

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0166

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On October 29, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 142703). The employer filed a timely request for hearing. On January 7, 2014, ALJ Sime conducted a hearing, and on January 13, 2014 issued Hearing Decision 14-UI-08298, affirming the Department's decision. On January 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

It appears that the ALJ inadvertently failed to include in Exhibit 1 the contract by which Glasgow Enterprises LLC received a \$15,000 loan from Michael Montalvo, the check by which Montalvo paid those funds and a deposit account rate calculator prepared by claimant on April 22, 2009. It also appears that those documents were sent to claimant before the hearing. Because those documents are relevant, and were discussed in the hearing as well as quoted in the ALJ's decision, we have marked them collectively as Exhibit EAB-1 and entered them into the record.

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

FINDINGS OF FACT: (1) JP Morgan Chase employer claimant as a personal banker from May 12, 2008 until September 30, 2009. On March 31, 2011, JP Morgan Chase again hired claimant, this time as a branch manager and vice-president, until July 22, 2013.

(2) The employer expected claimant to refrain from representing the employer in any transaction that also involved a family member or any entity in which claimant had a significant personal connection or financial interest. The employer also expected claimant to avoid using her position to derive benefits for herself, family members or entities to which she or a family member had a significant connection when those benefits were not available to others. Claimant was aware of the employer's expectations.

(3) In 2009, claimant was married to Adam Glasgow (Glasgow). Glasgow operated a construction business called Glasgow Enterprises LLC (GELLC). Glasgow was the only member of GELLC.

(4) Sometime around April 2009, Glasgow arranged for GELCC to obtain a loan of \$15,000 from Michael Montalvo (Montalvo), an individual. At some point, a document titled “Glasgow Enterprises LLC Simple Legal Contract” was prepared to memorialize Montalvo’s agreement with GELLC. Claimant did not prepare this contract. The contract identified the parties to the agreement as GELLC and Montalvo. The contract stated that Montalvo was providing \$15,000 to GELLC for “operating monies.” The contract also stated that, to repay the borrowed funds, GELLC “will set up a CD at Chase Bank and deposit funds on a monthly basis to accrue interest for 1 (one) year. In addition to the basic rate of interest that the CD will earn, we [GELLC] will pay an additional 3% [to Montalvo].” Exhibit EAB-1 at 1. The contract did not clearly specify the date by which GELLC would repay the borrowed funds to Montalvo, but provided “[t]he money will be set up for a one year maturity date. At no time before then will the money be available for ‘full’ withdrawal.” *Id.*

(5) On April 21, 2009, Glasgow asked claimant to go to Montalvo’s apartment to receive the funds from Montalvo and to obtain his signature on the contract. Glasgow was not able to go himself to Montalvo’s apartment himself, but was eager to obtain the funds for GELLC. After she arrived, claimant gave the contract to Montalvo to sign. Claimant did not read the contract. Montalvo signed the contract on a line marked “Lender” and claimant signed the contract on a line marked “Witness.” Exhibit EAB-1 at 1. Montalvo gave claimant a check made out in the amount of \$15,000. The check was made payable not to GELLC, but to claimant and Glasgow individually. Exhibit EAB-1 at 2. Glasgow and claimant later endorsed the check and Glasgow deposited it into GELLC’s business account. The business account was held at a different bank from the employer.

(6) On April 22, 2009, at Glasgow’s request, claimant generated a “deposit account rate calculator” showing how much would be earned if \$15,000 were deposited in an account with an interest rate of 4.65 percent. Exhibit EAB-1 at 3. Glasgow thought 4.65 percent interest was the rate GELLC was going to pay to Montalvo when three percent was added to the CD rate then offered at Chase Bank. Glasgow wanted to determine how much GELLC would owe Montalvo after one year.

(7) On July 8, 2013, Montalvo came to one of the employer’s branches, purportedly to withdraw money from a CD that he allegedly thought he owned. Montalvo contended claimant had assisted him when he visited the employer’s bank on April 21, 2009 seeking to deposit \$15,000 in a CD. Montalvo claimed that claimant had opened a CD for him using this money, and had arranged for him to receive an interest rate exceeding by three percent the employer’s established rate because he had authorized the employer to invest his funds in GELLC for one year. Montalvo told the employer he had waited for over three years to withdraw the funds that he believed he had on deposit because he had been “too busy” and he knew the funds would continue to “roll over for another year at the current rate.” Transcript at 43.

(8) On July 9, 2013, the employer assigned an investigator to research Montalvo’s contentions. On that day and with no advance notice, the investigator interviewed claimant for over three hours about her recollections. Claimant’s account of her interactions with Montalvo differed significantly from Montalvo’s. Claimant was unable to recall certain events that Montalvo described as having occurred over four years before. In formulating her responses to some questions, claimant accepted the representations of the employer’s investigator that certain events had occurred. At certain points when

answering the investigator's questions, claimant's memory was refreshed and, as a result, her accounts of the relevant events appeared to vary over time. At approximately 6:00 p.m. on July 19, 2013, at the investigator's request, claimant prepared a handwritten statement. As a result of certain inconsistencies in the statements claimant gave to the investigator, the employer decided Montalvo's account of his interactions with claimant on April 21 and 22, 2009 was accurate.

(9) On July 22, 2013, the employer discharged claimant for knowingly soliciting a loan for GELLC from Montalvo when he had initially come into the employer's bank to open a CD, and inducing Montalvo to make the loan by representing he would receive repayment through a CD opened at the employer's bank.

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).

To demonstrate claimant's alleged misconduct, the employer principally relied on Montalvo's hearsay statement and the handwritten statement claimant prepared on July 19, 2013. In the handwritten statement, claimant appeared to concede that Montalvo had come to the bank on April 21, 2009, that she had written in her name on Montalvo's check as a payee and, by her references to the contract between GELCC and Montalvo, appeared to concede she knew at least the main terms of it before Montalvo signed it. Exhibit 1 at 5, 6. At hearing, claimant disavowed the accuracy of the written statement. She contended that after a very lengthy questioning of three and a half hours on July 19, 2013, and much information supplied to her by the employer's investigator during the course of this questioning, she assumed the existence of certain facts that she included in her statement even though, after four and a half years, she had no independent recollection of them. Transcript at 19, 20, 23, 24, 26, 29, 35, 44, 48. Significantly, claimant never admitted in the statement that she attempted to dissuade Montalvo from investing his funds in one of the employer's CDs, steered Montalvo toward making a loan to GELLC or that she had prepared the contract between GELLC and Glasgow. Based on claimant's description of the circumstances surrounding her preparation of the written statement, her explanation for certain apparent admissions in it is plausible. As a result, we do not consider the written statement to provide a sound basis for impeaching claimant's testimony at hearing.

To show that claimant violated the employer's standards by the nature of her involvement in the transaction between GELLC and Montalvo, the employer needed to demonstrate that claimant diverted Montalvo's funds from investment with the employer's bank to GELLC or that claimant knew that GELLC proposed to repay the loan from Montalvo through a CD obtained at the employer's bank. Claimant denied Montalvo's hearsay contentions that he went to the employer's bank on April 21, 2009 to invest funds in a CD, and at that time claimant proposed and he agreed to a special arrangement under which he could receive an interest rate exceeding the bank's rate for CDs if he allowed the employer to invest his money with GELLC. Transcript at 9, 18, 23, 28, 40, 41. Claimant's first-hand evidence on

this issue is entitled to more weight than Montalvo's hearsay statement made to the employer. Although the employer presented a deposit rate calculator allegedly given to the employer by Montalvo to show he met with claimant to discuss CDs in April 2009, claimant testified she prepared the rate calculator at the request of Glasgow, and at some point Glasgow must have provided it to Montalvo. Transcript at 48. Claimant's explanation is plausible and Montalvo's possession of that document does not overcome her denial that she ever met Montalvo at the employer's bank or that Montalvo ever came to the bank to open a CD account. On these facts, the employer did not demonstrate, more likely than not, that claimant met with Montalvo at the bank on April 21, 2009 and dissuaded him from depositing his funds in a CD account with the employer or ever represented to Montalvo he was opening a CD account with the employer.

With respect to claimant's knowledge of the particulars of GELLC's arrangement with Montalvo to borrow money, claimant testified it was an agreement reached solely between Glasgow and Montalvo. Transcript at 20. Claimant testified that she knew at the time that Montalvo was loaning operating money to GELLC, but did not recall that she ever read the loan contract or knew its terms before the employer's investigator interviewed her on July 19, 2013. Transcript at 20, 31. Nowhere in claimant's testimony is there any evidence she was aware at that time that repayment of the loan was structured to require repayment through a CD obtained at the employer's bank or that she ever agreed to open such a CD account to facilitate that repayment arrangement. Although the employer contended at hearing that claimant admitted that she had drafted the contract between GELLC and Montalvo when she was interviewed on July 19, 2013, and presumably should have been aware of the repayment provisions, that fact is not present in the written statement she prepared for the employer. Transcript at 44, 45; Exhibit 1 at 4 *et seq.* Since claimant could not independently recall the specific details of the loan arrangement, and relied at hearing on what the employer's investigator later told her about the terms of the agreement between GELLC and Montalvo, we reasonably infer she was not aware that repayment of the loan required the establishment of a CD for Montalvo's benefits at the employer's bank. Transcript at 20, 21. On these facts, the employer did not meet its burden to establish, more likely than not, that claimant participated in the structuring of a transaction for GELLC that used a CD account with the employer as a means of repayment, or that she was aware of how the repayment of the loan was structured.

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

DECISION: Hearing Decision 14-UI-08398 is affirmed.

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

DATE of Service: March 25, 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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