

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0490

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110644). Claimant filed a timely request for hearing. On December 7, 2016 and January 11, 2017, ALJ Vincent conducted a hearing. On January 23, 2017, ALJ Triana, having reviewed the hearing and the other parts of the record, issued Hearing Decision 17-UI-20111 in ALJ Vincent's stead since he was unavailable, and reversed the Department's decision on the ground that claimant did not commit a disqualifying act under the Department's drug and alcohol adjudication policy. On February 10, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On March 23, 2017, EAB issued Appeals Board Decision 2017-EAB-1077 reversing and remanding this matter for further development of the record. On April 18, 2017, ALJ M. Davis conducted the hearing on remand, and on April 19, 2017 issued Hearing Decision 17-UI-81331, again reversing the Department's decision on the ground that claimant had not engaged in misconduct. On April 29, 2017, the employer filed an application for review with EAB.

FINDINGS OF FACT: (1) The city of Eugene (City) employed claimant as a fleet service technician from approximately April 6, 2015 until September 27, 2016.

(2) The employer expected that, as a City employee, claimant would uphold the Constitution, laws and regulations of the United States and the State of Oregon and the policies and principles of the City of Eugene. The employer also expected that claimant would refrain from behavior that reflected negatively on the City. The employer interpreted these policies, among other things, to prohibit claimant from engaging in on-duty or off-duty behavior that violated federal or state laws. Claimant understood that he was prohibited from engaging in unlawful activities.

(3) On at least three occasions during his employment, claimant gave a few oxycodone pills that a physician had prescribed to him for pain management to a coworker who had run out of pills in his own prescription for oxycodone. Claimant later accepted oxycodone from the coworker to replace the pills

that claimant had given to him. All of these exchanges of oxycodone took place off the worksite premises and during off-duty hours.

(4) On July 19, 2016, the employer was informed that claimant had been indicted by a Lane County grand jury for unlawful delivery of oxycodone, a class B felony crime, for his behavior in supplying oxycodone to his coworker. Claimant's indictment and the facts underlying it were reported in a local newspaper.

(5) On August 12, 2016, the employer placed claimant on paid administrative leave while it investigated the facts underlying his alleged criminal behavior. On August 15, 2016, at an investigatory meeting, claimant admitted to the employer that he had given oxycodone that was prescribed to him to a coworker and had later received oxycodone pills from the coworker to replace the pills that claimant had given to the coworker.

(6) On September 27, 2016, the employer discharged claimant for, among other things, having engaged in unlawful activities by giving and receiving oxycodone from his coworker.

(7) On February 6, 2017, claimant pled guilty to and was convicted of the crime of unlawful delivery of oxycodone, a class B felony.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

In EAB Decision 2017-EAB-0177, EAB concluded that claimant's actions in providing or receiving controlled substance) from coworkers when off-duty and away from the workplace, although unlawful acts, did not constitute violations of the Department's drug and alcohol adjudication policy under the circumstances established in this case. *See* ORS 657.175(9); OAR 471-030-0125(March 12, 2006). EAB remanded this case to determine whether claimant's actions in exchanging those controlled substances with coworkers away from the workplace constituted work-related misconduct under the general misconduct provisions of ORS 657.176(2)(a) and OAR 471-030-0038(3)(a) and disqualified him from benefits.

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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant readily admitted that on a few occasions during his employment while away from the workplace and off-duty he gave some oxycodone pills that were prescribed to him to a coworker whose own prescription for oxycodone had run out and that he received oxycodone pills back from that coworker as reimbursement for the pills he had supplied. Audio at January 11, 2017 Hearing at ~12:20, ~13:16, ~15:38, ~15:48; Transcript of April 18, 2017 Hearing at 20. While claimant contended these exchanges were in-kind and he never received or paid any money or anything of value for them, the issue is whether they nevertheless constituted "deliveries" of oxycodone within the meaning of Oregon

statutes controlling the dissemination of controlled substances. See ORS 475.005(a)(6) (a “controlled substance” means a drug classified in the federal schedules of controlled substances set out at 21 USC §§811, 812); 21 CFR §1308(12)(b) (oxycodone is a Schedule II controlled substance); ORS 475.005(8) (“delivering” a controlled substance means to transfer it to another, other than by “dispensing”)’ ORS 475.008(10) (“dispense” means delivering a controlled substances to another by lawful order of a practitioner, which includes a prescription). Since claimant did not give the oxycodone to the coworker pursuant to the lawful order of a practitioner, the facts he admitted about transferring the oxycodone established that it was a “delivery” within the meaning of the cited Oregon statutes. ORS 475.752(1)(b) states that the “delivery” of Schedule II controlled substance, like oxycodone, to another person is a class B felony, with no requirement either than the delivery was for valuable consideration or that the person delivering the substance knew it was illegal to do so without a prescription or other lawful order. As such, by his testimony, claimant admitted to all of the elements necessary to establish that he engaged in unlawful acts and committed the crime of unlawful delivery of oxycodone, a class B felony.

At hearing, while claimant testified he did not think it was “such a big deal” to give his coworker oxycodone pills from his own prescription, he did not dispute that he knew the employer prohibited him from engaging in unlawful activities that constituted felony crimes. Transcript of April 28, 2017 Hearing at 22. However, claimant’s criminal acts occurred when he was off-duty and away from the workplace. To find that claimant’s admitted criminal activities were disqualifying, they must have had a sufficient workplace nexus, despite where and when they occurred, to constitute “misconduct connected with work.” ORS 657.176(2)(a). Oregon authority holds that a claimant’s off-duty criminal behavior that occurs outside of the workplace may under certain circumstances have a sufficient connection to the workplace that it is work-related misconduct. See *Levu v. Employment Department*, 149 Or App 29, 149 Or App 29, 34-35, 941 P2d 1056 (1997) (claimant’s off-duty behavior in shoplifting was work-related misconduct when it called into reasonable question claimant’s honesty in performing work duties which created an atmosphere of suspicion and distrust that carried over to the workplace, and the requisite work connection existed because “the ramifications that flow from claimant’s actions negatively impact the morale or atmosphere of the workplace); *Erne v. Employment Division*, 109 Or App 629, 632-633, 820 P2d 875 (1991) (claimant’s off duty behavior in which he threatened and assaulted two tavern patrons was sufficiently connected to work to constitute misconduct when the patrons were employees of an important customer, customer relations and its business reputation were important to the employer and the “nature of the employer’s business” therefore made it reasonable for the employer to require certain standards for off-duty conduct); *Muscatell v. Employment Division*, 77 Or App 24, 28, 711 P2d192 (1985) (claimant’s off-duty behavior in beating up and robbing a coworker had the requisite work-connection and was misconduct since those acts created an intolerable level tension and fear in the workplace that claimant would repeat similar behavior in the future).

Here, claimant’s coworkers participated in his off-duty criminal behavior. For this reason, it is reasonable to infer that this joint participation in illegal acts would likely have negative impacts that carried over to the workplace, if only by engendering suspicion and distrust about the workplace activities of claimant and his coworkers. As well, claimant was public employee and his criminal acts and the subsequent police investigation of them were publicized in local media. Audio at January 11, 2017 Hearing at ~11:39. From the nature of the employer’s business activities, it is reasonable to infer that public perceptions of it and its reputation were of significant concern to the employer and that the involvement of its employees in criminal acts, even if off-duty, would have a seriously detrimental impacts on its reputation, its relations to the public and the trust and confidence the public placed in it.

For these reasons, claimant's admitted criminal behavior, while taking place off-duty and away from the workplace, had a sufficient nexus to the workplace to constitute work-connected behavior. Since claimant knew the employer prohibited him from engaging in illegal acts, and knew as matter of common sense that his participation in such acts would bring discredit on the employer, by his criminal behavior claimant willfully or with wanton negligence violated the employer's standards when he delivered oxycodone to a coworker.

Claimant's behavior is not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The behavior at issue of a claimant may be excused as an isolated instance of poor judgment only if it is 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). To qualify as behavior that may be excused, the behavior at issue must not have "exceeded mere poor judgment" by among other things, violating the law. OAR 471-030-0038(1)(d)(D). Here, the behavior to be excused was at least three occurrences of the class B felony crime of delivering oxycodone as set out at ORS 475.752(1)(b). Because claimant's admitted behavior constituted a crime, by definition it exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment.

Nor may claimant's behavior in engaging in criminal activities be excused as a good faith error under OAR 471-030-0038(3)(b). While claimant may not have known he was committing crimes when he delivered or received oxycodone from his coworker, he knew he was exchanging oxycodone with the coworker. There is no evidence in the record suggesting or tending to suggest that his behavior in exchanging oxycodone with the coworker arose from misunderstanding the employer's prohibition against illegal behavior.

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

DECISION: Hearing Decision 17-UI-81331 is

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

DATE of Service: June 2, 2017

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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