

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0937

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 103543). The employer filed a timely request for hearing. On July 9, 2015, ALJ Messecar conducted a hearing, and on July 17, 2015 issued Hearing Decision 15-UI-41665, reversing the Department's decision. On August 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

No party filed objections to the admission of Exhibits 2 and 3 into the hearing record within the time specified for doing so in Hearing Decision 15-UI-41665. Accordingly, both exhibits will remain in the record.

Both claimant and the employer submitted written arguments that presented facts not introduced into evidence at the hearing. Neither party explained why they did not offer these facts during the hearing nor otherwise show that factors or circumstances beyond their reasonable control prevented them from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new facts that the parties attempted to present. EAB considered only evidence received into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Mobile Manufacturing Co. employed claimant as an office manager from January 27, 2005 until April 6, 2015.

(2) The employer regularly shipped products that it manufactured using the delivery services of UPS and FedEx. The employer had accounts set up with both shippers allowing it to be billed monthly for all shipping services used. The employer expected its employees to reimburse it for the costs all items that they shipped for personal purposes using the employer's UPS and FedEx accounts. Claimant understood the employer's expectations.

(3) Starting around November 2005, claimant began to ship items to various family members who lived out of state using the employer's UPS and FedEx accounts. Claimant also allowed those family members to ship items to her or to other family members using the employer's shipping accounts. As office manager, claimant was the employee who reviewed the employer's monthly bills from UPS and FedEx to determine if they were accurate.

(4) Sometime before October 2014, the employer's owner observed that the employer's petty cash account never balanced and records were not being kept showing deposits into and withdrawals from the petty cash fund. Claimant and her coworker often argued about their inability to balance the petty cash account. On October 16, 2014, the owner instituted the use of a petty cash log and required employees to record all funds they placed into or withdrew from the petty cash fund. On January 6, 2015, the employer discontinued using the petty cash log to account for the balance of the petty cash fund. At that time, the balance of the petty cash fund was \$33 short and the owner adjusted the petty cash account to reflect the correct balance of the petty cash fund. Exhibit 1 at 25.

(5) Beginning on March 25, 2015 and continuing until April 6, 2015, claimant was on vacation. Sometime before April 1, 2015, when claimant was still away from work, the employer's owner wanted to allow a customer to use the employer's FedEx account to ship some items to the employer. The owner decided to review the employer's recent Fed Ex bills to determine how the customer should arrange for a third-party billing to the employer of its shipping costs. On approximately April 1, 2015, the owner looked at the employer's most recent bill from FedEx, issued on March 27, 2015, and he noticed that on March 10, 2015, claimant's daughter in Texas had used the employer's UPS account to ship an item to claimant for which the employer had been charged \$12.27 and on March 20, 2015, a person in Texas who was not known to him had used the employer's account to ship an item to claimant's daughter in Texas for which the employer was charged \$10.15. Exhibit 1 at 4. The owner had not been informed that claimant or others on her behalf were using the employer's FedEx account to ship items for personal purposes. On April 1, 2015, the owner spoke with one of claimant's coworker to learn if she knew anything about claimant or her family members' use of the employer's shipping accounts. The coworker told the owner that she thought claimant had been using the employer's shipping accounts for personal purposes, without reimbursing the employer for the costs she incurred, for a long period of time. The owner believed claimant had not reimbursed the employer for her family members' use of the FedEx account on March 10 and March 27, 2015.

(6) After April 1, 2015, the employer's owner reviewed the bills that the employer received from both UPS and FedEx to determine the extent of claimant's use of those accounts. Between January 2010 and March 2015, he determined that claimant and her family members had used the employer's shipping accounts at least 111 times and incurred shipping charges totaling \$3,298.44 that were billed to the employer. Exhibit 1 at 2, 5-8, 10, 13-15. The owner also determined, most recently, that in addition to the charges on March 10 and March 20, 2015, claimant or her family member had used the employer's shipping accounts to ship items on November 3, 2014 (\$51.03 / UPS), December 16, 2014 (\$66.46 / FedEx), January 16, 2014 (\$17.61 / FedEx), February 6, 2014 (\$16.44 / FedEx), February 6, 2015 (\$14.41 / FedEx). Exhibit 1 at 6-7, 18. In total, from October 6, 2014 through March 20, 2015, the employer was billed \$188.37 for claimant and her family members' personal shipments. Although the owner reviewed the employer's accounting records, he was unable to find any records that claimant had reimbursed the employer for these personal shipments.

(7) On April 6, 2015, when claimant returned to work after her vacation, the employer discharged her for using its shipping accounts for personal purposes and not reimbursing the employer for her use.

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

At hearing, claimant did not deny that beginning in November 2005 and continuing until she was discharged her and her family members regularly used the employer's UPS and FedEx accounts to ship items to each other for personal reasons. Transcript at 23. Claimant did not challenge the employer's evidence about the dates the personal shipments were made or the costs that the employer was billed for those shipments. Claimant also testified that she understood the employer expected her to reimburse it for all shipping charges she and her family member incurred using the employer's shipping accounts. Transcript at 21, 23, 24. Claimant's sole defense was that, in fact, she reimbursed the employer for all of her own and her family members' uses of the employer's shipping accounts after November 2005. Transcript at 24.

Claimant's testimony was not credible. After the employer's owner testified that he could not locate any records showing that claimant had reimbursed the employer for her personal use of its shipping accounts, claimant first testified that she had deposited her reimbursement payments into the employer's petty cash fund. Transcript at 24. When claimant was questioned about the petty cash log that the employer's owner instituted in October 2014 to account for all moneys deposited into and withdrawn from the petty cash fund, claimant adjusted her testimony to state that she did not use the log to record her reimbursement payments because she was "too busy" and often bypassed the petty cash fund and placed the cash reimbursements directly into the employer's bag intended for deposit at the bank. Transcript at 25. However, during the period when the petty cash log was in effect, claimant incurred approximately \$117.49 in shipping charges, yet during that same period the petty cash account was reconciled at \$33 short. Exhibit 1 at 24. Had claimant placed those funds in the petty cash fund without accounting for their source, the petty cash account would have been at least \$117.49 over its reconciled balance and, accounting for the \$33 shortage, the account should have reconciled at an overage of \$150.49. Assuming that claimant in fact deposited the reimbursement payments directly into the employer's bank deposit bag, rather than into the petty cash fund, during the period of November 3, 2014 through March 27, 2015, there should be \$188.37 in unaccounted for cash that was deposited into the employer's bank account. The employer's bank deposit records show that no cash, explained or otherwise, was deposited at the employer's bank from November 3 through December 12, 2014. Exhibit 3 at 22, 23, 25, 27, 30, 32, 33. On December 18, 2014, the employer deposited \$200 in cash in its bank account, but that is accounted for as a deposit of excess funds from its petty cash account. Exhibit 1 at 24, 25; Exhibit 3 at 34. From December 19, 2014 through January 6, 2015, the employer did not have any cash deposits. Exhibit 3 at 35, 38, 39. On January 26, 2015, the employer deposited \$400 in cash, on February 11, 2015 the employer deposited \$1,700 in cash, on February 17, 2015, the employer deposited \$1,000 in cash, and on March 24, 2015, the employer deposited \$595 in cash. Exhibit 3 at 8,

9, 10, 11. All of those cash deposits were identified as cash payments from customers. Exhibit 3 at 3. It appears that there existed no unaccounted for cash on the employer's books that supports claimant's contention that she reimbursed the employer in cash for her and her family members' personal shipping by placing it directly in the employer's bank deposit bag without accounting for it.

There are additional undisputed facts that undercut the credibility of claimant's assertion that she paid the employer back for all personal shipping she made using the employer's accounts. While claimant contended that she only learned when her family members used the employer's account to ship items to other family members by reviewing the itemized bills the employer received from the shipping companies, it is most unlikely that she would give her family members carte blanche to incur shipping costs in whatever amounts they wished and for which she would assume financial responsibility. Transcript at 31, 32. It is also unlikely that she reviewed the shipping companies' bills to determine how much she needed to reimburse the employer, since she did not dispute that eight of the personal shipments she made to her sister were misaddressed and \$85 in additional charges were incurred when the shipping company needed to correct the address label on the package. Transcript at 32, 33, 34. If claimant was actually reviewing the monthly bills and was going to reimburse the employer for the charged she had incurred, she would likely have noticed the misaddressed package to her sister and promptly corrected the mistake, rather than sending an additional seven packages to the wrong address. Viewing the record as a whole, claimant's assertion that she reimbursed the employer for her and her family's use of the employer's shipping accounts is not credible. The documents we have examined for the period from November 3, 2014 through March 24, 2015, demonstrate, more likely than not, that claimant did not reimburse the employer for her own and her family members' personal shipping using the employer's account. From this sample, it is reasonable to infer that claimant also did not reimburse the employer for the personal shipping made from November 2005 through November 2, 2014. Since claimant agreed that she knew the employer expected her to reimburse it for the costs of personal shipping through its accounts, it further can only be inferred, given the number of times she did so without reimbursing the employer, that she was deliberately and willfully violating the employer's expectation in order to obtain free shipping for herself and her family members.

Claimant's behavior in not reimbursing the employer for personal shipping is not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To constitute an "isolated instance of poor judgment," claimant's behavior must have been a single or infrequent occurrence rather than a repeated act to pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, on at least 111 occasions, claimant willfully used the employer's shipping accounts without reimbursing it. Claimant's behavior is excluded from constituting an isolated instance of poor judgment due to its frequency and the number of occurrences. It was not "isolated" within the meaning of OAR 471-030-0038(1)(d)(A).

Nor was claimant's behavior excused from constituting misconduct because it was a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that she behaved as she did as a result of a mistaken understanding about the employer's standards, or a belief that the employer would condone her failure to reimburse it for personal shipping charges. Because claimant did not make the threshold showing for a good faith error, that excuse was not applicable to her behavior.

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

DECISION: Hearing Decision 15-UI-41665 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: September 14, 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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