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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SILVESTRE ELA, Appellant, v. CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD, Respondent; LOS ANGELES UNIFIED SCHOOL DISTRICT, a public entity, Real Party in Interest.	B259497 (Los Angeles County Super. Ct. No. BS139877)

APPEAL from an order of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Silvestre Ela, in pro. per., for Appellant.

No appearance for Respondent.

Los Angeles Unified School District Office of General Counsel, David V. Greco, Assistant General Counsel, for Real Party in Interest.

A school district terminated an elementary school teacher's employment when he was convicted after pleading no contest to off-the-job possession of child pornography. He was thereafter denied unemployment compensation benefits pursuant to Unemployment Insurance Code section 1256, which disqualifies a discharged employee from receiving such benefits if the discharge was for work-related misconduct. The teacher instituted writ proceedings to compel the school district to reinstate his employment and pay accrued unemployment benefits on the ground that off-the-job possession of child pornography does not constitute work-related misconduct. The trial court denied the petition.

We conclude substantial evidence supports the trial court's determination that the teacher is disqualified from receiving unemployment compensation benefits. We therefore affirm the judgment.

BACKGROUND

Silvestre Ela was a fifth-grade teacher employed by the Los Angeles Unified School District (LAUSD or the district) for approximately 14 years. In 2010, he was charged in an information with violation of Penal Code section 311.11, subdivision (a), a felony, in that he "knowingly and unlawfully possess[ed] and control[led] matter, to wit: child pornography located on two Dell computer[s] and flashdrive[s] the production of which involved . . . a person under the age of 18 years, . . . knowing that the matter depicted a person under the age of 18 years, personally engaging in and simulating sexual conduct as defined in Penal Code section 311.4(d)."[1] Ela pleaded no

[1] On our own motion we take judicial notice of the file from Ela's criminal appeal, which contains the information. (Evid. Code, § 452, subd. (d).)

contest to the count and was convicted and placed on probation for a period of three years and ordered to register as a sex offender.

As a result of the conviction, the state Commission on Teacher Credentialing revoked Ela's teaching credential and the LAUSD terminated his employment. (See Ed. Code, §§ 44836, subd. (a)(1), 44010 [a school district may not employ a person who has been convicted following a plea of no contest to possession of child pornography].)

Ela appealed the conviction, contending evidence obtained during a search of his home should have been suppressed because the search warrant affidavit failed to establish probable cause to search the home. On August 30, 2012, we affirmed the conviction. (*People v. Ela* (Aug. 30, 2012, B236622 [nonpub. opn.]).)

Ela also applied to the state Employment Development Department for unemployment insurance benefits, arguing he was entitled to them because his off-the-job conduct did not constitute work-related misconduct. When the Unemployment Development Department requested information from the district about Ela's termination, the district responded through TALX UC eXpress, its "duly authorized agent," by sending a copy of the letter by which it had notified Ela his employment would be terminated due to his "recent conviction." The Unemployment Development Department then contacted Ela, who admitted to an interviewer that he had been terminated because of his conviction for possession of child pornography.

The Unemployment Development Department determined Ela was ineligible for benefits pursuant to Unemployment Insurance Code section 1256 (section 1256), which provides in pertinent part that "[a]n individual is disqualified for unemployment compensation benefits if . . . he or she has been discharged for misconduct connected with his or her most recent work."

Ela appealed the Unemployment Development Department's decision to the Unemployment Insurance Appeals Board (Appeals Board), contending the misconduct that led to his discharge was unrelated to his work because it occurred at home. The matter was handled by an administrative law judge (ALJ), who accepted evidence and conducted a hearing. Ela and his representative appeared at the hearing and presented evidence and argument, but the LAUSD did not attend.

At the hearing, Ela admitted he had been convicted after a no contest plea to a charge of felony possession of child pornography but now "denied all charges." He then invoked his Fifth Amendment right against self-incrimination and refused to testify about the circumstances leading up to his arrest. During closing argument, Ela's representative stated that although Ela had pleaded no contest to possession of child pornography, his conviction was currently on appeal and he now denied its factual basis.

Finding that Ela's conviction for off-duty possession of child pornography constituted work-related misconduct, the ALJ affirmed the Unemployment Development Department's determination that he was ineligible for unemployment compensation benefits.

In January 2012, while his criminal appeal was still pending, Ela appealed the ALJ's decision to the Appeals Board, contending it was unsupported by the record because the LAUSD had not attended the administrative hearing or offered evidence. Ela denied the allegations underlying his criminal conviction and argued that so long as his appeal was pending, there was no evidence he committed any misconduct.

A review panel of the Appeals Board found the record adequately established that Ela had been convicted of possession of child pornography

after pleading no contest, which disqualified him from unemployment compensation benefits.

Ela sought a writ of administrative mandate in the superior court. In a verified petition, he alleged the criminal charges against him arose after he unsuspectingly opened an "ambush" attachment to a malicious email sent by a "hacker." That attachment, which contained child pornography, triggered an automatic notification to authorities, leading to his arrest and conviction. Ela denied he intentionally accessed the pornography, but said he was forced to plead no contest in order to "better defend against the charges and . . . demonstrate his actual innocence through the appellate and habeas corpus process." Ela argued his no contest plea did not establish guilt for administrative purposes because it was made out of financial necessity, fear of incarceration, and a desire to minimize publicity. A presumption of innocence therefore applied during all stages of the administrative process, he argued, and he should have prevailed by default when the LAUSD failed to appear at the administrative hearing or present any evidence. Ela also argued that during the administrative hearing the ALJ improperly acted as the district's advocate, improperly admitted evidence sent from the district to the Unemployment Development Department, and compelled him to testify in violation of his Fifth Amendment privilege against self-incrimination.

After addressing each of Ela's contentions, the trial court denied his petition.

Ela timely appealed.

DISCUSSION

The issue is whether substantial evidence supported the trial court's finding that the Appeals Board properly determined Ela was disqualified for unemployment benefits.

A. Standard of Review

Section 1256 disqualifies an individual for unemployment compensation benefits if he or she "has been discharged for misconduct connected with his or her most recent work." "The provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment." (*Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal.3d 575, 584.)

Code of Civil Procedure section 1094.5 provides for review of administrative orders to determine whether the administrative body "has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [administrative body] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

"'In reviewing a decision of the [Appeals] Board, the superior court exercises its independent judgment on the evidentiary record of the administrative proceedings and inquires whether the findings of the administrative agency are supported by the weight of the evidence.' [Citation.] In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible and competent evidence." (*Sanchez v. Unemployment Ins. Appeals Bd.*, *supra*, 36 Cal.3d at p. 585.) However, the determination whether misconduct was "connected with" employment is an issue of law. Therefore, "where the probative facts are not in dispute, and those facts clearly require a conclusion different from that reached by the trial court, the latter's conclusions may be disregarded." (*Ibid.*) "Appellate review in such a case is based not upon the

substantial evidence rule, but upon the independent judgment rule." (*Pac. Mar. Ass'n v. Unemployment Ins. Appeals Bd.* (1985) 169 Cal.App.3d 568, 574.)

B. Misconduct Within the Meaning of Section 1256

Ela no longer disputes that a teacher's conviction for possession of child pornography at home constitutes misconduct connected with teaching. He argues only that insufficient evidence established misconduct here because the LAUSD failed to attend the administrative hearing and presented no evidence. (Ela's requests for judicial notice are granted.)

The term "misconduct" as used in section 1256 "is limited to "'conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.'"" (*Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 678.) ""'On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.'"" (*Ibid.*; accord, Cal. Code Regs., tit. 22, § 1256-30, subd. (d).)

Negligence alone does not constitute misconduct. "The policy of [section 1256] is to provide benefits to 'persons unemployed through no fault of their own.' [Citation.] 'Accordingly, fault is the basic element to be considered in interpreting and applying the code sections on unemployment

compensation.' [Citation.] [¶] The determination of fault is not concluded by a finding that the discharge was justified. The claimant's conduct must evince culpability or bad faith. 'The conduct may be harmful to the employer's interests and justify the employee's discharge; nevertheless, it evokes the disqualification for unemployment insurance benefits only if it is wilful, wanton or equally culpable.' [Citations.] [¶] A claimant may not be denied benefits solely on the basis of a 'good faith error in judgment.'" (*Amador v. Unemployment Ins. Appeals Bd.*, *supra*, 35 Cal.3d at pp. 678-679.)

Misconduct is work connected if: "(1) The claimant owes a material duty to the employer under the contract of employment. [¶] (2) There is a substantial breach of that duty. [¶] (3) The breach is a willful or wanton disregard of that duty. [¶] (4) The breach disregards the employer's interests and injures or tends to injure the employer's interests." (Cal. Code Regs., tit. 22, § 1256-30, subd. (b).)

An employee's "participation in illegal or criminal actions while away from the place of employment usually is not connected with the work and is not misconduct." (Cal. Code Regs., tit. 22, § 1256-30, subd. (d).) For example, a janitor arrested during off-duty hours for drunk driving has committed no work-related misconduct because the janitor owed no duty to the employer to drive sober and the act did not tend to injure the employer's interests. (Cal. Code Regs., tit. 22, § 1256-33, example 3.) When off-duty conduct does not injure or potentially injure the employer's interest, the employer cannot reasonably impose its standards of behavior on the employee during off-duty time. (Cal. Code Regs., tit. 22, § 1256-33, subd. (b)(1).)

"However, there are off-the-job situations where the interests of an employer are either injured or tend to be injured by the conduct of an employee during these off-duty periods, usually involving illegal or criminal

activity." (Cal. Code Regs., tit. 22, § 1256-33, subd. (b)(1).) Off-duty criminal activity that undermines the employer's reputation and the public's trust and confidence in the employer is work-connected misconduct. Accordingly, off-duty activity by an employee who "works in a safety-sensitive position or [in such a position] that his conduct will undermine public trust and damage the employer's reputation" may be work connected. (*American Federation of Labor v. Unemployment Ins. Appeals Bd*. (1994) 23 Cal.App.4th 51, 60.)

For example, an off-duty theft committed by a bank official would tend to damage the bank's business reputation, "even if the theft was not from the bank," whereas the same theft committed by a janitor at the bank "would have little effect on the bank's reputation and public trust and confidence in th[e] bank." (Cal. Code Regs., tit. 22, § 1256-33, example 1.) Similarly, a pharmacist's arrest at home for illegal drug possession would tend to injure the interests of his employer pharmacy and lessen the public's faith and confidence in the employer. (*Id*. at example 2.)

A teacher's off-duty obligations are similar. "A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students." (*M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517.) A school district must ensure a safe environment for its students, faculty and community. In furtherance of this goal, the Legislature enacted Education Code section 44836, which provides in pertinent part that "a school district shall not employ or retain in employment persons in public school service who have been convicted, or who have been convicted following a plea of nolo contendere to charges, of any sex offense as defined in [Education Code] section 44010." (Ed. Code, § 44836, subd. (a)(1).) A conviction of felony possession of child pornography under

Penal Code section 311.11 is a "sex offense" for purposes of Education Code section 44836. (Ed. Code, § 44010, subd. (a).)

Considering a school district's duty to protect its students and the Legislature's proscription against employing sex offenders, we easily conclude that a teacher's off-the-job possession of child pornography would tend to injure a school district's interests and lessen the public's faith and confidence in the district.

C. Substantial Evidence of Misconduct

Ela's actions satisfy all the elements of work-related misconduct. As a teacher, he owed a material, statutory duty to his school district not to possess child pornography. As he admitted in criminal proceedings, he knowingly breached that duty, which endangered the school district's interest in preserving its reputation for providing a safe environment for children. Ela's conduct thus tended to undermine the public's faith and confidence in the LAUSD because any parent who discovered his conviction could reasonably be put in fear that the district's employment of a sex offender would endanger children.

Ela argues no evidence supports the ALJ's findings because his compelled testimony at the administrative hearing violated his Fifth Amendment right against self-incrimination and his statutory right to transactional immunity. He argues no other evidence supports the findings because the LAUSD failed to attend the administrative hearing and presented no evidence, and the information sent by TALX UC eXpress to the Unemployment Development Department was incompetent because nothing established that TALX UC eXpress was actually the school district's agent. The argument that no evidence supports the ALJ's decision is without merit.

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const., 5th Amend.) Unemployment Insurance Code section 1955 sets forth an analogous right in the administrative context, providing that "[n]o individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise."

Assuming for the sake of argument that Ela was compelled to testify at the administrative hearing, he was subjected to no prosecution, penalty or forfeiture as a result. His criminal prosecution occurred in 2011, long before he testified before the ALJ. And the ALJ imposed no penalty and required no forfeiture. Although the ALJ found Ela did not qualify for unemployment benefits, a disqualification is neither a forfeiture—the relinquishment of a right—nor a penalty, i.e., a "[p]unishment imposed on a wrongdoer." (Black's Law Dict. (7th ed. 1999) p. 1153.) In any event, before invoking his Fifth Amendment right Ela voluntarily admitted, both at the administrative hearing and in an interview with the Unemployment Development Department, that he had pleaded no contest to possession of child pornography. Under both the Fifth Amendment and Unemployment Insurance Code section 1955, a voluntary statement made before the speaker invokes his or her right against self-incrimination may be used against the speaker. (E.g., *People v. Huggins* (2006) 38 Cal.4th 175, 197 [inculpatory statements may be used if they were made before the right against self-incrimination was invoked]; cf. Unemp. Ins. Code, § 1955 [statements made before privilege is claimed are unprotected].)

The ALJ's findings were thus supported by substantial evidence, which the trial court reasonably found outweighed Ela's denial of the criminal charges.

D. The Effect of Ela's No Contest Plea

Ela denies he knowingly possessed child pornography. On the contrary, he contends he inadvertently opened a malicious email, which triggered an automatic notification to authorities, resulting in his arrest.[2] He argues inadvertent conduct does not constitute misconduct within the meaning of section 1256. The argument is meritless.

Penal Code section 311.11 provides, in pertinent part, that it is a felony to "knowingly possess[] or control[] any matter, representation of information, data, or image, including, but not limited to . . . computer software . . . that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct . . . ." (Pen. Code, § 311.11, subd. (a).) Ela was charged with "knowingly and unlawfully possess[ing] and control[ling] . . . child pornography[,] . . . knowing that the matter depicted a person under the age of 18 years, personally engaging in and simulating sexual conduct . . . ."

A suspect charged in a criminal proceeding may plead guilty, not guilty, or nolo contendere (no contest). (Pen. Code, § 1016.) A "plea of guilty includes an admission of every element entering into the offenses charged . . . ." (*People v. Brown* (1934) 140 Cal.App. 616, 619.) "A plea of guilty is admissible in a subsequent civil action on the independent ground that it is

[2] Ela's representations conflict with the record of his criminal proceedings, but as will be seen, his no contest plea makes our elaboration of the record and discussion of the discrepancy unnecessary.

an admission." (*Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 605.) Such a plea is also admissible in a subsequent administrative action. (Cf. *County of Los Angeles v. Civil Service Com*. (1995) 39 Cal.App.4th 620, 632.) The legal effect of a nolo contendere plea to a felony charge "shall be the same as that of a plea of guilty for all purposes." (Pen. Code, § 1016.)

By pleading no contest to felony possession of child pornography, Ela admitted he knowingly possessed matter that he knew depicted a person under 18 years of age engaging in or simulating sexual conduct. This admission could be considered in later administrative proceedings as nonconclusive evidence of the truth of the criminal allegations. (See *People v. Goodrum* (1991) 228 Cal.App.3d 397, 402 [a plea may be used against a claimant in later civil proceedings, although it does not mean the facts admitted in the criminal proceedings have been conclusively established].) At the administrative hearing, Ela was free to contest the truth of the matters he previously admitted through his plea and to explain why he had entered it. (*Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 191.) He could also have introduced the criminal hearing transcript to establish his understanding that the plea was not an admission of factual guilt. But the ALJ was entitled to credit the earlier admission over any later denial, and the trial court's review was only to determine whether the former outweighed the latter. On appeal, we may inquire only as to whether the trial court's affirmance of the ALJ's findings is supported by substantial, credible, and competent evidence. Ela's admission during the criminal proceedings that he knowingly possessed child pornography is substantial, credible, and competent. Therefore, the trial court was within its discretion to find the prior admission outweighed Ela's denial at the administrative hearing.

Ela argues that even if misconduct occurred, it was not work connected because no contract between himself and the district was admitted into evidence, and thus no evidence establishes he owed any duty to the district. (Ela does not argue he actually owed no duty to the district, only that no evidence supporting such a duty was admitted at the administrative hearing.) As briefly touched upon above, misconduct is considered to be work connected if: "(1) The claimant owes a material duty to the employer under the contract of employment. [¶] (2) There is a substantial breach of that duty. [¶] (3) The breach is a willful or wanton disregard of that duty. [¶] (4) The breach disregards the employer's interests and injures or tends to injure the employer's interests." (Cal. Code Regs., tit. 22, § 1256-30, subd. (b).) The ALJ was entitled to infer Ela worked for the LAUSD pursuant to contract, as Ela has never contended otherwise and it is well known the LAUSD employs teachers pursuant to contract, and in any event any agreement to teach in exchange for pay would be a contract. The ALJ was also entitled to conclude the contract impliedly included certain statutory duties, including the duty not to possess child pornography. (Ed. Code, § 44836, subd. (a)(1).) The record therefore established Ela substantially breached a material duty he owed to the district under a contract of employment.

Given that substantial evidence supported the trial court's determination irrespective of the LAUSD's contribution below, we need not reach Ela's arguments that TALX UC eXpress was not the LAUSD's agent or that the LAUSD lacks standing to participate in these proceedings.

DISPOSITION

The judgment is affirmed. Real party in interest is to recover its costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.