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

343
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0986

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 172622). Claimant filed a timely request for hearing. On September 18, 2018, ALJ Snyder conducted a hearing, and on September 26, 2018 issued Order No. 18-UI-117273, affirming the Department's decision. On October 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that he provided a copy of the argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) US Bank National Association employed claimant as an inbound sales banker from March 16, 2015 until July 20, 2018.

(2) The employer had prepared disclosures that informed customers about specific matters relating to particular transactions they might decide undertake. The employer expected claimant to read the disclosures approved for particular transactions to all customers involved in those transactions verbatim, without adding or omitting any of the approved language. Claimant understood the employer's expectations.

(3) On May 17, 2017, July 24, 2017 and May 23, 2018, the employer gave claimant verbal warnings for failing to read approved disclosures to customers who were deciding whether to become involved in certain transactions.

(4) On July 3, 2018, the employer gave claimant a verbal warning for several issues, including the addition of language to supplement the approved language in an applicable disclosure. Claimant was advised to read the disclosures verbatim without supplementing the disclosure with additional language.

(5) On July 18, 2018, the employer issued a written warning to claimant for adding language to an approved disclosure intended to inform customers that if they provided their cell phone numbers to the employer, the employer would not use that number for marketing purposes. The language that claimant added related to informing customers about cell phone charges they might incur if they used their cell phones to communicate with the employer. The employer told claimant that he was expected to read only the applicable disclosures verbatim to customers, and not to supplement the disclosure with additional language. However, later that day, after receiving the warning, claimant added language to an approved disclosure when reading it to a customer.

(6) On July 19, 2018 and July 20, 2018, claimant added language to an approved disclosure when reading it to a customer.

(7) On July 20, 2018, the employer discharged claimant for failing to read approved disclosures verbatim to customers without the addition of supplemental language.

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) (January 11, 2018) 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 and good faith errors 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).

At hearing, claimant did not dispute that he knew the employer expected him to read applicable disclosures verbatim to customers without adding or omitting any of the approved language. While claimant vigorously denied that he added language to any approved disclosure about cell phone data charges, he did not deny that he added other language to the disclosures that he was expected to read verbatim to customers on July 18, 19 and 20, 2018. Audio at ~18:50, ~26:28. In what appeared to be consciously chosen language, claimant testified in the hypothetical that if he added language to the approved disclosures, it was done in anticipation of a customer's expression of concern about what was stated in the disclosure, and he thought that the supplemental language was intended to serve the customer's and the employer's best interests. Audio at ~18:00, ~19:30, ~24:40, ~26:28. Based on claimant's testimony, it is appears that he did indeed add unapproved language to the approved language of the disclosures. Claimant was warned several times about the expectation that he read verbatim only the approved disclosure and was warned on July 18 to refrain from augmenting the approved language with words of his own choice. Claimant therefore was reasonably aware on July 18, 19 and 20 that he needed to pay attention to the disclosures and to limit his comments to the approved language only. It is unlikely that this would have slipped claimant's mind and his conscious awareness on the same day that he received the warning and the two days that immediately followed. Claimant's behavior in choosing to

supplement the approved language of applicable disclosures on July 18, 19 and 20, 2018 was, at a minimum, wantonly negligent.

Although the behavior for which claimant was discharged was wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be considered an isolated instance of poor judgment, however, claimant's behavior must have been, among other things, 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). Here, claimant violated the employer's standards with wanton negligence three separate times within two days of receiving the July 18 written warning. Given the frequency and number of times claimant violated the employer's standards, claimant's behavior was neither single nor infrequent. As such, claimant's behavior in failing to limit disclosures to the approved language only may not be excused as an isolated instance of poor judgment.

Nor may claimant's behavior on July 18 through 20 be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that he misunderstood the employer's requirement that he limit the disclosures to reading the approved language only, or that he thought the employer would allow him to augment that language with language of his own. Claimant did not make a threshold showing for the applicability of the excuse of good faith error.

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

DECISION: Order No. 18-UI-117273 is affirmed.

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

DATE of Service: November 15, 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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