

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1017

Affirmed
Disqualified

PROCEDURAL HISTORY: On July 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 110431). Claimant filed a timely request for hearing. On August 17, 2016, ALJ S. Lee conducted a hearing, and on August 24, 2016, issued Hearing Decision 16-UI-66199, affirming the administrative decision. On August 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From February 19, 2013 until June 9, 2016, the North Clackamas School District #12 (District) employed claimant as a human resources specialist. Among claimant's duties were: processing leaves of absence, including those requested under the Family and Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA); setting up payroll; "onboarding" newly hired employees, *i.e.*, processing payroll and other forms for new employees, and processing personnel actions. Claimant's position required that she access confidential and personal employee materials, such as addresses, social security numbers, salary levels and medical information.

(2) In December 2015, claimant was arrested and incarcerated on charges of theft and fraud. The District placed claimant on administrative leave while criminal proceedings against claimant were pending.

(3) On June 3, 2016, claimant pled guilty in Clackamas County Circuit Court to three felony counts of theft and making a false claim for payments from the Oregon Department of Human Services (DHS). As part of her guilty plea, claimant admitted that she had falsely claimed to be the caregiver for a niece and two nephews, and accepted payments from DHS for these services, which she had not actually

provided. Claimant then gave the money she received from the state to a family friend who actually cared for the children. Audio recording at 27:20.

(4) On June 9, 2016, the District discharged claimant. In a letter dated June 8, 2016, the District explained that it was discharging claimant

...due to you being charged and convicted of felonies involving fraud and dishonesty. [sic] In which you attested to ‘unlawfully and knowingly’ committing in your sentencing hearing. You are employed in a position that requires honesty and integrity in the handling of confidential employee information. As a result of your felony convictions, the District can no longer trust you in this position. Exhibit 1.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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 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.

The employer discharged claimant for committing crimes of theft and fraud. Evidence presented by claimant, which was unrebutted by the District, showed that the crimes to which claimant pled guilty took place during her off-duty time and involved claimant's friends and family members; claimant did not steal from or defraud the District or any of its employees. 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 her to refrain from such conduct. To constitute work-connected misconduct under ORS 657.176(2)(a), 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). In *Levu*, the court found that because claimant's job as a hotel night auditor involved handling the employer's finances, honesty was an integral requirement of her position. Because “claimant's off-duty criminal act [shoplifting] resulted in a breakdown of the employment relationship by creating an atmosphere of suspicion and distrust,” the court concluded that shoplifting was work-related misconduct. *Levu* at 35.

By pleading guilty to crimes of theft and fraud, claimant admitted that she engaged in the behavior that constituted these crimes. In regard to the connection between the crimes to which claimant pled guilty

and her work, we conclude that claimant's off duty conduct had the reasonable likelihood of negatively affecting "the morale or atmosphere of the workplace." Claimant's job involved working with information employees needed and wanted to keep confidential, such as social security numbers, salaries, and medical documentation to support requests for FMLA and OFLA leaves of absence. The employee information to which claimant had access could be used for illegal purposes, such as identity theft. As a result of claimant's conviction for fraud and theft, the employer, and the employees whose information claimant accessed, could reasonably have begun to distrust claimant's ability to keep the information with which she was entrusted confidential and could reasonably suspect that she might misuse this information for her own or someone else's benefit.¹ As the court did in *Levu*, we conclude that the employer met its burden to show that claimant's off-duty behavior had the reasonable likelihood to create "an atmosphere of suspicion and distrust," and therefore constituted work-related misconduct.

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 committing theft and fraud 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 she sincerely believed, or had a rational basis for believing, that the employer condoned her commission of a crime.

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

DECISION: Hearing Decision 16-UI-66199 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: September 29, 2016

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. 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.

¹ At the hearing, claimant defended against the charge of work-related misconduct by testifying that she did not sign any of the false time cards she submitted to DHS, in which payment was claimed for services claimant never performed, and that she did not keep any of the money she received from DHS. Audio recording at 29:21, 29:36. Claimant's admission that she engaged in criminal conduct that benefitted family members and a friend, however, could cause the District (and employees with whom claimant worked) to reasonably fear that she could misuse the information to which she had access for the benefit of herself or someone else.

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