

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0891

Reversed
Disqualification

PROCEDURAL HISTORY: On May 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 110316). The employer filed a timely request for hearing. On July 7, 2015, ALJ Logan conducted a hearing, and on July 10, 2015, issued Hearing Decision 15-UI-41386, affirming the Department's decision. On July 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Sleep Country USA, a mattress retailer, employed claimant as a retail sales associate from January 28, 2014 to March 26, 2015.

(2) The employer paid its retail sales associates an hourly wage or commissions on posted sales plus commission bonuses, whichever was greater, during a given fiscal month. A sales associate received commission credit when a sale posted in the employer's accounting system. The employer's payroll manager was responsible for determining when sales were posted and did so after the product sold was delivered and payment was finalized. When a customer sought to return a purchase, an associate generated a return invoice that posted immediately, cancelling the sale's commission, and included a product pickup date. The insertion of a "service line" on an account invoice had the effect of delaying posting of the sale until the service line was removed. Transcript at 40.

(3) The employer expected its employees to refrain from dishonesty regarding work related activities, which included falsifying employer records and “invoice manipulation” to control when sales were posted and commissions credited. Transcript at 6. The employer’s expectation was set forth in its ethics policy, a copy of which claimant received at hire. Claimant was aware of the employer’s expectations.

(4) In early 2015, claimant inserted service lines in three sales invoices to prevent those sales from being posted in the normal course and delay the timing of the commission credit to a later fiscal period. On or around February 18, 2015, the employer’s district sales manager asked claimant about the service lines he had inserted and claimant explained that he had done so “to keep them from posting during ‘bad weeks’ and [being] absorbed into hourly pay.” Exhibit 1. Thereafter, the employer clarified to claimant that he was not permitted to attempt to manipulate invoices to influence his pay and began an investigation into whether claimant should be terminated for his conduct.

(5) On February 28, 2015, a sales manager asked claimant to return a call from a recent customer of his, who wanted to return her purchase and obtain a refund. When claimant failed to call by the end of the next day, the customer complained and the sales manager prepared a return invoice authorizing a refund and scheduling the pickup of her merchandise. On or about March 2, after claimant learned the refund had been authorized “on the last day of the bonus period,” he directed the employer’s help desk to delete the invoice “to [delay] a commission hit” and preserve his commission on the sale for that fiscal month. Exhibit 1; Transcript at 31-32. On March 4, the first day of the next fiscal month, after the customer complained about the failed pickup without notice, claimant contacted the customer, after which he prepared a new return invoice with a new pickup date.

(6) On March 26, 2015, the employer discharged claimant for dishonesty based both on his invoice manipulation on or about March 2 to delay a commission loss and his invoice manipulation and records falsification by insertion of service lines in the three invoices solely to control when the sales would be posted and commissions earned.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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. 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).

As a preliminary matter, we note that claimant’s testimony on matters in dispute was not credible. When asked about the final instance, claimant testified the customer was “relieved” to speak with him but in his written statement to the employer he said she was embarrassed. *See* Transcript at 36; Exhibit 1. He testified that a new employee, Bruce, was responsible for processing the return invoice that he

directed be cancelled, which contradicted his written statement to the employer that Josh processed the invoice. *Compare* Transcript at 33-34; Exhibit 1. He also provided internally inconsistent testimony about the employer's "no questions asked return policy", first asserting that the employer had such a policy, then testifying that the employer trained its employees to question customers who wanted to return merchandise, a fact disputed by the employer. Transcript at 25-26, 35. Because claimant's testimony on those matters was evasive and inconsistent, we considered his testimony as a whole unreliable, and, even though the employer's evidence was based at least in part on hearsay, we considered it more reliable than claimant's, and found facts in accordance with the employer's witness's testimony on all matters in dispute.

In a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred when it did and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Although the employer asserted that it discharged claimant for several instances of invoice manipulation and dishonesty, it also clarified that the "final instance" was claimant's conduct in deleting the invoice for the product return and refund on or about March 2. Transcript at 6. Accordingly, that incident was the proximate cause of claimant's discharge and is the proper initial focus of the misconduct analysis.

In Hearing Decision 15-UI-41386, the ALJ concluded the employer discharged claimant, but not for misconduct, because in the final instance claimant was not wantonly negligent, reasoning,

Because claimant was attempting to salvage the sale as he had been trained to do, and because he was accustomed to personally contacting customers who sought returns or exchanges, and because the employer's help desk validated claimant's request by deleting the invoice, claimant's conduct was not a wantonly negligent violation employer's reasonable expectations.

Hearing Decision 15-UI-41386 at 3. We disagree. Claimant was not credible, the record as a whole supports the employer's assertions that claimant purposely manipulated invoices to maximize his income in violation of the employer's known expectations, and there was no evidence that the employer's help desk "validated" claimant's directive to delete the invoice rather than simply followed his instructions.

The employer had the right to expect claimant to refrain from acts of dishonesty concerning sales commissions through invoice manipulation, particularly after being counseled about such conduct on or about February 18. Claimant admitted as much at hearing when he agreed that he was aware by that date that manipulation of invoices to increase his commissions during a given fiscal period was against company policy. Transcript at 49. Claimant violated that expectation on or about March 2 when he directed the help desk to delete the return invoice "to [delay] a commission hit" and preserve his commission on the sale in question for that fiscal month. Claimant's conduct was a willful violation of the employer's expectation that he refrain from dishonesty by manipulating invoices to affect his pay.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or

infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct.¹ Claimant falsified three invoices in early 2015 by inserting service lines in them solely to delay their posting and thereby affect his compensation for a fiscal period. Claimant's falsification of employer invoices was willful and part of a pattern of other willful or wantonly negligent conduct including the "final instance." Claimant's invoice manipulation on or about March 2 was not an isolated instance.

Claimant's March 2 conduct cannot be excused as a good faith error in his understanding of the employer's expectation under OAR 471-030-0038(3)(b). Claimant admitted at hearing that he was aware by February 18 that manipulation of invoices to increase his compensation for a given fiscal period was against company policy.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 15-UI-41386 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 9, 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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¹ OAR 471-030-0038(1)(d)(A).