

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1368

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and cancelling benefit rights based on wages earned prior to the date of the discharge (decision # 121646). Claimant filed a timely request for hearing. On October 13, 2016, ALJ Wyatt conducted a hearing, and on October 21, 2016, issued Hearing Decision 16-UI-69696, affirming the administrative decision. On November 10, 2016, Hearing Decision 16-UI-69696 became final, without a timely application for review with the Employment Appeals Board (EAB) having been filed. On December 6, 2016, claimant filed an untimely application for review with EAB.

Late Application for Review: ORS 657.270(6) required that claimant's application for review of Hearing Decision 16-UI-69696 be filed no later than November 10, 2016. Because claimant filed his application for review on December 6, 2016, it was untimely. OAR 471-041-0070 (August 30, 2011) provides that the filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875. "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). "A reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist. OAR 471-041-0070(2)(b).

Claimant submitted the following materials with his application for review: a fax cover sheet from a Department office dated November 1, 2016, which indicates a fax was sent to EAB and includes the title "Application for Review," and a "TX Report" showing that a fax transmission to EAB on November 1 was "OK." Based on these materials, it appears more likely than not that on November 1, claimant sought assistance from a Department representative in faxing a timely application for review to EAB,¹ and that some error occurred in the representative's transmission of the fax. The representative's

¹ An application for review may be filed in person, by mail, or by fax to EAB or any Department office. OAR 471-041-0060(2) (January 8, 2008).

inability to transmit the fax to EAB was a circumstance beyond claimant's reasonable control. Claimant's has therefore demonstrated good cause for filing a late application for review.

FINDINGS OF FACT: (1) Walmart employed claimant, last as a shift manager, from November 6, 2008 to July 23, 2016.

(2) On July 21, 2016, while claimant was on vacation, he visited a Walmart store other than the one in which he worked. Claimant's son found a wallet and gave it to claimant. Claimant took \$380 out of the wallet, and then gave the wallet, without the cash, to a Walmart employee. Claimant explained that his son had found the wallet on the ground.

(3) After claimant's actions in taking money from the wallet were discovered through a video surveillance camera, he was arrested and charged with first degree theft, a Class C felony under ORS 164.055(3). Claimant reported his arrest to his supervisor, as required by his employer's policy. In a July 22, 2016 email to his supervisors, claimant admitted that he had taken money from the wallet on July 21, and said that "I know that there is no excuse for my actions and I know that my actions were morally wrong." Exhibit 1, Claimant's 7/22/16 email.

(4) On July 23, 2016, the employer discharged claimant for theft of money from a Walmart customer.

(5) On July 24, 2016, claimant filed a claim for unemployment benefits. The Department mailed a notice of claim filing to the employer, and the employer filed a timely response within 10 days in which it alleged that it discharged claimant for theft.

(6) On August 29, 2016, a Department representative called claimant and left a message, asking that claimant contact the representative to discuss the reasons for his discharge. On or before August 31, 2016, claimant talked with the Department employee and admitted to the employee that on July 21, he took money from a wallet he found in a Walmart store. The employer also submitted to the Department a copy of claimant's July 22 email in which he admitted to the theft. Audio Recording at 28:00.

(7) On September 13, 2016, claimant pled guilty to a charge of theft in Linn County Circuit Court. He was sentenced to pay a fine and participate in a six month diversion program. Audio Recording at 31:03.

CONCLUSION AND REASONS: We agree with the ALJ. The employer discharged claimant for misconduct under ORS 657.176(2)(a) and claimant's benefits rights based on wages earned prior to the date of discharge are 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.

The employer discharged claimant for committing the crime of theft. The record shows that the theft to which claimant admitted and pled guilty occurred during claimant's off duty time, when he was on vacation and visiting a Walmart store other than the one where he worked for the employer. 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, and 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.

Claimant worked as a manger in the employer's retail store. Claimant knew or should have known that the employer expected him to exhibit honesty and integrity in all customer transactions. In addition, the employer reasonably expected that because claimant was a manager, he would model and provide an example of appropriate behavior for the employees he supervised. As a result of the theft that claimant committed, which involved money stolen at a Walmart store, from a Walmart customer, the employer lost trust in claimant's ability to deal honestly with customers, or to model honest behavior to subordinate employees. We conclude, as the court did in *Levu*, that claimant's off duty behavior had the reasonable likelihood of creating "an atmosphere of suspicion and distrust," and therefore constituted work-related misconduct. Because claimant's conscious decision to engage in actions he knew were "morally wrong" (Finding of Fact 3) demonstrated his indifference to the consequences of his actions, his conduct 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). Because claimant's action in committing theft violated the law, it 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. Claimant's discharge was for misconduct.

Wage Cancellation. ORS 657.176(3) states that an individual's benefit rights based on wages earned prior to discharge shall be canceled under the following circumstances: if the individual admits to an authorized representative of the Department that he committed a felony or theft leading to his discharge;

if the individual signed a written admission of a felony or theft that has been submitted to the Department; or, if the theft results in a conviction in a court of competent jurisdiction. In addition, the individual's employer must notify the Department of the discharge within ten days of the date on which the Department issues the notice of claim filed. Here, the employer discharged claimant for theft and the employer responded within ten days to the Department's notice of claim filed. The theft also resulted in claimant's conviction in Linn County Circuit Court. Claimant's benefit rights based on wages earning prior to his discharge on July 23, 2016 are therefore canceled under ORS 657.176(3)(c).

DECISION: Hearing Decision 16-UI-69696 is affirmed.

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

DATE of Service: December 12, 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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