

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1294**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 114928). Claimant filed a timely request for hearing. On October 19, 2015, ALJ Vincent conducted a hearing, and on October 21, 2015, issued Hearing Decision 15-UI-46296, affirming the administrative decision. On October 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Providence Health & Services employed claimant as a registered nurse in its Oncology Clinic from January 27, 2014 to August 25, 2015.

(2) The employer's policies prohibited employees from behaving in a manner inconsistent with the behavior expected of a Providence employee or engaging in misbehavior that would create a potentially dangerous situation in the workplace. The policies specified that violation of these expectations was grounds for termination. The employer's "core values" required that employees treat each other appropriately and with respect. Claimant knew and understood the employer's policies and expectations.

(3) In approximately April 2014, claimant and a coworker, who worked in the same clinic as claimant, began dating. They dated on and off until July 2015.

(4) On July 10, 2015, claimant engaged in an altercation with the coworker whom he had been dating. The altercation did not occur in the employer's workplace and did not occur during claimant or the coworker's work hours.

(5) On August 17, 2015, in Washington County Circuit Court, claimant pled guilty to the charge of fourth degree assault (domestic violence), ORS 163.160, for his behavior on July 10. Claimant was sentenced to two years of formal probation; the conditions of claimant's probation included a prohibition

against contact with the victim except for incidental contact for work purposes, and participation in a domestic violence intervention program as directed by a probation officer. (Exhibit 1).

(6) After claimant was sentenced and at her request, the coworker whom claimant assaulted was temporarily assigned to another clinic.

(7) On August 25, 2015, the employer discharged claimant because it determined that his conviction for fourth degree assault was conduct “inconsistent with the standards expected of a Providence employee.” (Exhibit 1).

**CONCLUSION 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. 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.

The employer discharged claimant for committing the crime of fourth degree assault while he was working for the employer. It is undisputed that the altercation that resulted in claimant's conviction took place during his employment, but not while he was on duty. When a claimant is discharged for off-duty conduct, it is necessary to determine if the conduct was “connected with work,” so that the employer had the right to expect him to refrain from such conduct. To constitute work-connected misconduct, the off-duty conduct must affect or have a reasonable likelihood of affecting the employee's work or the employer's workplace. *Erne v. Employment Div.*, 109 Or App 629, 633, 820 P2d 875 (1991). The connection to work of a claimant's off duty conduct “is not limited to impairment of claimant's job performance or ability to do the job. It is enough that the ramifications that flow from claimant's actions negatively impact the morale or atmosphere of the workplace.” *Levu v. Employment Department*, 149 Or App 29, 34-35, 941 P2d 1056 (1997), citing *Muscatell v. Employment Div.*, 77 Or App 24, 28, 711 P2d 192 (1985) (a claimant's actions in beating and robbing a coworker could likely result in “an intolerable level of tension, if not downright fear, on the job” so as to create the required connection to work).

By pleading guilty to fourth degree assault on August 17, 2015, claimant admitted that he engaged in the behavior that constituted the crime. ORS 163.160(a) provides that a person commits the crime of fourth degree assault if the person “intentionally, knowingly, or recklessly causes physical injury to another.”<sup>1</sup> The evidence therefore demonstrates that claimant willfully and consciously engaged in the conduct that

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<sup>1</sup> ORS 163.160(1)(b) provides that a person commits assault in the fourth degree if the person “with criminal negligence causes physical injury to another by means of a deadly weapon.” The record contains no evidence that the July 10 altercation involved a “deadly weapon.”

resulted in his conviction. In regard to the connection between the crime to which claimant pled guilty and his work, we conclude that claimant's off duty conduct had the reasonable likelihood of negatively affecting "the morale or atmosphere of the workplace." As a result of claimant's conviction for assaulting a coworker, other employees could reasonably have begun to distrust claimant's ability to treat them appropriately and respectfully in the workplace, and could also have reasonably begun to fear for their own personal safety on the job. As the court did in *Muscatell*, we conclude that the employer met its burden to show that claimant's off-duty behavior had the reasonable likelihood to create fear and tension among other employees.

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). Because claimant's actions in assaulting his coworker violated the law, they 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 commission of a crime.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Hearing Decision 15-UI-46296 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** November 30, 2015

**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 Court of Appeals website at [courts.oregon.gov](http://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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