

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0349

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 28, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125702). Claimant filed a timely request for hearing. On March 28, 2018, ALJ Scott conducted a hearing, and on March 29, 2018, issued Order No. 18-UI-106293, affirming the Department's decision. On April 5, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wal Mart Associates, Inc. employed claimant, last as a claims supervisor, from March 31, 1997 to February 9, 2018.

(2) The employer expected its employees to refrain from committing acts of dishonesty or fraud, including falsification of claims to suppliers. Claimant was aware of and understood the employer's expectations as a matter of common sense.

(3) Claimant's job involved processing "virtual claims." Audio Record ~ 10:30 to 15:00. Processing a virtual claim essentially involved categorizing items listed for sale as an actual sale, return or markdown and affected the store's profitability depending on how the item was categorized and the financial transaction adjusted. It also affected the store manager's year-end bonus because if the returns or markdowns were lower, the manager's bonus was higher.

(4) Sometime in 2016, claimant's store manager directed her to fraudulently enter virtual claims for damaged, returned or unsold items that did not accurately reflect what had happened to the merchandise, which effectively increased the store's profit margin and size of the manager's bonus. Claimant knew that many of the items in question had been thrown out or donated rather than marked down or returned to the suppliers. Claimant initially objected to processing the claims inaccurately because she knew it was fraudulent but the store manager directed her to do it anyway, and told her, "This is my store and you will do as I say." Audio Record ~ 16:00 to 17:00. Claimant thought the store manager would discharge her if she did not do as the store manager said, and processed the claims as directed to avoid

being discharged. Claimant told the manager that if she was ever questioned she would tell the truth about the fraudulent claims. Claimant gained no financial benefit from the transactions she processed.

(5) Thereafter, claimant continued to process virtual transactions as directed. She did not report the issue to the manager's supervisor or the employer's corporate office because she was afraid she would be discharged by the manager.

(6) In early 2018, claimant was questioned by corporate investigators about her claims filing practices and told them she filed many virtual claims knowing that they were fraudulent but did so at the store manager's insistence, and that she had done so to avoid being discharged or demoted.

(7) On February 9, 2018, the employer discharged claimant for "knowingly submit[ing] fraudulent virtual claims." Exhibit 1.

CONCLUSIONS AND REASONS: We agree 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.

The employer had the right to expect claimant to refrain from committing acts of dishonesty or fraud when processing virtual claims for the employer, which claimant understood as a matter of common sense. Despite being directed to engage in fraudulent acts by the store director, claimant knew the store director's directions contradicted the employer's policies, was conscious of her conduct, and consciously violated the employer's expectations when processing each of the virtual claims in question. Claimant's conduct, at the very least, demonstrated conscious indifference to the consequences of her actions for the employer.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error 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. OAR 471-030-0038(1)(d)(A). Claimant's conduct was not isolated having occurred numerous times up to the time the fraudulent claims were discovered and she was discharged by the employer for her role in processing those fraudulent claims. Claimant did not dispute that each fraudulent claims processing event involved a conscious exercise of poor judgment. Nor can claimant's conduct be excused as a good faith error in her understanding of the employer's expectations. Claimant did not assert or show that she reasonably believed, or had a factual basis for believing the employer, as opposed to the store manager, would condone her actions or those of the store manager whose directions she was following.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on her work separation until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-106293 is affirmed.

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

DATE of Service: May 4, 2018

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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