

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1251

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90045). Claimant filed a timely request for hearing. On October 20, 2016, ALJ Murdock conducted a hearing, and on October 24, 2016 issued Hearing Decision 16-UI-69806, affirming the Department's decision. On November 9, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) PeaceHealth employed claimant as a registered nurse in its home health department from July 28, 2015 until July 22, 2016.

(2) Claimant provided nursing services to ill patients in their homes. The patients were often hospice patients. Claimant's physical presence in the patients' homes was unsupervised.

(3) The employer expected claimant to be honest, law-abiding and trustworthy when in the patients' homes providing services to them. Claimant understood the employer's expectations.

(4) Between January 2013 and October 2, 2013, a person with progressive dementia and impaired cognition resided in an adult foster home that claimant owned and operated. Sometimes, claimant had the resident sign blank checks drawn on his bank account, which claimant later filled out and negotiated. On October 2, 2013, the resident died. Exhibit 1 at 1. On November 20, 2015, claimant was charged with the crimes of criminal mistreatment in the first degree and theft in the first degree resulting from her involvement in the resident's financial affairs in 2013. Exhibit 1 at 2.

(5) On July 12, 2016, claimant waived her right to jury trial on the crimes with which she was charged, stipulated to the facts surrounding those charges and agreed to a court trial. Exhibit 2 at 1. After the trial, the judge entered a verdict finding claimant guilty of the crime of theft in the second degree. Exhibit 2 at 1.

(6) In July 13, 2016, claimant informed the employer that she had pled guilty to the crime of theft in the second degree. On July 22, 2016, the employer discharged claimant, concluding that as a result of her criminal conviction it would no longer trust her to care for a vulnerable patients in their homes. Exhibit 2 at 1.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant testified at hearing she understood that the employer expected her to behave with honesty and integrity in her dealings with patients. Audio at ~14:00. However, claimant took the position that since she was convicted of theft in the second degree arising from off-duty behavior, that behavior, even if dishonest, did not violate the employer's reasonable expectations concerning her on-the-job behavior. Audio at 20:18. However, the Court of Appeals has recognized that a claimant's off-duty dishonesty that results in a criminal conviction may violate the employer's expectations if, as a result of the nature of claimant's position, the employer necessarily trusted claimant to behave with honesty and integrity. *See Levu v. Employment Department*, 149 Or App 29, 33-34, 941 P2d 1056 (1997) (claimant's conviction for off-duty shoplifting violated the employer's standards because as a night auditor who handled the employer's cash and kept the employer's financial books, honesty and integrity were integral considerations for that position). Here, claimant went unsupervised into the homes of very ill patients, once in their homes had ready access to their property and other resources and, due to their illnesses, the patients likely were not be able to effectively safeguard themselves or their assets. Claimant did not dispute that she held a position of trust in her dealings with the patients on behalf of the employer or that considerations of honesty, integrity and law abidingness were integral to her position of providing in-home care. The employer had a right to expect that claimant would not engage in off-duty behavior that showed a propensity for dishonest or untrustworthy behavior like the alleged facts underlying her conviction for theft from a resident in an adult foster care facility.

Claimant testified that the crime for which she was convicted resulted from a "misunderstanding" with the family of the adult foster care resident, and that she pled guilty to theft in the second degree because the judge and the district attorney told her she would be able to continue working for the employer despite the conviction, and the employer's director for home care services told her she would be transferred to work in the hospital, where she would be allowed to work since she would be supervised. Audio at ~14:56, ~16:06, ~17:35. However, claimant's conviction was the result of the entry of a verdict after a bench trial on stipulated facts, and not a guilty plea. Exhibit 2 at 1. It is unlikely that the judge or district attorney would have seen a need to comment or would have commented on the status of claimant's employment as a condition (or inducement) to the entry of a verdict. As well, the employer's director of home care services denied that she promised claimant employment in the hospital after her conviction and credibly testified she would not have made such a promise since she had no control over the hospital's hiring or transferring of employees. Audio at ~21:55. With respect to the alleged

“misunderstanding” with the resident’s family, claimant never explained the nature of it, how it led to the criminal prosecution and did not contend that the verdict entered against her was incorrect and not based on facts to which she stipulated. On this record, given that a trial verdict was entered on facts to which claimant voluntarily stipulated, it appears more likely than not that claimant indeed engaged in the behavior that gave rise to the conviction. Claimant knew or should have her conduct probably violated the employer’s expectations, and her conscious decision to engage in such conduct demonstrated indifference to the consequences of her actions. Claimant’s conduct therefore was, at best, a wantonly negligent violation of the standards of behavior the employer had a right to expect of her.

Although claimant might have engaged in dishonest behavior off-duty, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(1)(b). An “isolated instance of poor judgment” means, among other things, behavior that does not exceed mere poor judgment by breaking the law or being tantamount to an unlawful conduct. OAR 471-030-0038(1)(d)(C). The entry of the trial verdict on facts to which claimant stipulated renders it more likely than not that she committed the crime of theft in the second degree. Because the act which violated the employer’s standards constituted a crime, claimant’s behavior is not excusable as an isolated instance of poor judgment.

Claimant’s behavior also was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing that the conduct resulting in her conviction of the crime of theft in the second degree complied with the employer’s standards of honesty and integrity. There is insufficient evidence in this record to excuse claimant’s behavior as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-69806 is affirmed.

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

DATE of Service: December 8, 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.

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