

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0597

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 103043). The employer filed a timely request for hearing. On April 13, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 26, 2016. On April 26, 2016, ALJ S. Lee conducted a hearing, at which claimant failed to appear, and on April 29, 2016 issued Hearing Decision 16-UI-58493, concluding claimant's discharge was for misconduct. On May 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

In his application for review, claimant asked that the hearing be reopened on the grounds that he had no advance notice of the hearing. Claimant's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In support of his request, claimant asserted that his address of record, to which OAH mailed the notice of hearing, belonged to his parents, and, because the notice of hearing arrived at that address while they were on vacation, claimant did not receive the notice until the day after the hearing. Notably, the notice of hearing was mailed 13 days prior to the hearing. It was reasonably foreseeable that claimant might receive time-sensitive mail related to his unemployment insurance claim sometime within an almost two week period, and claimant did not assert or show that it was beyond his reasonable control to make arrangements to receive his mail despite his parents' vacation, or to arrange to have the Department send him mail at an address to which he had access during that period of time. By choosing not to do so, claimant assumed the risk of mail delays and their consequences. Accordingly, claimant's failure to receive the notice of hearing until after the hearing was not caused by a circumstance outside claimant's reasonable control. Claimant's request to consider new information under OAR 471-041-0090 is, therefore, denied.

FINDINGS OF FACT: (1) AT&T Mobility employed claimant as a retail sales consultant from October 11, 2013 to January 23, 2016.

(2) The employer expected employees to refrain from processing transactions that benefited themselves or their families. The employer had a written policy to that effect, and provided it to claimant.

(3) In August 2015, the employer started a sales promotion through which it gave customers who purchased a new cell phone a \$200 buy-back credit for their old phones, but only if they either transferred their phone service from a different carrier, or added a new line of service. The employer expected employees to give credits only to those customers that qualified for them.

(4) In early August 2015, an assistant manager gave claimant a verbal warning for giving buy-back credit to a customer who had not transferred his service or opened a new line of service. The assistant manager warned claimant at that time that buy-back credit was only available for customers who had either transferred their phone service or added a new line.

(5) On August 13, 2015, claimant failed to give buy-back credit to an eligible customer. On August 20, 2015, claimant improperly processed buy-back credits totaling \$600 for three cell phones. Two of those customers were entitled to a \$200 buy-back credit, but claimant did not give it to them. The third customer was not entitled to a \$200 buy-back credit. Claimant consolidated that combined \$600 buy-back credit and applied them to the sale of one new phone.

(6) On August 21, 2016, claimant processed transactions involving the return of phones from three of his family members. In those transactions he processed buy-back credits totaling \$600, for which the phones did not qualify, applied the \$600 toward the purchase of a new cell phone for his cousin, and processed payment for the remaining amount of the purchase price using his personal credit card.

(7) Between September 2015 and January 2016, the employer investigated claimant's transactions under the buy-back promotion. On January 23, 2016, the employer discharged claimant for processing his own transactions on August 21st and improperly processing buy-back credits in August 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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.

The employer discharged claimant, in part, for processing his own transaction on August 21, 2015. The employer had the right to expect claimant not to process his own transactions, gave claimant a copy of

its policy to that effect, and, therefore, claimant knew or should have known that expectation. On August 21, 2015, claimant processed a transaction involving return of three of his family's phones and \$600 in buy-back credits they were not entitled to, and he charged a \$49 purchase to his own credit card. Claimant was conscious of his conduct, knew or should have known processing his own transactions would violate the employer's expectations, and was, at a minimum, indifferent to the consequences of doing so. His conduct was, therefore, a wantonly negligent violation of the standards of behavior the employer had the right to expect of him.

The employer also discharged claimant, in part, for incorrectly processing transactions involving buy-back credits. The employer had, as of early August 2015, issued claimant a verbal warning for that conduct, and informed him that only customers who transferred their phone service from a different carrier or added a new line of service were eligible for the buy-back credit. Notwithstanding that warning, on seven occasions claimant improperly processed transactions involving buy-back credit by failing to give buy-back credit customers entitled to it, and giving buy-back credit to customers who were not entitled to it. Given his recent verbal warning about which types of transactions were eligible for buy-back credit, and that claimant kept track of some transactions to use in others, it is more likely than not that he was conscious of his conduct while processing those transactions and knew or should have known that his conduct would probably violate the employer's expectations. His conduct was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Conduct is excusable as an isolated instance of poor judgment only if it is a single or infrequent occurrence of poor judgment, and not if the act is repeated or part of a pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(a). As previously stated, claimant's wantonly negligent exercises of poor judgment occurred on seven occasions, so the conduct was not isolated. Claimant did not sincerely believe, or have any factual basis for believing, that the employer would condone his failures to properly allocate customers' buy-back credits, so the conduct was not the result of a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-58493 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: June 20, 2016

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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