

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1760

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct but claimant's benefits rights based on wages earned prior to the discharge were not cancelled (decision # 114437). Claimant filed a timely request for hearing. On October 22, 2014, ALJ R. Davis conducted a hearing, and on October 28, 2014 issued Hearing Decision 14-UI-27755, reversing the Department's decision. On November 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer and claimant both submitted written arguments that asserted the existence of facts not contained in the hearing record. Neither party provided an explanation for failing to offer this new information during the hearing, and neither otherwise showed that factors or circumstances beyond their reasonable control prevented them from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For that reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Freeman Fruit International, LLC employed claimant as a secretary from approximately November 16, 2002 until August 19, 2014.

(2) The employer's owner and claimant worked in adjacent offices. On occasion, the employer's administrative assistant worked in the office area. No other employees worked in the office area.

(3) The employer expected claimant to refrain from making unauthorized personal purchases using the employer's debit or credit cards, which would result in the employer paying for those purchases. Claimant was aware of the employer's expectations as a matter of common sense.

(4) Claimant regularly used the employer's debit card to purchase supplies, equipment and other items related to the employer's business. Claimant knew the debit card number and the personal identifying information number (PIN) that enabled her to use the employer's debit card. Claimant kept the debit card number and PIN written on a piece of paper in her desk drawer.

(5) Claimant often purchased items online using her personal debit card linked to her personal checking account. Claimant often had those personal purchases delivered to the workplace. On June 19, 2014, claimant used her personal debit card to purchase online some GC Extract Plus, a weight loss supplement, through Amazon for \$89.99. Claimant Exhibit 2 at 2. Claimant had the GC Extract Plus delivered to her at the workplace.

(6) Sometime before August 19, 2014, the employer's owner reviewed the employer's recent bank statements and observed that they appeared to show that several items intended for personal use had been purchased with the employer's debit card, including GC Extract Plus for \$89.99 on June 25, 2014 and July 14, 2014, some books, some music CDs and what might have been video games. Employer Exhibit 1 at 2; Employer Exhibit 5 at 2. The owner asked claimant about these purchases and claimant told him that she thought he had transacted them online using the employer's debit card. When the owner denied that he had bought the items, claimant told him that the employer's computerized financial information must have been hacked and that the hacker had obtained the numbers needed to use the debit card and had done so.

(7) Sometime before August 19, 2014, the employer concluded that claimant had purchased the personal items using the employer's debit card because some of the purchases seemed to have been made locally and he thought that the items purchased were of a type that claimant might purchase.

(8) On August 19, 2014, the employer discharged claimant for making unauthorized personal purchases using the employer's debit card.

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 prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's evidence linking claimant to the unauthorized use of its debit card was problematic. While the owner presented a bank statement showing that someone had used the employer's debit card to purchase bottles of GC Extract Plus on June 25, 2014 and July 14, 2014 and further testified that he found a bottle of GC Extract Plus at claimant's desk after she had been discharged, claimant introduced into evidence her personal bank statement showing that she used her personal debit card to purchase some GC Extract Plus for \$89.99 on June 19, 2014. Transcript at 9, 10; Employer Exhibit 1 at 2; Claimant Exhibit 2 at 2. Based on the objective evidence of claimant's bank statement, it cannot be

concluded that the bottle of GC Extract Plus located at claimant's desk was not the one that she purchased using her own debit card or that, having once purchased that same product a few days earlier, it was more likely than not that claimant was the only person who would have purchased the GC Extract Plus using the employer's debit card on June 25, 2014 and July 14, 2014. The evidence that the employer presented did not rule out that the employer's administrative assistance, the owner, himself, or someone else other than claimant used the employer's debit card to purchase the GC Extract Plus on June 25, 2014 and July 14, 2014.¹ Nor did the employer's evidence rule out that the other items apparently purchased for personal use had not been purchased by someone other than claimant. The owner did not present any evidence showing that the administrative assistant did not have access to the information that would allow her to use the debit card. The employer did not present any evidence that the GC Extract Plus or any other of the questioned items were purchased online from claimant's computer at times when only she was at that computer, that in some way those transactions were uniquely traceable to claimant or that the items were shipped to claimant's attention after they were purchased. Transcript at 13. In an attempt to rebut claimant's belief that the administrative assistant was the one who made the unauthorized purchases if the owner had not done so, the owner contended that, although he saw the administrative assistant in the offices, he had never seen her using claimant's work computer. Transcript at 28, 51, 52. However, as a matter of common sense, any computer could have been used to purchase the merchandise online so long as the debit card number and PIN were known to the user and the owner's failure to see the administrative assistant using claimant's computer does not rule out she used a different computer when making the purchases. Finally, the owner's contention that he discovered \$30,000 to \$40,000 in unauthorized purchases on the bank statements over the past three years does not appear likely given his testimony that the accountants who prepared the employer's tax returns, and presumably reviewed the legitimacy of the employer's business expenses for tax reporting purposes, did not notify him that such significant amounts appeared to have been spent on personal items using the employer's funds. Transcript at 33, 34. There is some reason to doubt the accuracy of some aspects of the owner's testimony and his stated conviction that claimant made the purchases that he questions.

In this case, the evidence is evenly balanced on whether claimant made the unauthorized purchases, with the owner contending that she did, claimant contending otherwise and scant reliable objective evidence supporting either party's contentions. In addition, while the owner testified that in 2003 or 2005 claimant fraudulently diverted a significant amount of the employer's funds for personal purposes but was not discharged, apparently to establish a pattern of dishonest conduct by claimant, claimant disputed that this had occurred, or that she was disciplined for it, and the employer was unable to provide any extrinsic evidence to support the occurrence of the incident. Transcript at 17, 19-20. There is no sound reason in the record to doubt the testimony of either party on these disputed facts or to prefer the

¹ Although the owner stated that he found shipping paperwork stating that the one bottle of GC Extract Plus that he located after claimant was discharged had been shipped to claimant, this is to have been expected when claimant admitted the June 19, 2014 purchase and is not especially probative of whether claimant made any unauthorized purchases using the employer's debit card. Transcript at 9, 10. Significantly, the owner did not testify about any payment information appearing on the shipping paperwork and that it indicated the employer's debit card was used for the purchase. The employer also argued that claimant's admission that she purchased one bottle of GC Extract Plus using her own personal debit card combined with her testimony that, after she ordered that product, the company from which she purchased it kept shipping her other products she had not ordered somehow established that claimant used the employer's debit card for the purchase of GC Extract Plus appearing on the employer's bank statement. Employer's Written Argument at 2-3. The basis for the employer's implication is not clear, and it does not make any more likely that it was claimant who ordered the GC Extract Plus using the employer's debit card.

testimony of one party over the other party. When, as on this record, the evidence is evenly balanced, the contested factual issues must be resolved in claimant's favor, since the employer was the party who carried the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Given claimant's rebuttal and the uncertainty of the employer's evidence, the employer did not establish, more likely than not, that claimant made unauthorized purchases of items for personal items using the employer's debit card and the employer's funds. The employer did not meet its burden to establish that claimant engaged in misconduct.

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

DECISION: Hearing Decision 14-UI-27755 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: December 18, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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