

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0011

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 13, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 142521). The employer filed a timely request for hearing. On November 26, 2013, ALJ Seideman conducted a hearing, and on December 11, 2013 issued Hearing Decision 13-UI-06145, affirming the Department's decision. On December 31, 2013, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) JP Morgan Chase employed claimant as a relationship banker and small business specialist from October 19, 2009 until July 8, 2013.

(2) When a bank customer reported stolen checks, the employer expected a banker to "evaluate[] the situation in order to provide the customer with an appropriate solution, while minimizing the risk to the bank." Exhibit 1. The employer generally expected that in situations where there was a "low risk of account compromise," the banker would issue stop payment instructions for the stolen checks. *Id.* The employer generally expected the banker to issue instructions to close the account when there was a "high risk of account compromise." *Id.* The employer defined a "high risk" situation to include when a "customer's checks were stolen out of house [sic] or vehicle." *Id.* The employer also expected the banker to whom stolen checks were reported to report the theft to the employer's fraud hotline. Transcript at 6. Claimant was aware of the employer's expectations.

(3) On May 31, 2013, a box of checks from one of claimant's business customers was stolen from the customer's vehicle. The customer did not report the theft of checks to claimant until the customer came to the bank on June 6, 2013. At that time, claimant recommended to the customer that he close the business account. The customer told claimant "it was not possible to immediately close the account"

because certain checks written to important vendors were outstanding and he “urged” claimant “to do everything that we could to not close the account.” Transcript at 45. Claimant told the customer stop payment instructions could be issued for the stolen checks, but he needed the numbers of those checks to do so. The customer did not know the check numbers. Claimant asked the customer to call him later with the numbers so he could make a report to the employer’s fraud hotline and issue stop payment instructions. The customer abruptly left the bank after telling claimant he was in a “hurry” and “didn’t have the time” to get the check numbers to claimant right then. Transcript at 20. Claimant did not call the fraud hotline at this time because he did not yet know the numbers of the stolen checks and, without that information, the fraud hotline could do nothing since the customer did not want the account closed.

(4) On June 7, 2013, when the customer had not called him, claimant called the customer and left a voicemail message to ask him to provide the numbers of the stolen checks so he could issue the stop payment instructions. Later that day, claimant called and left a second voicemail message for the customer, also asking the customer to supply the numbers of the missing checks. The customer did not return claimant’s phone messages because the customer had left Oregon for a Frisbee tournament in Wisconsin.

(5) On June 8, 2013, still not having heard from the customer, claimant telephoned the employer’s fraud hotline and asked a representative what his options were if a customer’s checks were stolen and the customer did not want to close the possibly compromised account but had not provided the numbers of the stolen checks to allow issuing stop payment instructions. The representative told claimant that a “claim,” or a compromised notification, had already been placed on the account and that he did not need to do anything more. Transcript at 20, 28.

(6) On June 10, 2013, the customer called the employer to provide the check numbers for the stolen checks. The customer learned in that call that two of the checks stolen from him had been fraudulently drafted, negotiated and had already been paid from his account. The total amount of these checks was \$3,600. The employer ultimately reimbursed the customer for one-half of the loss and the customer assumed the balance.

(7) On July 8, 2013, the employer discharged claimant because, after he was aware that the customer’s checks had been stolen on May 31, 2013, he failed to notify the fraud hotline or to take steps to protect the customer’s account. Transcript at 5, 6.

CONCLUSIONS AND REASONS: The employer discharged claimant but not 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. The employer carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer’s witnesses testified that claimant was discharged for his failure to take certain steps after he was notified that a customer’s checks had been stolen on May 31, 2013, the witnesses also

testified at length about prior acts of claimant's alleged misconduct. Transcript at 7-11, 29, 30-34. When an employer was aware of a claimant's prior acts at or near the time that they occurred, EAB generally limits its analysis to the final incident of alleged misconduct preceding the discharge because the employer must necessarily have determined that the prior acts of alleged misconduct were not of sufficient magnitude to merit discharge. See *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred). Because it appears from the record that the employer was aware of claimant's alleged prior acts of misconduct at the approximate time they occurred, we have limited our evaluation to the final incident in which claimant allegedly failed to act in response to the notification that a customer's checks had been stolen on May 31, 2013.

It is not unreasonable to interpret the employer's policy about the steps a banker should take when the banker is informed that a customer's checks have been stolen to give the banker some discretion to decide, depending on the situation, to issue stop payment instructions or to close the account. See Exhibit 1. In this case, it is not disputed that claimant immediately recommended to the customer that his account be closed when claimant was first made aware that the customer's checks had been stolen, and claimant only raised the option of issuing stop payment instructions for the stolen checks when the customer insisted that the account remain open. Transcript at 11, 19-20. It also is not disputed claimant told the customer that to effectuate stop payment instructions the customer needed to provide him the numbers of the stolen checks. *Id.* The options claimant raised with the customer showed he was not indifferent to the customer's needs or the employer's interests. The objection the employer's witness had to claimant's approach with the customer was that claimant "didn't pressure him [the customer] to move forward [to close the account]." Transcript at 11. However, the customer's insistence that the account remain open, regardless of the stolen checks, placed claimant in a difficult situation since the customer had a legitimate business need for the account to remain open and had resisted his recommendations to close the account. Because the customer owned the account, it is not clear from this record what more the employer expected of claimant, and whether, specifically, it expected him to close the account over the customer's objection and without the customer's permission.

Given the firmness of the customer's resistance to closing the account, it was not wantonly negligent of claimant to agree to issue stop payment instructions for the stolen checks rather than to close the account. If claimant had been able to take this step, he would have been able to reasonably protect the customer and the employer. The subsequent failure of the customer to promptly supply the check numbers, which would have allowed claimant to issue stop payment instructions and to avert the financial loss that the customer and the bank sustained, also was not due to any willful or wantonly negligent behavior on the part of claimant. Although the employer's witness testified the customer supplied the check numbers to claimant on Monday, June 3, 2013, which should have given claimant ample time to issue stop payment instructions, both claimant and the customer testified the customer did not provide those numbers until he returned from Wisconsin on Monday, June 10, 2013. Transcript at

11, 21, 45. Based on this testimony, it is more likely than not that the employer did not receive the check numbers from the customer until June 10, 2013, which was after the fraudulent checks had been paid from the customer's account. The preponderance of the evidence does not support that claimant unreasonably delayed in issuing any stop payment instructions after he had the information that would enable him to do so. Moreover, it is not disputed that, in their first conversation about the stolen checks on June 6, 2013, claimant told the customer of the importance of supplying the check numbers to allow him to issue instructions to stop payment if the customer opposed closing the account. It also is not disputed that claimant then called the customer two times the next day, June 7, 2013, when the customer had not called him, and left messages urging the customer to supply the check numbers. While the employer's witness disputed claimant's testimony that he called the employer's fraud hotline the next day, June 8, 2013, to determine if he could take any steps to protect the account from fraudulent transactions when the customer did not want to close the account, there is no reason in the record to believe either party's testimony over that of the other party. Transcript at 6, 20, 28, 35. Because the employer has the burden of persuasion in a discharge case, we accept claimant's testimony on this issue and conclude, more likely than not, that claimant called the fraud hotline on June 8, 2013 for guidance. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Given claimant's initial recommendations and instructions to the customer, his promptness in trying to contact the customer when he did not receive the check numbers and could not issue stop payment instructions and his call to the fraud hotline to determine if there was any further action he should take, claimant did not disregard the employer's or the customer's interests. Under these circumstances, the employer has not established that claimant's behavior in not issuing stop payment instructions was wantonly negligent.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 13-UI-06145 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: February 11, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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