

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1053

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 115220). The employer filed a timely request for hearing. On August 29, 2016, ALJ Murdock conducted a hearing, and on September 7, 2016 issued Hearing Decision 16-UI-67044, affirming the Department's decision. On September 12, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Marion County employed claimant as bilingual wraparound facilitator from March 21, 2011 to May 25, 2016.

(2) On January 20, 2016, claimant's supervisor gave claimant permission to leave work early to pick up her sick child. However, claimant did not leave work early because her ex-husband was able to pick up their sick child. Claimant accurately recorded working a full shift that day, but failed to notify her supervisor that she had not left work early. The employer mistakenly concluded that claimant falsely recorded working a full shift on January 20.

(3) The employer expected claimant to accurately bill for services she provided clients, including team meetings, within seven days, if practicable. Claimant understood that expectation. On February 3, 2016, claimant attended a team meeting. However, claimant accidentally billed for attending a team meeting on February 4, and not on February 3. The employer mistakenly concluded that claimant deliberately billed for attending a team meeting on February 4 that she did not attend.

(4) On March 14, 2016, claimant attended a team meeting. Claimant initially did not bill for attending the meeting, but eventually did so. A coworker who attended the meeting did not report that claimant

attended the meeting. The employer mistakenly concluded that claimant billed for attending a team meeting on March 14 that she did not attend.

(5) As of April 13, 2016, claimant had billed for all services she had provided clients on or before that date. On April 14, 2016, claimant performed only office work, and not services for clients.

(6) On Friday, April 15, 2016, claimant accurately reported transporting a client's family member in one of the employer's vehicles to a social security office, but did not have time to bill for that or other services she provided clients that day. An employee failed to record claimant checking out the vehicle, and the family member later did not recall being transported to the social security office. The employer mistakenly concluded that claimant falsely reported transporting the client's family member to the social security office.

(7) On Monday, April 18 and Tuesday, April 19, 2016, claimant was in training, and therefore did not perform services for clients or have time to bill for services provided clients on April 15, 2016. From April 20 through 26, 2016, claimant was on vacation. From Wednesday, April 27 through Monday, May 2, 2016, claimant was catching up on other duties, and therefore did not have time to bill for services she provided clients during that time, or that she had provided on April 15, 2016.

(8) On May 2, 2016, the employer notified claimant that it was investigating her for alleged false billings of services for clients. From May 3 through 9, 2016, claimant did not bill for services she provided clients because she was concerned the employer would consider the billings fraudulent. On May 10, 2016, the employer suspended claimant.

(9) On May 25, 2016, the employer discharged claimant, alleging that she falsely recorded working a full shift on January 20, 2016, billed for attending team meetings on February 4 and March 14, 2016 that she did not attend, falsely reported that she transported the client's family member to the social security office on April 15, 2016, and failed to bill for services she provided clients from April 14, 2016 through May 9, 2016.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). To be isolated, the exercise of poor judgment must be 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). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(1)(d)(D).

The employer discharged claimant, in part, for allegedly falsely recording that she worked a full shift on January 20, 2016, billing for attending a team meeting on March 14, 2016 that she did not attend, and falsely reporting that she transported the client's family member to the social security office on April 15, 2016. However, the record shows claimant worked a full shift on January 20, 2016, attended the March 14, 2016 meeting, and transported the client's family member to the social security office on April 15, 2016. Absent a showing that claimant engaged in the conduct alleged by the employer, we cannot find misconduct.

The employer also discharged claimant, in part, for billing for a team meeting on February 4 that she did not attend. However, the record shows that claimant accidentally billed for attending a team meeting on February 4, intending to bill for a team meeting she attended on February 3. Absent a showing that she consciously billed for attending a team meeting on February 4, or consciously engaged in other conduct she knew or should have known would probably result in her doing so, we do not find misconduct.

The employer also discharged claimant, in part, for failing to bill for services she provided clients from April 14, 2016 through May 9, 2016. The employer had a right to expect claimant to bill for services she provided clients within seven days, if practicable. On April 14, 2016, however, claimant performed only office work, and not services for clients. On Friday, April 15, 2016, she did not have time to bill services she provided clients that day. On Monday, April 18 and Tuesday, April 19, 2016, she was in training, and therefore did not perform services for clients or have time to bill for services provided clients on April 15, 2016. From April 20 through 26, 2016, claimant was on vacation. From Wednesday, April 27 through Monday, May 2, 2016, claimant was catching up on other duties, and therefore did not have time to bill for services she provided during that time, or that she had provided on April 15, 2016. In sum, the record fails to show it was practicable for claimant to bill services she provided clients within seven days from April 14 through May 2, 2016.

From May 3 through 9, 2016, claimant did not bill for services she provided clients because she was concerned the employer would consider the billings fraudulent. However, claimant's decision not to comply with the employer's expectations during that time was, at most, an isolated instance of poor judgment, and not misconduct. The record fails to show claimant's conduct violated the law or was tantamount to unlawful conduct. Nor did claimant's conduct, when viewed objectively, create an irreparable breach of trust in the employment relationship, given the context of the employer's investigation into claimant's billing practices, and claimant's understandable concern that any new billings would be considered fraudulent.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 16-UI-67044 is affirmed.

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

DATE of Service: October 12, 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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