

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0661

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On March 3, 2011, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, denying benefits (decision # 80241). Claimant filed a timely request for hearing. On April 1, 2014, ALJ Kirkwood conducted a hearing, and on April 2, 2014, issued Hearing Decision 14-UI-14074, affirming the Department's decision but modifying the separation date. On April 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Luke-Dorf Behavioral (Luke-Dorf) employed claimant as a residential counselor for mentally ill patients from October 8, 2007 to January 31, 2014.

(2) Because Luke-Dorf was licensed by the state to treat mentally ill patients, Oregon law required that its staff members pass a criminal background check conducted by the Oregon Department of Human Services (DHS) as a condition of employment. The employer's written policy required employed staff members to immediately notify it in the event of a criminal conviction which triggered the employer's obligation to notify DHS. Exhibit 1. In such a case, DHS would conduct a renewed criminal record check, and if that agency determined the nature of the reported conviction precluded continued employment, the employer was obligated to terminate the staff member's employment. Claimant was aware of the employer's policy.

(3) On January 21, 2014, claimant pled guilty to and was convicted of a criminal charge of harassment. The charge arose out of an off-duty argument between claimant and a family member. Claimant reported her conviction to the employer. The employer notified DHS, which conducted a renewed background check, determined that claimant was no longer employable in her position and notified the employer. On January 31, 2014, the employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. Because claimant was terminated due to off-duty conduct, the question is whether claimant willfully or with wanton negligence created the situation that made it impossible for her to attend work, satisfy an employer requirement or comply with an employer expectation.¹

Claimant pled guilty to a criminal charge of harassment. ORS 166.065(1)(a)(A) provides that a person commits the crime of harassment if the person “intentionally” harasses or annoys another person by subjecting such other person to “offensive physical contact.” By pleading guilty to the charge, claimant acknowledged that she consciously created the situation that led to her off-duty conviction. Claimant knew, or should have known, that her conduct could result in a criminal conviction that would affect her employability as a counselor for the mentally ill. By engaging in such conduct, claimant demonstrated indifference to the consequences of her actions, when she knew or should have known that she was violating standards of behavior the employer had the right to expect of her, i.e., that she avoid conduct or circumstances which could disqualify her from performing her job. Claimant’s conduct was at least wantonly negligent.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment or good faith error under OAR 471-030-0038(3)(b).² Although claimant’s conduct was isolated, OAR 471-030-0038(1)(d)(D) provides that acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible, exceed mere poor judgment and cannot be excused. Claimant’s conduct violated a criminal statute and her conviction for that conduct made a continued employment relationship impossible. Consequently, it exceeded mere poor judgment. Claimant’s conduct cannot be excused as a good faith error. Claimant was aware of the employer’s policy and that her continued employment was probably dependent upon her ability to remain conviction free. On this record, failed to show that she had a sincere belief, or a factual basis for believing, the employer would condone conduct which made a continued relationship impossible.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until she requalifies by earning four times her weekly benefit amount from work in subject employment.

¹ See OAR 471-030-0038(1)(c), OAR 471-030-0038(3)(a); see also, *Barnes v. Employment Department et. al.*, 171 Or App 342 (2000) (claimant’s loss of his driver’s license, a requirement of the job, due to off-duty DUII, was misconduct connected with work); *Weyerhauser v. Employment Div.*, 107 Or App 505 (1991) (claimant’s imprisonment, and consequent absence from work, due to off-duty probation violation, was misconduct connected with work); *Erne v Employment Division*, 109 Or App 629 (1991) (claimant’s act of threatening employees of employer’s client with a gun, while off-duty and which threatened employer’s business reputation, was misconduct connected with work); *Levu v. Employment Dept.*, 149 Or App 29 (1997) (claimant’s conviction for off-duty shoplifting which created atmosphere of mistrust where claimant handled employer’s cash and kept employer’s books, was misconduct connected with work).

² OAR 471-030-0038(3)(b) provides that isolated instances of poor judgment and good faith errors are not misconduct.

DECISION: Hearing Decision 14-UI-14074 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: May 27, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.