

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0935

Affirmed
Disqualification
Wage Credits Canceled

PROCEDURAL HISTORY: On April 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and canceling all benefit rights based on wages earned prior to the date of discharge (decision # 112036). Claimant filed a timely request for hearing. On May 12, 2014, ALJ Holmes-Swanson conducted a hearing, and on May 16, 2014 issued Hearing Decision 14-UI-17826, affirming the Department's decision. On May 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB in which he submitted new information that he did not offer into evidence at hearing. The new information related to a Settlement Agreement and Release in Full of Claims (Agreement) between claimant and the employer, signed on May 29, 2014. OAR 471-041-0090 (October 29, 2006) allows EAB to consider new information not received into evidence at hearing upon a showing that factors or circumstances beyond the offering party's reasonable control prevented the party from offering the information at hearing and that the new information is relevant and material to EAB's determination. Because claimant and the employer executed the Agreement on May 29, 2014, after the hearing, claimant has shown that circumstances beyond his reasonable control prevented him from offering the Agreement into evidence at hearing. In the Agreement, the employer agreed to withdraw claimant's dismissal, and claimant agreed to resign. However, claimant's work separation occurred on March 6, 2014. The nature of the work separation is determined not by the parties' characterizations, but by applying Employment Department law. How the parties agreed to characterize the work separation in the May 29, 2014 Agreement is not relevant and material to EAB's determination. We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Hearing Decision 14-UI-17826 refers to Exhibit 1, which the ALJ did not mark, but did identify and admit into evidence without objection at hearing. Accordingly, the documents identified at hearing as Exhibit 1 were marked as EAB Exhibit 1. Any party that objects to our doing so must submit such

objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the information will remain in the record as EAB Exhibit 1.

FINDINGS OF FACT: (1) Oregon Department of Revenue employed claimant from July 18, 2005 to March 6, 2014. Claimant began working as a principal executive manager in the employer's personal tax and compliance division in March 2013.

(2) Claimant's duties included supervising the flow of tax-related correspondence such as billings, offsets, garnishments, refunds and adjustments for the personal tax and compliance division. As part of his job duties, claimant also explained tax obligations to his unit and to the public. Claimant also supervised an account resolution team that had the ability to approve or deny tax penalties, waivers and account adjustments. EAB Exhibit 1.

(3) By policy, the employer expected employees to act with integrity and in an ethical manner, and to refrain from engaging in any activity that conflicted with the duties and responsibilities of the employee or the employer, or that created a perception that harmed the public confidence in the employer or tax system. Claimant understood the employer's expectations.

(4) On October 10, 2013, claimant was arrested and charged with multiple counts of forgery. Claimant was placed in custody.

(5) On November 5, 2013, claimant was released from custody, and the employer suspended him from work pending the outcome of his criminal case. EAB Exhibit 1.

(6) On February 4, 2014, claimant pled guilty and was convicted in Marion County Circuit Court of five counts of forgery in the first degree, and one count of criminal possession of a forged instrument in the first degree, each count being a class C felony. The crimes stemmed from the making of counterfeit currency.

(7) Claimant's convictions were reported in the local media, and the media reports identified claimant as being a manager at the Oregon Department of Revenue. Exhibit 2.

(8) On March 6, 2014, the employer discharged claimant because he was convicted of the felonies of forgery and possession of a forged instrument.

(9) On March 17, 2014, the Department sent the employer a Notice of Claim Filed (Form 220). On March 21, 2014, the employer returned the completed Form 220 to the Department, stating that it discharged claimant for committing a felony.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant for misconduct and that all benefit rights based on wages earned prior to the date of discharge shall be canceled.

Misconduct. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for committing the crimes of forgery and possession of a forged instrument while employed. It is not disputed that claimant's conduct took place during his employment, but not while he was on duty. EAB Exhibit 1. When a claimant is discharged for off-duty conduct, the first issue is whether the conduct was "connected with work," so that the employer had the right to expect him to refrain from such conduct. For off-duty conduct to be connected with work, it must affect or have a reasonable likelihood of affecting the employee's work or the employer's workplace. *Levu v. Employment Department*, 149 Or App 29, 34, 941 P2d 1056 (1997). It is enough that the ramifications that flow from the claimant's actions have a reasonable likelihood of negatively impacting the morale or atmosphere of the workplace. *Id.*

Claimant understood that, as a Department of Revenue employee, the employer expected him to exhibit high ethical conduct. Transcript at 29. Claimant also knew or should have known as a matter of common sense that committing crimes involving dishonesty and an intent to defraud would probably violate the employer's expectations. The record shows the employer believed it could no longer trust claimant to ethically perform his duties, and that claimant's continued employment was reasonably likely to harm the public's confidence in and perception of the employer. As a principal executive manager in the employer's personal tax and compliance division, claimant managed the flow of personal tax-related correspondence, and supervised employees who had the ability to approve or deny taxpayers' tax penalties, waivers and account adjustments. Claimant's crimes involved dishonesty, and affected the employer's ability to trust him and to rely upon his integrity on the job. Moreover, local media publicized claimant's convictions, and it was reasonably likely that such publicity would harm the public's confidence in and perception of the employer. Claimant's commission of crimes while employed by the employer therefore was connected to work, and the employer had a right to expect him to refrain from such conduct. Claimant's conscious decisions to repeatedly engage in such behavior demonstrated indifference to the consequences of his actions, and therefore was wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to 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. OAR 471-030-0038(1)(d)(A). Acts that violate the law or that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant's repeated decisions to engage in conduct that violated the law cannot be excused as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, that the employer condoned his violating the law. Thus, to the extent the employer discharged claimant for committing

crimes while employed by the employer, it discharged him for misconduct. Claimant is disqualified from the receipt of benefits.

Wage Cancellation. ORS 657.176(3) states that an individual's benefit rights based on wages earned prior to discharge shall be canceled if the individual admits to an authorized representative of the Department that he committed a felony or theft leading to his discharge, signed a written admission of a felony or theft that has been submitted to the Department, or has been convicted of a felony or theft by a court, and if the individual's employer notifies the Department of the discharge within ten days of notice from the Department. The employer discharged claimant for committing a felony, and the employer responded in a timely manner to the Department's Form 220. Claimant's benefit rights based on wages earning prior to March 6, 2014 are canceled under ORS 657.176(3)(c).

DECISION: Hearing Decision 14-UI-17826 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: July 8, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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