EO: 200
BYE: 201915

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0614

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151334). Claimant filed a timely request for hearing. On June 4, 2018, ALJ Seideman conducted a hearing, and on June 8, 2018 issued Order No. 18-UI-111004, affirming the Department's decision. On June 15, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) VanderVeer Center, PC employed claimant as a patient advocate from March 1, 2016 to April 17, 2018.

(2) A key part of claimant's position involved administering a vendor-funded rewards points program, through which the employer's patients received points, redeemable by the vendor, to pay for the employer's services. The accrual of points was based upon the cost of the services patients bought from the employer. Although the points were not redeemable by patients for cash, patients used the points in lieu of cash to pay for the employer's services, and the vendor reimbursed the employer with cash.

(3) Claimant was a rewards program administrator. She registered patients in the program, awarded patients rewards points based upon their purchases through the employer's business, and redeemed patients' points. Claimant was in charge of training others in the employer's front office to administer the rewards program. None of claimant's coworkers administered rewards points to patients who had not personally earned the points.

(4) The rewards program terms and conditions stated that it was a "points-based program where registered users of the Program may accrue points by engaging in certain activities, and may, in tern, redeem points for certain benefits." Exhibit 4. The rewards program allocated points for specific activities, and required that recipients of points "undertake an activity . . . which may include . . .

purchasing . . . treatments . . . and/or . . . procedures." *Id.* The program rules stated, "Points can be accrued only for activity taken and completed by you and can be applied only to your account." *Id.* Points were not transferrable between users or accounts; accrual of 600 or 1200 points within a calendar year entitled rewards program members to certain additional gifts.

(5) The employer maintained and used a fake rewards program account that was not tied to an actual patient. The employer used the fake account as a holding account to use when the vendor's site was down or there were points the employer could not allocate to a patient. The vendor authorized the employer's use of the account for those purposes. In the course of her duties, claimant allocated points to the fake account and redeemed coupons on the employer's behalf.

(6) Sometime prior to April 16, 2018, the employer terminated an employee's employment. Per the employer's policies, which were well-known to staff, the ex-employee was not permitted on the employer's premises after her termination.

(7) On April 16, 2018, the ex-employee did not receive any services from the employer and was not on site. That day, claimant accessed the ex-employee's rewards account and entered data showing that the ex-employee had undergone five aesthetic procedures that day. Had the ex-employee actually undergone those procedures, it would have cost her approximately $10,000. As a result of claimant's entries, the ex-employee accrued 2900 rewards points that entitled her to $290 worth of treatments from the employer or any other aesthetic services office that participated in the vendor's rewards program, and obligated the vendor to reimburse whatever aesthetic services office through which the ex-employee redeemed the points with the cash value of the points. The ex-employee had not spent $10,000 on treatments and was not entitled to the rewards points or the redemption value of those points.

(8) The same day, claimant sent the ex-employee an email that stated, "Happy Monday friend! I issued you BD [rewards program] points. You should come here and get tx. I miss you so much!" Exhibit 3.

(9) The employer discovered that claimant had allocated the ex-employee $290 worth of rewards points the ex-employee had not accrued based upon her own activities, and, on April 17, 2018, discharged claimant for theft.

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

The employer had the right to expect claimant not to add procedures to the ex-employee's account reflecting $10,000 of procedures the ex-employee did not receive, thus entitling the ex-employee to rewards points she had not earned, valued at $290. Claimant argued at the hearing and in her argument that the employer's lack of training protocol and existence of a fake patient account had caused her not to understand that her conduct with respect to the ex-employee's account would violate the employer's expectations. However, claimant should have known as a matter of common sense that falsifying the ex-employee's account to reflect treatments she did not receive, so she could accrue rewards points and value she had not earned, would violate the employer's expectations of any employee's conduct, regardless of specific training. Additionally, the employer's use of a holding account for administrative convenience, with the vendor's authorization, did not give claimant a plausible basis for her actions with respect to the ex-employee. Claimant knew that the holding account was not a real person's account, and that no individual would use that account or redeem its rewards points for cash from the vendor; she knew that the ex-employee was an individual whom she invited to come to the employer's business to redeem rewards points she had not earned for their cash value from the vendor. The situations were distinct enough that the existence or use of the holding account would not plausibly lead claimant to believe that she was permitted to add procedures to the ex-employee's account or allocate rewards points to the ex-employee for redemption. It is more likely than not, under the circumstances, that claimant knew, or at a minimum should have known, that her conduct with respect to the ex-employee's account would probably violate the employer's expectations, and that she understood that conduct with indifference to the consequences of her conduct. Claimant's conduct was, therefore, a wantonly negligent violation of the standards of behavior the employer had the right to expect of her.

Claimant's conduct was not excusable as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not sincerely believe, or have a plausible factual basis for believing, that allocating procedures to accrue rewards points to an ex-employee who had not earned them was consistent with the employer's expectations. Claimant was responsible for training other employees to administer the rewards points program, and none of the individuals claimant trained had done the same thing claimant did, suggesting both that claimant's conduct was not standard procedure and suggesting that it was likely generally understood not to act as claimant did. Claimant did not establish that she acted in good faith with respect to the ex-employee's rewards points account.

Although the record shows that claimant's conduct was likely an isolated instance of wantonly negligent poor judgment under OAR 471-030-0038(1)(d)(A)-(C), her conduct was not excusable under OAR 471-030-0038(1)(d)(D) because it exceeded mere poor judgment. OAR 471-030-0038(1)(d)(D) states that conduct that is unlawful, tantamount to unlawful conduct, causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible exceeds mere poor judgment and cannot be excused. Claimant's conduct in this case was tantamount to theft under ORS 164.015(1) because, although it does not appear that she personally gained anything of value from the employer or the rewards points program, she appropriated a $290 value of rewards points from the vendor and allocated it to a third party, the ex-employee. As an administrator of the rewards points program, especially one who was responsible for training others to administer the program, claimant's conscious misuse of the rewards program by allocating procedures to the ex-employee, awarding rewards points valued at $290, and then inviting the ex-employee to use the points the ex-employee had not earned, caused an irreparable trust in the employment relationship. As a result of claimant's conduct, no reasonable employer could continue to trust claimant to administer the program for its

patients, allocate points to patients, or train staff to administer the program. For both of those reasons, considered singly or together, claimant's conduct exceeded mere poor judgment, and cannot be excused even though it was an isolated instance.

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

DECISION: Order No. 18-UI-111004 is affirmed.

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

DATE of Service: July 12, 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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