

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1049**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On July 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharge claimant for misconduct (decision # 114321). Claimant filed a timely request for hearing. On August 28, 2017, ALJ Shoemake conducted a hearing, and on August 29, 2017 issued Hearing Decision 17-UI-91418, affirming the Department’s decision. On September 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-91418 is reversed and this matter remanded for another hearing.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a policy that required its employees to notify the employer if they plead guilty to any type of felony. Exhibit 1. Claimant pled guilty to one count of felony identity theft in March 2017, and notified her employer of the conviction in a timely manner. The employer’s policy also provided that a conviction “may not necessarily mean that the [employee] will face . . . termination,” and that the employer’s decision to discharge an employee would “depend upon the particular facts of a given situation, including without limitation the nature of the crime committed, the potential impact on the safety and welfare of associates, vendors and customers, and the potential effect of the conviction on the

company's reputation." Exhibit 1. The employer's human resources department learned of claimant's conviction in July 2017 and discharged her on July 11, 2017 because of the conviction.

The ALJ concluded that claimant's conviction for identity theft was a wantonly negligent violation of the employer's reasonable expectations.<sup>1</sup> However, given the employer's policy stating that the employment consequence of a felony conviction will depend on the particular facts underlying the conviction, it is not sufficient to conclude based on claimant's conviction alone that claimant consciously engaged in willful or wantonly conduct that she knew or should have known would violate the employer's expectations. The vague information in the record about the facts underlying claimant's conviction shows that it was regarding a "domestic issue" from 2016, and involved claimant's elderly mother and claimant's role doing "caregiving." Audio Record at ~ 27:26, ~34:01, ~36:10, ~36:30. The information is insufficient to determine if claimant's conduct leading to the conviction was a willful or wantonly negligent violation of the employer's expectations. Thus, the ALJ must inquire into the facts underlying claimant's conviction to determine whether claimant's conduct was willful or wantonly negligent.

A full inquiry into the facts that resulted in claimant's arrest and conviction for identity theft<sup>2</sup> is needed to determine if claimant's behavior was a willful or wantonly negligent disregard of the employer's interest. Claimant contended at hearing that she was "forced" by her attorney to plead guilty to avoid prison. Audio Record at ~ 29:17. On remand, the ALJ must inquire as to the nature of the prosecution's evidence, and why claimant alleges she was "forced" by her attorney to plead guilty to a crime. The ALJ must ask claimant what she did that lead to her arrest, and why she did it. The ALJ must ask claimant if she was aware of the consequences that might result from her decisions to do what she did.

Moreover, 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). For example, the ALJ must ask claimant when the crime took place, who was involved in the crime, did claimant's conduct involve anybody outside of her family, and did claimant misuse another person's information that she was entrusted to keep confidential. If so, what information, and how did claimant misuse the information? Did she misuse it for her own or someone else's benefit? The record

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<sup>1</sup> Hearing Decision 17-UI-91418 at 3.

<sup>2</sup> ORS 165.800 provides, in part, "A person commits the crime of identity theft if the person, with the intent to deceive or to defraud, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person." ORS 165.800(4)(a) provides that "another person" means "an individual, whether living or deceased, an imaginary person or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, professional corporation or other private or public entity." ORS 165.800(4)(b) lists the information that is considered to be "personal identification."

shows the employer's customers provided claimant their credit card information to purchase items telephonically. What other personal information did customers provide, or did claimant otherwise have access to, that customers would want to keep confidential? Was there any other reason that honesty was an important requirement of claimant's job? In what ways, if any, would claimant's crime and conviction have the reasonable likelihood of negatively affecting "the morale and atmosphere" of the employer's workplace?

Additionally, there was general testimony regarding the conditions claimant agreed to as part of her plea agreement, including that she was required to "stay away from" senior citizens and "those who required extra protection." Audio Record at ~ 35:51. The employer asserted that claimant could violate her plea agreement while conducting her job duties if elderly customers contacted her. Audio Record at ~36:42. We are unable to determine if it this assertion is correct without knowing the precise terms of claimant's agreement. The ALJ must ask the parties to read the precise terms into the record that might restrict claimant's contact with customers or otherwise affect her ability to perform her work.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether the employer discharged claimant for misconduct, Hearing Decision 17-UI-91418 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 17-UI-91418 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** September 29, 2017

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-91418 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

**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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