

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1298

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged 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). On September 29, 2017, EAB issued EAB Decision 2017-EAB-1049, reversing Hearing Decision 17-UI-91418 and remanding this matter for further development of the record. On October 20, 2017, ALJ Shoemake conducted another hearing and issued Hearing Decision 17-UI-95491, again affirming decision # 114321 by adopting Hearing Decision 17-UI-91418. On November 9, 2017, claimant filed an application for review of Hearing Decision 17-UI-95491 with EAB.

Claimant submitted written argument to EAB but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Garmin AT, Inc. employed claimant from December 8, 2014 until July 11, 2017 as a product support specialist.

(2) Claimant's job was to assist the employer's customers on the telephone with the devices they had purchased from the employer. Some of the employer's customers were elderly. Her daily responsibilities required claimant to receive and use customers' names, shipping addresses, and debit or credit card information for payments for products and shipping. Claimant understood that honesty was an important part of her job.

(3) The employer had a policy that required employees to notify the employer within five business days if they were convicted of a felony. 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 . . ." Exhibit 1, Audio Record (August 28, 2017) at 14:36-15:00. Claimant received the employer's policy at hire and again annually. Claimant understood that a conviction for felony identity theft could cause the employer to discharge her.

(4) On July 6 and 12, 2017, claimant used her elderly mother's debit card to remove money from her mother's bank account through an automatic teller machine in a deli, and to purchase groceries in a grocery store. See Exhibit 3 at 7-8. In August 2016, claimant was charged with and arrested for five counts of identity theft based on her conduct on July 6 and 12, and was released pursuant to a release agreement on August 3, 2017. Exhibit 3 at 4-5.

(5) Claimant hired an attorney to represent her in the criminal case and was satisfied that the attorney was "doing what she was supposed to do." Audio Record (October 20, 2017) at 21:10-23:13. On March 23, 2017, upon her attorney's recommendation, claimant pled guilty to three counts of identity theft. The plea agreement stated that the factual basis for claimant's guilt was her conduct on July 6 and 12, 2016 when, on those dates, claimant "unlawfully, with intent to deceive and defraud," used her elderly mother's debit card to obtain \$298. Exhibit 3 at 11. As part of her plea agreement, claimant agreed she "shall not act as a . . . fiduciary for any elderly or dependent person." Exhibit 3 at 13, 17. That term was also a condition of claimant's probation, which would end on March 23, 2019. Exhibit 3 at 17.

(6) On March 25, 2017, claimant complied with the employer's requirement that she report criminal convictions to the employer and told her supervisor that she was convicted of felony identity theft. The supervisor did not report the conviction to human resources or senior management until July 6, 2017 because she did not know she was required to do so. The employer considered claimant's conviction to be evidence that continuing claimant's employment posed a potential risk to the employer and its customers because claimant received customers' addresses and debit and credit card information, and claimant was convicted of identity theft after she used her mother's debit card unlawfully. The employer was not willing to allow claimant to continue working when her plea agreement prohibited her from acting as a fiduciary for elderly people.

(7) On July 11, 2017, the employer discharged claimant because she was convicted of felony of identity theft.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she was convicted of felony identity theft. The crimes to which claimant pled guilty took place while claimant was not at work, and the victim was claimant's mother, who we presume was not the employer's customer. 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).

By pleading guilty to identity theft, claimant admitted that she engaged in the behavior that constituted these crimes. We are not persuaded by claimant's argument at hearing that she was "forced" by her attorney to take a plea agreement. See Audio Records (August 28, 2017) at 29:13-29:47, (October 20, 2017) at 21:10-23:13. When claimant referred to being "forced" to take the plea agreement, she was not in fact "forced," but rather, chose to take the plea agreement rather than accept the risk of a 5-year jail sentence if she took the case to trial. That is the nature of a plea agreement, and had claimant been dissatisfied with the representation her attorney provided for her, she could have discharged the attorney and sought other counsel. Claimant knew or should have known that the conduct resulting in her conviction for felony identity theft would probably result in her violation of the employer's expectations, and her conscious decisions to engage in such conduct demonstrated indifference to the consequences of her actions. Claimant's conduct therefore was wantonly negligent.

In regard to the connection between the crimes to which claimant pleaded guilty and her work, we conclude that claimant's off-duty conduct impaired claimant's ability to do her work. Claimant asserted at hearing that she did not believe it would violate her probation to assist elderly customers with their financial transactions if she did not know they were elderly. Audio Record (October 20, 2017) at 33:13 to 33:37. We disagree. Claimant was obligated to follow the court's order that she not hold a relationship of trust with any elderly person, which would presumably include caring for financial information from elderly customers, regardless of whether claimant knew they were elderly. The employer could not allow claimant to continue working in violation of that probation condition.

Moreover, 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. In *Levu*, 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. In this case, claimant's job involved working

with customers' debit and credit card information and the employer had a duty to safeguard its customers' information. It is reasonable that the employer considered claimant's conviction as evidence that she posed a risk to that duty and that it might distrust claimant with its customers' information. 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 of creating "an atmosphere of suspicion and distrust," and therefore constituted work-related misconduct for that reason as well.

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). Claimant was convicted of three counts of identity theft from conduct that occurred on two days, July 6 and 12, 2016. Thus, claimant's crimes were not a single or infrequent occurrence. Additionally, 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). OAR 471-030-0038(1)(d)(D). Because claimant's actions in committing identity theft 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. The record does not show that claimant sincerely believed, or had a rational basis for believing, that the employer condoned her commission of a crime. The fact that claimant's supervisor did not report claimant's crime to human resources until July 2017 does not show that claimant had a plausible basis for believing the employer would condone 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 17-UI-95491 is affirmed.

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

DATE of Service: December 13, 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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