to act as a member of the management team. Finally, regardless of whether having a valid Oregon driver's license was a requirement of her job, ODOT reasonably determined that the loss of that license negatively affected her ability to effectively perform her job duties.

We acknowledge that Keller's DUII violation took place while she was off duty. We have previously explained that a management service employee's off-duty conduct may reflect negatively on the agency and be grounds for removal from management service. *See Herbst v. State of Oregon, Department of Public Safety Standards and Training*, Case No. MA-5-06 at 39-40 (October 2008). In assessing a removal from management service based on off-duty misconduct, we have explained:

“It is a reasonably accurate generalization to say that public employees do not, as a condition of employment, give up the right to conduct their private, off-duty lives as they wish, free from employer scrutiny or intrusion. However, it is also true that employers can require employees to refrain from conduct, even off the job, which would damage the employer's business, its reputation, or the employee's effectiveness. The task here is to weigh these competing interests to determine whether the employer was entitled to rely on the manager's off-duty activity in [the dismissal].” *Id.* at 39-40 (internal brackets omitted) (quoting *Lawson v. Department of Fish and Wildlife*, Case Nos. MA-15/28-94 at 14-15).

Here, in weighing those competing interests, we conclude that ODOT established that Keller's off-duty conduct demonstrated that she was “unable or unwilling to fully and faithfully perform the duties of [her] position satisfactorily” within the meaning of ORS 240.570(3). In reaching that conclusion, we give weight to the fact that ODOT's mission involves providing “a safe, efficient transportation system” in Oregon. ODOT's values and goals likewise include safety and improving safety in the state's transportation system. ODOT also underwrites a statewide safe driving campaign to discourage people from driving while intoxicated.

Keller's conduct in April 2011 of driving under the influence of intoxicants strikes at the core of the agency's mission, values, and goals. Moreover, that conduct was the subject of a media report that negatively reflected on ODOT's reputation, particularly given the mission of the agency and Keller's role as a management service employee. Finally, we conclude that Keller's conduct and its public exposure would likely have damaged Keller's effectiveness as a manager. Accordingly, under these circumstances, we find that there was a sufficient nexus between Keller's off-duty conduct and ODOT's mission, such that her actions reflected negatively on the agency and demonstrated that Keller was unable or unwilling to fully and faithfully perform the duties of her managerial position satisfactorily. *See* ORS 243.570(3).

We disagree with Keller's assertion that ODOT's decision to remove her from management service was not the act of a reasonable employer. As explained above, in applying the “objectively reasonable” standard to management service cases, an employer's burden is “relatively minor” and an employer may hold a management service employee to strict standards of behavior, so long as these standards are not arbitrary or unreasonable. *Lucht* at 24; *Heifer* at 22. Here, we do not find it unreasonable or arbitrary for ODOT, an agency charged with providing a safe transportation system and that underwrites a statewide safe driving campaign to discourage people from driving while intoxicated, to expect its management service employees

to refrain from driving under the influence of intoxicants, even while off duty. Moreover, in light of this agency’s mission and Keller’s repeated DUII violations, we conclude that it is reasonable that ODOT’s trust and confidence in Keller have been harmed, and that Keller’s capacity to act as a member of the management team has been compromised. Finally, we emphasize that we give weight to the effect of the management service employee’s actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Salchenberger* at 11; *Lucht* at 24. Under the circumstances of this case, we conclude that ODOT’s standards were not arbitrary or unreasonable.

In sum, we conclude that ODOT demonstrated that Keller was unable or unwilling to fully and faithfully perform the duties of her managerial position satisfactorily. See ORS 243.570(3). Consequently, ODOT did not violate ORS 243.570(3) when it removed Keller from management service.

Dismissal from State Service

We now turn to her dismissal from state service. We begin our analysis by determining whether ODOT proved the charges on which its actions are based: misconduct, malfeasance, and other unfitness to render effective service due to two DUII offenses between 2008 and 2011. We have defined “misconduct” as “a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior.” *Mabe* at 26. (Emphasis in original.) In addition, the conduct must involve intentional wrongdoing in order to meet the definition of misconduct under ORS 240.055. *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 30 (July 2006), *recons denied*, (September 2006).

There is no dispute that Keller engaged in the conduct for which she was removed from management service and dismissed from state service—namely, driving under the influence of intoxicants twice from 2008 to 2011. That conduct is undisputedly “unlawful,” and the result of willful, intentional actions. Thus, we find that Keller engaged in “misconduct” within the meaning of ORS 240.055.⁶

We do not understand Keller to argue otherwise. Rather, Keller contends that ODOT did not act as a reasonable employer in dismissing her from state service. A reasonable employer is “one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee’s length of service and service record, and applies the principles of progressive discipline, except when the offense is gross.” *Bellish v. State of Oregon, Department of Human Services, Seniors and People with Disabilities*, Case No. MA-23-03 at 8 (April 2004), *recons*, (June 2004). When we apply the reasonable employer test to review a dismissal from state service, we scrutinize an agency’s conduct more stringently, under rules that are substantially different from those governing management service removal. *Mabe* at 23; *Peyton v. Oregon State Health Division, Office of Environment and Health System*, Case No. MA-4-87 (January 1989). Charges that are adequate to support removal from

⁶Because we find that Keller engaged in “misconduct,” we need not determine whether her conduct also constitutes “malfeasance” or “other unfitness to render effective service” under ORS 240.055.

management service might not be sufficient to justify dismissal from state service. *Mabe* at 23; *Stoudamire v. Department of Human Services*, Case No. MA-4-03 at 8 (November 2003). An employer must show that it dismissed the employee in good faith for cause. *Mabe* at 23; *Plank v. Department of Transportation, Highway Division*, MA-17-90 (March 1992).

Although a much closer call, we nevertheless conclude that ODOT dismissed appellant in good faith for cause and acted as a reasonable employer under all of the present circumstances. We reason as follows.

As set forth above, in 2008, Keller pled guilty to DUII and her license was suspended for 90 days. She previously had been cited for DUII in 1988. When ODOT was informed of the 2008 DUII, it elected not to discipline Keller at that time because she expressed remorse over the incident and pledged not to engage in such conduct in the future. In deciding not to discipline Keller in 2008, ODOT also considered Keller's lengthy service with ODOT and her role as a member of the leadership team. Her supervisor, Tell, communicated his expectations going forward, including the expectation that such conduct would not recur.

We disagree with Keller's assertion that ODOT's decision to forego discipline for the 2008 incident means that it could not dismiss her from state service for a repeat infraction in 2011. One of the primary purposes of progressive discipline is to give an employee the opportunity to correct behavior. *Boaz v. State of Oregon, Office of Private Health Partnerships, Family Health Insurance Assistance Program*, MA-10-09 at 19 (November 2010). Here, Keller was afforded that opportunity, even though ODOT elected in 2008 not to impose formal discipline. Specifically, Keller was put on notice that such conduct was not consistent with the mission of the agency or the agency's expectations of her as an employee. She acknowledged as much by promising that she would not engage in that action in the future. Under these circumstances, we conclude that Keller was given an opportunity to correct her behavior in 2008, but that she failed to do so when she again drove under the influence of intoxicants in 2011.

Moreover, as a result of her DUII arrest in April 2011, Keller knew that she had violated ODOT's, and her own, expectations. She also knew or should have known that prompt disclosure of her arrest to her employer was expected, especially given her previous 2008 DUII incident. Keller nevertheless delayed telling anyone at ODOT for three weeks, despite attending a business meeting the day of her arrest, meeting with McCartin four days later, and being in regular contact with McCartin and ODOT personnel. Even when she submitted paperwork for her FMLA leave, Keller did not tell anyone about her arrest, only that she was suffering from a possibly serious medical condition. When she finally informed McCartin, it was only after Keller had been contacted by the press and knew that her arrest would be publicized. We find that Keller's lack of candor with her employer reflected poor judgment, which provides an additional factor weighing in favor of ODOT's decision to dismiss her from state service.

Additionally, Keller did not appear to appreciate the seriousness of her conduct and how it affected ODOT. When her 2011 arrest was reported in the press, it put ODOT in the awkward position of explaining a high-level manager's DUII violation, while expending resources to underwrite a statewide campaign against drunk driving. Keller did not see how her arrest reflected poorly on ODOT, and did not view the press coverage of her incident as necessarily

negative. Her failure to appreciate the seriousness of her conduct added to ODOT's concerns. In sum, we agree with ODOT that Keller's conduct would not likely be remedied by progressive measures.

We also conclude that ODOT considered Keller's length of service and value as a manager, consistent with the reasonable employer standard. ODOT acknowledged Keller's service and performance record, but concluded that her record of service did not sufficiently mitigate her repeat DUII infractions. Indeed, ODOT had already relied on her service and performance record in deciding not to formally discipline her following her 2008 arrest. At that time, Keller was informed and acknowledged that such conduct would not be tolerated in the future. Here, given the nature of the agency and its mission, and the nature of Keller's repeated misconduct that violated a core tenet of that mission, we do not conclude that the employer was unreasonable in how it weighed Keller's length of service and performance record.

We acknowledge again that Keller's misconduct occurred while she was off duty. As set forth above, generally, an employee's off-duty conduct is "out of bounds" for an employer. However, where, as here, there is a sufficient nexus between the agency and the type of off-duty misconduct, such that the off-duty misconduct would damage the employer's business, its reputation, or the employee's effectiveness, an employee may be dismissed for that off-duty misconduct. *See Herbst* at 39-40. Here, in weighing the right of Keller to be free to live her off-duty life free from employer scrutiny or intrusion, there are several factors that nevertheless lead us to conclude that her dismissal did not violate ORS 240.555 or ORS 240.570(5).

First, as set forth above, there is a particularly strong nexus between ODOT's mission as an agency and Keller's off-duty misconduct. As part of its mission, ODOT underwrites a statewide safe driving campaign to discourage people from driving while intoxicated—Appellant's repeated violations of this law undermined the mission of ODOT and that campaign. Second, Keller had been put on notice that this particular type of unlawful off-duty misconduct was not to recur and she promised as much. Third, Keller's off-duty conduct was publicized in a mainstream online publication, which reflected negatively on the agency. Fourth, Keller was not candid with her employer when the infraction occurred and did not, thereafter, express sincere appreciation for the gravity of her misconduct. Fifth, at least in the short term, Keller's driver's license suspension negatively affected her ability to successfully perform her job duties. Finally, Keller's conduct demonstrated a lack of judgment and responsibility of an employee who, after receiving the benefit of continued employment for a previous DUII, persisted in behavior contrary to ODOT's mission and values. Under such circumstances, we conclude that ODOT acted as a reasonable employer in dismissing Keller from state service, even though the misconduct occurred off duty.

Finally, we address Keller's argument that ODOT acted as an unreasonable employer because it did not follow a "loss-of-driver's-license matrix" that was put together by ODOT HR Operations Staff. According to Keller, ODOT should have permitted her to remain employed and provide her own transportation based on the matrix.

The matrix was developed "to create a guide for management and HR based [on] current [ODOT] practices." However, the matrix also states that "harsher discipline may be appropriate"

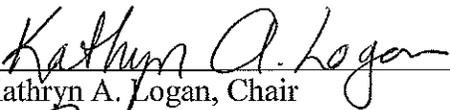
in some circumstances, “if the loss of license is not the only element for which discipline is being taken.” As set forth above, Keller’s loss of her driver’s license was not the only, or even the primary, basis for her dismissal from state service—far more significant was Keller’s repeat DUII conviction after her pledge that such conduct would not recur. Therefore, we do not conclude that ODOT acted as an unreasonable employer by determining that the matrix did not apply to Keller’s situation, or that the matrix somehow precluded dismissal from state service.

In sum, after considering the totality of circumstances, we conclude that ODOT did not violate ORS 240.570(3), ORS 240.570(5), or ORS 240.555 in removing Keller from management service and dismissing her from state service. Accordingly, we will dismiss Keller’s appeal.⁷

ORDER

The appeal is dismissed.

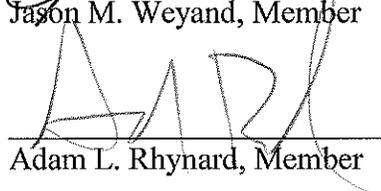
DATED this 10 day of September 2013.



Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

⁷Keller also argues that ODOT failed to accommodate her ADA claim based on alcoholism, but EEO/ADA Coordinator Smith assigned two investigators to gather facts and report back to her. The ADA claim investigation runs on a parallel track to the employment action, but once Keller was dismissed, there was no accommodation to be made. Determinations of disability and reasonable accommodation are within the express authority of other federal and state agencies, and we will not consider the merits of her ADA claim. *McCoy v. State of Oregon, Department of Transportation*, Case No. MA-8-02 (January 2003).