

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0101

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84140). Claimant filed a timely request for hearing. On January 27, 2015, ALJ Kirkwood conducted a hearing and issued Hearing Decision 15-UI-32430, affirming the Department's decision. On February 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Department of Revenue, a state agency, employed claimant from March 1, 2004 until December 2, 2014, last as a revenue agent in the compliance and collections unit of the employer's business division.

(2) The employer expected claimant to engage in ethical behavior in the workplace and to refrain from behavior demonstrating a lack of integrity or honesty. Claimant understood this expectation as a matter of common sense.

(3) Sometime between April and June 2014, the business Image Builders, Inc. timely submitted a quarterly tax return by sending it to claimant in the form of an emailed fax. At that time, claimant was the revenue agent assigned to manage Image Builders' tax account. Claimant received the email from Image Builders, which included its tax return, and opened it. However, claimant neglected to process that tax return and did not enter it in the employer's information system as having been timely filed. Claimant forgot about the email.

(4) Sometime after claimant received the emailed tax return from Image Builders, its tax account was assigned to another revenue agent. Sometime before October 2014, the new revenue agent for Image Builders issued a garnishment against it based on its apparent failure to timely file its quarterly tax return. The revenue agent did so because claimant had failed to enter that the tax return had been received. The amount garnished from Image Builders was \$4,500. Audio at ~14:50.

(5) On approximately October 1, 2014, a certified public accountant (CPA) representing Image Builders called claimant to inquire about the reason that the employer was garnishing funds from it. The CPA told claimant that he or she had timely filed Image Builder's the last quarterly tax return through a fax emailed to claimant. During this call, the CPA told claimant the date that Image Builders' tax return had been emailed, but claimant was unable to locate that email in her electronic files. Claimant told the CPA that she could not find evidence that the tax return had been emailed to her and asked the CPA to send in the tax return again. The CPA agreed that she would do so. Later that same day, claimant discovered the original email from the CPA, which included Image Builders' quarterly tax return, and knew that the tax return had been timely filed. Claimant deleted from her electronic records the original email that she had received from Image Builders' CPA.

(6) On October 7, 2014, the new revenue agent for the Image Builders tax account, who was also claimant's lead worker, came to claimant's desk to inquire about whether she had received the original tax return from Image Builders at or around the time that it was emailed to her. Claimant told the revenue agent that she had not received it, although she knew that she had received it and deleted it. Audio at ~23:43. The new revenue agent told claimant that he wanted to look through her emails with her to see if they could find the emailed tax return. Audio at ~23:43, ~24:26. Claimant refused to allow him to do so, stating that it was not necessary because the CPA for Image Builders had agreed to send another tax return to the employer. Audio at ~23:49.

(7) On October 8, 2014, claimant was off from work for a medical appointment. On October 9, 2014, claimant reported for work and asked to meet with her immediate manager. During that meeting, claimant told the manager that sometime on approximately October 1, 2014 she had deleted the email which showed that Image Builders had timely filed its quarterly tax return. Claimant told the manager that she knew she had done something wrong. Audio at ~32:45. Claimant's manager told her that he would get back to her in about two weeks to let her know the employer's position on the appropriate discipline for her actions. Audio at ~33:00. Sometime after October 9, 2014, claimant's manager reported to his manager, the section manager, about the email from Image Builders' CPA that claimant had deleted on approximately October 1, 2014.

(8) On October 22, 2014, when claimant reported to work, she was instructed to go to the human resources office to attend an investigatory meeting about her behavior in deleting the email containing Image Builders' tax return. She did so. On November 12, 2014, claimant attended a pre-dismissal meeting that the employer convened to inquire further into her behavior surrounding the deleted email.

(9) On December 2, 2014, the employer discharged claimant for knowingly deleting the emailed fax from Image Builders' CPA and thereby violating its standards of integrity and honesty.

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

As an initial matter, it was difficult to piece together from claimant's testimony at hearing a coherent sequence for the relevant events. While claimant testified that the CPA for Image Builders called her in "early October," that she deleted the emailed tax return on the same day that she received the CPA's call, and that Image Builders' new revenue agent contacted her on that same day to inquire about whether she had received the original tax return from Image Builders, the employer's documents showed that the CPA contacted claimant on October 1, 2014 and the new revenue agent first contacted claimant on October 7, 2014, after receiving a phone call from Image Builders that first alerted him to the possibility that its original tax return had been timely filed and that the employer's garnishment of Image Builders was not warranted. Audio at ~12:48, ~23:25; Exhibit 1 at 9, 11, 23, 31. The sequence and timeline for these events is significant because of the negative inferences that may be drawn from a substantial delay between when claimant deleted the emailed tax return, when claimant misrepresented to the new revenue agent that she had not received the original emailed tax return and when claimant ultimately admitted to her manager that she had deleted that tax return. In claimant's written answers to the employer's charges, claimant did not dispute that the new revenue agent first contacted her on October 7, 2014 about the missing tax return, and that sometime earlier in October 2014, the CPA for the employer had initially contacted her. Exhibit 1 at 36-37, 39-40. Viewing the sum of this evidence, it appears likely that claimant's testimony at hearing incorrectly collapsed into a single day when she received the CPA's call and when the new revenue agent first contacted her, when they were actually two separate days, approximately October 1, 2014 and October 7, 2014. In addition, claimant testified that the CPA did not tell her during their October 1, 2014 call that Image Builders was the subject of a garnishment due to an alleged failure to timely file its quarterly tax return. Audio at ~27:28. However, it does not make sense that the CPA would decide for no discernable reason simply to call claimant one day, four months after it had sent the tax return to her, to inquire whether she had received it. Assuming that the CPA called claimant because of the garnishment, it challenges common sense that the CPA would not have told claimant the reason for checking on the status of the filing of Image Builders tax return was because Image Builders was the subject of a tax garnishment. That the CPA told claimant that Image Builders was being garnished as an explanation for the CPA's inquiry is corroborated by claimant's written answers to the employer's charges, in which she did not dispute that the CPA informed her of the garnishment during the initial telephone call. Exhibit 1 at 36, 37. It appears most likely that the CPA told claimant of the garnishment during their phone conversation before claimant deleted the emailed tax return.

As a matter of common sense, claimant knew or reasonably should have known that the employer prohibited her from taking steps to permanently delete a timely submitted tax return, particularly when knowing the actual date when the return was submitted would be necessary to overturn an erroneously issued garnishment. Audio at ~17:34. Because the employer's mission was to neutrally enforce tax

requirements on all tax payers, it can be inferred as a matter of common sense, that claimant was reasonably aware that by deleting evidence establishing that the employer had wrongfully assessed certain tax liabilities against a taxpayer would violate the employer's expectations of honesty and integrity in her workplace behavior. Here, after being informed that Image Builders was the subject of a garnishment due to its apparent failure to timely file its quarterly tax return and discovering in her own records that Image Builders had timely submitted that tax return but was being garnished because she had failed to process its original return, claimant knowingly deleted the emailed tax return, which would have established that the employer's garnishment was unfounded. Although claimant contended that her deletion of Image Builders' original tax return was the result of a poor decision-making, she did not contend her actions were less than intentional, or that they were inadvertent or accidental or that she did not know or understand what she was doing when she made the deletion. Because claimant intentionally deleted Image Builders' originally filed tax return when she knew or reasonably should have known that this behavior would violate the employer's standards for workplace integrity and honesty, claimant willfully violated the employer's expectations.

Claimant also lied to her lead worker, who was also the new revenue agent for the Image Builders' account, when she knowingly told him on October 7, 2014, approximately six days after she had found and deleted the Image Builders tax return, that she had not been able to locate any evidence in her emails that she had ever received that tax return and, presumably, knowingly implied that the garnishment of Image Builders was a correctly imposed tax penalty. Audio at ~23:43. While claimant contended that she lied because she was "intimidated" by the lead worker, she did not contend that she did not appreciate that she was deceiving the lead worker about the originally filed tax return, or that her behavior was anything less than intentionally dishonest. Audio at ~23:43, ~24:06. Claimant's apparent position, that she was under such duress from the lead worker that she was compelled to deceive him, is not demonstrated by her broad assertions that the lead worker was "hovering" over her during their conversation, and that he caused her to feel "uneasy" and "uncomfortable." Audio at ~24:20. Under the circumstances of having deleted the original emailed tax return, it is to be expected that claimant would find it difficult or distressing when her lead worker to questioned her pointedly about the email and stated that he wanted to search with her through her emails to determine if it could be located. There is insufficient evidence in the record to show that claimant had no reasonable choice but to lie to the lead worker, or that she deceived him for reasons other than that she did not want her subterfuge uncovered. Because claimant intended to deceive the lead worker by her statements on October 7, 2014, and reasonably knew that the employer expected her to respond honestly to questions that would relieve a tax payer from wrongfully assessed tax liabilities, claimant willfully violated the employer's standards of integrity and honesty in the workplace.

Claimant contended at hearing that her voluntary disclosures of her actions to her manager on October 9, 2014 should operate in some mitigation of her willful misconduct. Audio at ~25:32, ~32:32. On this record, claimant kept her actions secret for approximately eight days before disclosing her dishonesty to the section manager. It is not at all clear that claimant made the confession that she did out of a belated realization of the ethical ramifications of what she had done, or whether she realized that the employer's discovery of her actions was inevitable given the tax payer's persistent assertions that it had timely filed its original tax return. Even if claimant's behavior was based on the former, it does not rescind her initial dishonesty in deleting the email that remained undiscovered for eight days and in intentionally deceiving the lead worker. It does not nullify her willful misconduct.

Claimant's dishonesty in both willfully deleting Image Builders' originally submitted tax return and in willfully trying to deceive her lead worker are not excused from constituting misconduct as isolated instances of poor judgment under OAR 471-030-0038(3)(b). To qualify as an "isolated instance of poor judgment," claimant's behavior must have been 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's behavior also must not have exceeded "mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant's willful violations of the employer's standards of honesty and integrity occurred on two separate occasions, when she knowingly and intentionally deleted the email of the originally submitted tax return on approximately October 7, 2014 and when she knowingly and intentionally deceived her lead worker on October 7, 2014 by telling him that she had been unable to locate that email. Because claimant's behavior involved two different and discrete decisions to deceive the employer, at two different times, claimant's willful violations of the employer's standards were repeated and not isolated. As such, they are not excused an isolated instance of poor judgment.

It is also not appropriate to excuse claimant's behaviors on approximately October 1, 2014 and on October 7, 2014 as isolated instances of poor judgment because they exceeded mere poor judgment. EAB has consistently held that a single act of workplace dishonesty may exceed mere poor judgment because honesty in the workplace is a fundamental underpinning to an employment relationship. *See Patricia M. Jensen* (Employment Appeals Board, 2013-EAB-2464, January 17, 2014) (dishonesty exceeded mere poor judgment when lied in order to use another employee's greater employee discount and arranged for other employee to purchase merchandise intended for claimant); *Morgan J. Wichman* (Employment Appeals Board, 13-AB-1101, July 26, 2013) (dishonesty exceeded mere poor judgment when lied about internet searches); *Brenda D. Barnes* (Employment Appeals Board, 11-AB-0651, March 11, 2011) (dishonesty exceeded mere poor judgment when falsified a time card entry); *Joseph A. Brucken* (Employment Appeals Board, 11-AB-0614, March 9, 2011) (dishonesty exceeded mere poor judgment when falsified a computer record); *Tara R. Pape* (Employment Appeals Board, 10-AB-3851, December 30, 2010) (dishonesty exceeded mere poor judgment when falsified a certification card and lied that card was stolen); *Rhonda M. Gosso* (Employment Appeals Board, 10-AB-1294, June 7, 2010) (dishonesty exceeded mere poor judgment when lied during an investigation); *Robert M. Bien* (Employment Appeals Board, 09-AB-0319, February 23, 2009) (dishonesty exceeded mere poor judgment when falsified job application); *Romaldo G. Munoz* (Employment Appeals Board, 08-AB-2007, November 3, 2008) (dishonesty exceeded mere poor judgment when lied about whether work was performed); *Richard T. Christie* (Employment Appeals Board, 08-AB-1566, August 28, 2008) (dishonesty exceeded mere poor judgment when falsified job application); *Jacob W. Smith* (Employment Appeals Board, 08-AB-1586, August 27, 2008), Oregon Court of Appeals *aff'd w/o opinion* September 9, 2009 (dishonesty exceeded mere poor judgment when lied about whether work was performed). Here, claimant knowingly and intentionally deceived the employer about matters pertaining to a tax payer's tax liabilities, when correct assessments of those liabilities are at the core of the employer's mission as a state agency. On those facts, a reasonable employer would objectively conclude that, by twice intentionally deceiving it about facts relevant to whether a tax collection action had been properly undertaken against a tax payer, claimant irreparably breached its trust and made a continued employment relationship impossible. For both of the reasons cited, claimant's behavior was not excusable as an isolated instance of poor judgment.

Claimant's behavior on approximately October 1, 2014 and on October 7, 2014 also is not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present any evidence showing that she sincerely believed that the employer would condone her behaviors or that she acted as she did based on a misunderstanding of the employer's standards. Indeed, that claimant kept her behaviors secret for some days strongly suggests that she knew the employer would not approve of it. There is no evidence in the record to support excusing claimant's willful violations of the employer's standards as a good faith error.

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

DECISION: Hearing Decision 15-UI-32430 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: March 23, 2015

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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