

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0610

*Hearing Decision 14-UI-13879 Reversed
No Disqualification*

*Hearing Decision 14-UI-14659 Affirmed
Ineligible for Week 5-14*

PROCEDURAL HISTORY: On January 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #90158). On February 25, 2014, the Department served notice of an administrative decision concluding claimant had not filed her claim for benefits for the period January 26, 2014 to February 1, 2014 (week 5-14) in accordance with Department rules (decision #91340). Claimant filed timely requests for hearings on both decisions. On March 24, 2014 and April 9, 2014, ALJs Wipperman and Wyatt conducted separate hearings. On April 1, 2014, ALJ Wipperman issued Hearing Decision 14-UI-13879 affirming decision #90158. On April 9, 2014, ALJ Wyatt issued Hearing Decision 14-UI-14659, affirming decision #91340. On April 10, 2014, claimant filed applications for review of Hearing Decisions 14-UI-13879 and 14-UI-14659 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-13879 and 14-UI-14659. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-0608 and 2014-EAB-0610).

FINDINGS OF FACT: (1) JP Morgan Chase Bank employed claimant from July 20, 1985 to December 17, 2013 as a branch manager.

(2) Claimant understood that the employer usually required a manager be on duty in claimant's branch at all times. Claimant also understood that a district manager had the authority to approve an exception to that requirement.

(3) In October 2013, claimant's district manager gave claimant permission to schedule one of the personal bankers from claimant's branch to work without a manager. On November 7, 2013, the employer replaced the district manager with a new district manager.

(4) The employer also expected branch managers to follow operational controls and to coach personal bankers regarding sales and customer service. Claimant understood that expectation.

(5) On November 27, 2013, a district manager visited claimant's branch. No management was present or scheduled for the day.

(6) On November 30, 2013, claimant sent an email to the district manager stating claimant was sick and was leaving ten minutes before closing. The district manager responded later that evening stating that there should be a manager in the branch at all times. Claimant responded that she would check all the schedules to ensure a manager was always on duty in the branch.

(7) On December 17, 2013, the employer discharged claimant for failing to schedule a manager on duty at all times, and for allegedly failing to engage in leadership and coaching with her staff.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude the employer discharged claimant, not for misconduct. We agree with the ALJ that claimant is ineligible for benefits for week 5-14 because she did not timely file her claim in accordance with the Department's rules.

Discharge. 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 has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b). A "good faith error" usually involves a mistaken but honest belief that one is in compliance with the employer's policy or expectation, and some factual basis for believing that to be the case without reason to further investigate what the expectation was. *Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006).

The employer's district manager testified at hearing that the employer discharged claimant for unsatisfactory performance in the areas of operational control and leadership, and cited unsatisfactory performance reviews from February 2013 to September 2013, the results of its pre-audit visit to claimant's branch on October 21, 2013, and additional operational and leadership issues in November 2013, as reasons for discharging claimant. Exhibit 1. However, the record shows the district manager responded to claimant's unsatisfactory performance reviews by giving claimant repeated warnings through September 2013, and set up an "action plan" for claimant's branch to follow immediately after the October 21, 2013 pre-audit visit. Exhibit 1. The employer did not decide to discharge claimant at those times. We therefore focus on the alleged complaints about claimant's leadership in November 2013, and her failure to schedule a manager on November 27, 2013, 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.

The employer provided only hearsay information to support its allegation that claimant failed to provide sufficient leadership and coaching to the staff at her branch in November 2013. *See* Exhibit 1. Claimant denied the employer's allegation and testified at hearing that she did coach her bankers, and "was very involved with her staff." Transcript at 45. The employer failed to show by a preponderance of the evidence that claimant violated its expectation that she lead and coach her staff, let alone that she did willfully or with wanton negligence. Absent such a showing we cannot find misconduct.

Claimant understood that the employer's usual policy was to have a manager present during all business hours. However, claimant also understood that district managers could make exceptions to the policy. Claimant testified at hearing that the former district manager had authorized one of the personal bankers to work while no manager was on duty, and that the former district manager's written authorization was "sitting in [the personal banker's] employee file." Transcript at 22-23, 40. Claimant testified that she scheduled no managers to work on November 27, 2013 based on her understanding that she was authorized to do so by the former district manager. *Id.*

In Hearing Decision 14-UI-13879, the ALJ concluded that claimant's conduct on November 27, 2013 was wantonly negligent, and not a good faith error, because a new district manager might not permit the practices of the prior manager, and because claimant was no longer the only manager at her branch.¹ However, claimant testified that the former district manager approved the exception in October 2013, which was after the assistant bank manager began working at claimant's branch. Additionally, claimant testified at hearing that the personal banker was permitted to work without a manager, in part, because she was being trained to become a manager. Transcript at 23. Although claimant incorrectly assumed the new district manager would continue the exception permitted by the prior manager, the record does not show claimant acted with a lack of honesty or belief in the correctness of her actions, or that she should have known she was expected to verify the exception with the new district manager. Under OAR 471-030-0038(3)(b), claimant's failure to schedule a manager to work on November 27, 2013 was, at worst, a good faith error, and not misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

Late Claim. On *de novo* review of the entire hearing record and pursuant to ORS 657.275(2), Hearing Decision 14-UI-14659 is **adopted**.

DECISION: Hearing Decision 14-UI-13879 is set aside, as outlined above. Hearing Decision 14-UI-14659 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D. E. Larson, not participating.

DATE of Service: May 12, 2014

¹ Hearing Decision 14-UI-13879 at 3.

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>.

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.

Note: 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.