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State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

# EMPLOYMENT APPEALS BOARD DECISION
# 2017-EAB-1328

*Affirmed*
*Disqualification*

**PROCEDURAL HISTORY:** On September 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135530). Claimant filed a timely request for hearing. On October 25, 2017, ALJ Frank conducted a hearing, and on October 27, 2017 issued Hearing Decision 17-UI-95588, affirming the Department's decision. On November 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she sought to introduce information that she did not present during the hearing. The employer submitted a written argument seeking to introduce new information in rebuttal to the new information that claimant sought to present. Claimant did not explain why she did not offer the new information that she now is seeking to have EAB consider during the hearing, and did not otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to introduce by way of her written argument. EAB also did not consider the new information that the employer sought to present since, as a result of EAB's refusal to consider the new information that claimant proffered, no rebuttal was necessary. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Steph's Bookkeeping Service, Inc. employed claimant to perform bookkeeper and data entry services from February 21, 2015 until July 14, 2017.

(2) The employer assigned its bookkeepers to perform services for particular clients and billed clients based on the time the bookkeeper spent performing those services. The employer expected that each day a bookkeeper worked, the bookkeeper would prepare a comprehensive, detailed and accurate narrative of all tasks performed for particular clients and would accurately report the hours the bookkeeper had worked for each client. The bookkeeper's narrative formed the basis of billing invoices provided to the employer's clients. Claimant understood the employer's expectations.

(3) Over several months in 2017, the employer developed concerns that claimant was absent excessively and taking overly long meal breaks. The employer also had concerns that claimant was not completing tasks assigned to her to perform for clients.

(4) On July 13, 2017, claimant took a three hour lunch break without the employer's prior approval. Upon learning this, the employer's owner decided to examine claimant's time records for July 13, 2017 to determine how much time claimant had actually worked and on what. For one client, claimant started a QuickBooks file that day. Claimant billed 2.25 hours and handwrote in her billing narrative: "Save and print out all [bank] statements for 2017. Start entering [in QuickBooks] all 2017 [bank transactions]." Audio at ~29:20. Upon investigation, the employer's records showed that the only entries claimant made in QuickBooks for banking transactions were from the dates January 1 through January 11, 2017, and constituted 22 transactions. Based on her bookkeeping experience, the owner considered claimant's billings for the client to evidence "extreme excess." Audio at ~8:39. The owner estimated that it should only have required approximately seven to eight minutes of time to perform the tasks listed for that client in claimant's billing narrative and not the 2.25 hours that claimant had billed. Audio at ~10:35.

(5) For a second client, claimant made two time entries of 0.75 and 0.50 hour, for a total of 1.25 hours billed for July 13, 2017. Claimant handwrote in her billing narrative to explain that time: "Start investigation into new QuickBooks. Set up on desktop for payroll. Start new QuickBooks." Audio at ~31:25. Upon investigation, the employer's records showed that no new payroll was started or activated in that client's file, the preliminary steps needed to start a payroll file had not been taken, no payroll subscription was set up in that file, and basic information about the second client's business, such as the employer identification number, had not been entered in the client's QuickBooks file. Audio at ~30:57, ~31:45. The owner concluded claimant had not performed much of the work listed in the billing narrative. Based on experience, the owner estimated that it would have taken approximately 10 or 15 minutes of time to accomplish the tasks that claimant had actually completed for the second client, not the 1.25 hours that claimant had billed. Audio at ~ 11:08. The owner determined that claimant had fraudulently overbilled both clients for the work she had performed.

(6) On July 14, 2017, the employer discharged claimant for falsifying two client billings on July 13, 2017, including by not actually performing some of the work for which she had billed clients and, of the work she had completed, by inflating the time actually spent on it.

**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 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer contended that the time claimant billed for both clients on July 13, 2017 was grossly disproportionate to the time that should have been spent on the work she performed and the employer inferred that claimant's billings were deliberately fraudulent, both because she had billed for tasks not performed, and had inflated the time she had spent on the tasks she actually performed. Audio at ~8:39, ~11:35. Claimant denied the employer's allegations and testified that the employer's owner was either fabricating evidence against her or was mistaken about her billings. Audio at ~22:26. However, the employer's evidence was very specific as to the tasks that claimant had billed for on July 13, 2017, the billed tasks that the employer's records showed that claimant had not actually performed as of July 13, 2017. And both employer witnesses agreed that, based on their bookkeeping experience, the time that claimant had billed for the tasks she claimed to have performed so greatly exceeded the time that should have been spent on them, that claimant must been intentionally inflating her billings to disguise that she was not actually working the hours the employer expected.

While claimant contended she could not recall having worked for the two clients whose billings were at issue on July 13, 2017, she did not dispute that the employer had her handwritten time sheets and billing narratives from that day showing that she had indeed billed those two clients for what the employer contended she had. As well, claimant did not dispute that had she performed the tasks she billed the two clients for on July 13, 2017, the time she spent should have been very significantly less than the 2.25 and 1.50 hours, respectively, that she billed for her tasks that day. The preponderance of the evidence in this record shows that the employer's contentions as to claimant's billings from July 13, 2017 likely were accurate. Given that the time claimant billed to those two clients was very greatly in excess of the time the tasks she represented she had performed should have required, it is most likely that claimant was inflating her hours with the intention of deceiving the employer about the work she was actually performing. By fraudulently representing she had performed work for those clients when she had not, and by fraudulently inflating the time she worked on the tasks she actually had performed, claimant willfully violated the employer's standards.

While claimant might have willfully violated the employer's standards on July 13, 2017, claimant's behavior may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). A claimant's behavior is considered to have been isolated if it was 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). To be excused as an isolated instance of poor judgment, a claimant's behavior at issue 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 willfully violated the employer's standards in two separate and discrete acts on July 13, 2017, one for each of the two clients at issue that she billed for work for that day. Each fraudulent billing involved a separate decision to deceive. Because claimant's behavior in violation of the employer's standards on July 13, 2017 was neither a single nor infrequent act, it may not be excused as an isolated instance of poor judgment.

Claimant's behavior on July 13, 2017 also may not be excused as an isolated instance of poor judgment because it exceeded mere poor judgment. Honesty and integrity in billing clients only for work actually performed and only for the time actually spent performing that work is fundamental to the employment relationship. Claimant's dishonest behavior was a breach of that trust and, based on the extent to which it undercut the employment relationship, a reasonable employer would have objectively concluded that it could no longer trust claimant to comply with its standards of honesty in the future. Because claimant's deceitful behavior on July 13, 2017 cause an irreparable breach of trust in the employment relationship, it also is not excusable as an isolated instance of poor judgment since it exceeded mere poor judgment.

Nor may claimant's behavior on July 13, 2017 be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). It is not plausible that claimant believed the employer would allow her to prepare fraudulent billing narratives to support invoices issued to clients, or that claimant sincerely believed the employer would condone that behavior. For these reasons, claimant's willful behavior in violation of the employer's standards is not excused as a good faith error.

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

**DECISION:** Hearing Decision 17-UI-95588 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: <u>December 20, 2017</u>**

**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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