

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0092-R

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 16, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 171514). The employer filed a timely request for hearing. On January 7, 2014, ALJ Seideman conducted a hearing, and on January 13, 2014 issued Hearing Decision 14-UI-08370, reversing the Department's decision. On January 16, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On February 5, 2014, EAB issued Appeals Board Decision 2014-EAB-0092, reversing Hearing Decision 14-UI-08370 and remanding this matter to the Office of Administrative Hearings (OAH) for lack of a complete record. On March 3, 2014, OAH transmitted a complete record to EAB.

EAB considered the entire hearing record. On January 17, 2014, claimant submitted and asked EAB to consider documents that are not part of the hearing record. However, claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the documents into evidence at the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) JP Morgan Chase Bank employed claimant as a personal banker from July 6, 2010 to August 7, 2013.

(2) During the week from July 29 through August 2, 2013, a customer complained to the employer that claimant was "sloppy and unprofessional," and two customers requested a different personal banker, asserting that when claimant had assisted them previously, "their issues were not resolved." Exhibits 1 and 2. The employer discharged claimant because of the customers' complaints.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, 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. 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. In a discharge case, the employer had the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). For an act to be isolated, the exercise of poor judgment must be 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).

In Hearing Decision 14-UI-08370, the ALJ found that the employer discharged claimant for his behavior toward customers on July 22 and 24, 2013, and because, during the week from July 29 through August 2, 2013, three customers complained about claimant's "performance and demeanor."¹ However, the record shows that the employer's branch manager or assistant branch manager "coached" claimant after the July 22 and 24 incidents immediately after they occurred, and did not decide to discharge claimant until after receiving the three customer complaints from July 29 through August 2. Transcript at 43-44; Exhibits 1 and 2. We therefore focus on the three customer complaints as the final incidents resulting in claimant's discharge, and address prior incidents only if necessary to determine whether claimant was discharged for an isolated instance of poor judgment.

At hearing, the employer failed to show what claimant did that caused the customer to complain that he was "sloppy and unprofessional," or the other two customers' to complain that he failed to "resolve" their issues. See Transcript at 33, 43; Exhibits 1 and 2. Absent such a showing, we cannot conclude that claimant consciously engaged in conduct he knew or should have known probably violated the employer's expectations, or that he was indifferent to the consequences of his actions. The employer failed to establish that claimant was discharged for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-08370 is set aside, as outlined above.

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

DATE of Service: March 3, 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,

¹ Hearing Decision 14-UI-08370 at 2-3.

Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.