

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0428

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 19, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120039). Claimant filed a timely request for hearing. On March 30, 2015, ALJ Triana conducted a hearing, and on April 1, 2015 issued Hearing Decision 15-UI-36099, reversing the Department's decision. On April 15, 2015, 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 Bank employed claimant as a personal banker from May 16, 2012 until January 15, 2015.

(2) The employer's written code of conduct prohibited employees from accessing a customer's confidential information or disclosing it to third-parties or coworkers not involved in providing services to the customer without the customer's permission. Exhibit 1 at 15-16. The employer's code of conduct also prohibited employees from representing the employer in any transaction or business relationship that involved persons with whom they had a significant personal connection, negotiating with the employer on behalf of others with whom they had personal connections and borrowing from or lending money to customers or acting as a guarantor, co-signer or surety for customers. Exhibit 1 at 22. The employer interpreted these general standards to mean that employees were: prohibited from retaining information about a customer's debit card number or a customer's online user identification and passwords, prohibited from directly accessing or logging into a customer's online accounts for banking services, and, prohibited from assisting a customer to access the customer's online accounts unless the customer was in the employee's physical presence. Notwithstanding the employer's interpretations and its expectations, claimant thought that she was permitted to retain copies of debit cards, user identification log-in information and passwords if the customer gave that information to her and it was

needed to provide ongoing assistance to the customer in the customer's financial transactions. Claimant also thought she was allowed to directly access a customer's online accounts if the customer was unable to do so and specifically asked that she do so.

(3) Beginning in approximately February 2014, claimant started assisting a customer in using the employer's online automatic bill paying system. The customer had not previously been successful when he tried to set up and use the bill paying system himself, and employees at two of the employer's other branches would not help him. The customer brought in statements for his regular monthly bills and claimant helped him input the information to activate the bill paying system to make the necessary monthly payments using funds from his bank account. The bill-paying option that the customer selected required that each month, he authorize the dollar amount of the payment that would be made to each creditor. In the process of assisting the customer, claimant became aware of the customer's bank account number, his user identification and his password, which claimant had helped the customer select. One of the customer's utility bills did not allow for a regular electronic payment and claimant determined that to pay that bill the customer needed to call the utility each month and authorize payment over the phone using his debit card. After the bill paying system was set up, the customer, with claimant's help, paid his first set of monthly bills

(4) In approximately March 2014, the customer came to claimant and told her he had not been able to pay his bills that month using the employer's online banking system. Claimant determined that the customer was unable inaccurately inputting his user identification or password to access the bill paying system. Claimant had the customer return to the bank with his monthly statements and, with her help, he was able to accurately input the information to pay his monthly bills and to call the creditor who did not allow electronic payments to authorize a monthly payment using his debit card. To organize the information that would enable the customer to use the bill paying system himself to make the monthly payments, claimant wrote down his user identification on one of her business cards and the customer added his password to the card.

(5) In approximately April 2014, the customer arrived at claimant's branch again asking for her assistance in making his bill payments for that month. The customer told claimant that he had lost the business card with his user identification and password and had been unable to make the payments electronically. Claimant wrote the customer's user identification and password on a piece of paper that she kept at her desk so she could assist the customer in the future when he came in to pay his monthly bills. By this time, claimant understood that the customer was unable to pay his bills using the employer's online system if he tried to do so independently. The customer scheduled appointments with claimant in each successive month to help him pay his bills. On one occasion when the customer came in to meet with claimant to pay his monthly bills, he forgot his debit card and needed to make a second appointment to pay the utility bill that did not accept direct electronic payments. At that time, claimant made a copy of the debit card to ensure that he was able to pay that bill if in the future he forgot to bring the debit card when he came in for his regular bill-paying appointment. By November 2014, claimant had helped the customer pay his regular monthly bills approximately ten times

(6) In early to mid-November 2014, the customer called claimant at work and told her he was in the hospital and unable to meet with her to pay his monthly bills. The customer told claimant that he intended to have someone deliver the monthly billing statements to her and asked if she would pay the bills. Claimant agreed to help the customer and told the customer she would keep receipts for each bill

that she paid using funds from claimant's bank account; the customer could either pick up the receipts when he was able or she would mail them to him.

(7) In approximately mid-November 2014, an individual brought the customer's monthly bills to claimant. On the day that she received the bills, claimant logged into the employer's bill paying system, used the customer's user identification and password to gain access, inputted the amount to pay each creditor that month and authorized withdrawals of those amounts from the customer's bank account. Claimant called the utility that did not accept direct electronic payments and authorized a payment for the customer using the customer's debit card.

(8) On approximately January 9, 2015, the employer contacted claimant about the bill payments she had authorized on behalf of the customer in November 2014. Claimant prepared a statement that admitted that she had logged into the employer's bill paying system and authorized payment of several monthly bills for the customer and had used the customer's debit card to pay another bill for him. Claimant stated that she and the customer had "been working together for over a year" and he "usually needs help with his bill pay." Exhibit 1 at 7. Claimant also explained that she thought the customer was in "desperate need" of assistance to pay his bills due to his hospitalization. *Id.* In the statement, claimant further stated, "I [] now see maybe helping this customer was not the right thing to [do] and [I] do realize I will have to be responsible and deal with the circumstances." Exhibit 1 at 7-8.

(9) On January 15, 2015, the employer discharged claimant for using the customer's user identification and password to log into the employer's bill paying system to authorize bill payments for a customer who was not in her physical presence. The employer also discharged claimant for retaining information about the customer's user identification, password, and debit card number at her desk.

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. Good faith errors are not misconduct. OR 471-030-0038(3)(b). 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).

The employer's written argument asserted that claimant was aware that a "bank employee cannot transact business on a customer's account" and that "retention of customer confidential information [*e.g.* user identifications, passwords and debit card numbers] outside of the computer system" was prohibited. The actual words used in the employer's written code of conduct are so vague and general that they are reasonably susceptible of interpretations that would not preclude claimant from logging into the employer's bill paying system and authorizing withdrawals from a customer's account to pay the customer's bills outside of the customer's presence if the customer had given his explicit permission to do so. Nowhere in the written code of conduct is any distinction made between what an employee may permissibly do in a customer's presence and what an employee may not. As well, the written code of conduct does not have any language forbidding an employee from retaining at the employee's locked

desk confidential customer information that is also present in the employer's records, particularly when it can be reasonably inferred that the customer approved of its retention and knew it was being kept at the employee's desk since he regularly consulted the records containing it when he came in to pay his bills each month. While, at times, claimant appeared to concede in her hearing testimony that she was aware of the employer's specific expectations that she allegedly violated, it was unclear when she came to understand the employer's specific expectations. The record does not show if she learned about the employer's specific expectations after her activities came to the employer's attention, or if she was aware of these expectations at the time she engaged in the acts that resulted in her discharge. *Cf.* Transcript at 15, 22, 24, 33, 34 and Transcript at 23, 24; 31-32; Exhibit 1 at 7-8.

Assuming claimant was aware of the employer's expectations that she allegedly violated in November 2014, her testimony at hearing was quite clear that she thought the employer would condone her actions because she had an established, long-standing relationship with the customer in assisting him to pay his bills. In addition, she paid the customer's bills in November 2014 at the customer's request, during a time when the customer was unable to come into the branch to meet with her to do so and the customer had given her the user identification, password and debit card numbers to have them readily available when he paid his bills. Transcript at 15-16, 18, 22, 23, 24, 34. Given the nature of the relationship that claimant had developed with the customer surrounding the payment of his monthly bills, the vagueness of the employer's written standards and the unusual circumstances that she faced in November 2014, it is not implausible that claimant believed that the employer would allow her to deviate from rigidly adhering to its standards when the customer needed her assistance and could not pay his bills himself.

In *Goin v. Employment Department*, 203 Or App 758, 125 P3d 734 (2006), the court held that the type of mistake that is excused from constituting misconduct, even though it violates the employer's standards, is "some sort of mistake made with the honest belief that one is acting rightly" under known circumstances that do not require further investigation. The employer's witnesses did not suggest that claimant did not sincerely and honestly believe that the employer would allow her to act as she did given the atypical circumstances under which she was asked to pay the customer's bills for him. The employer's witnesses did not present any evidence to show that claimant's motive was dishonest or fraudulent, or other than to provide assistance to a customer who needed it. While one of the employer's witnesses testified that claimant should have contacted other employer representatives to confirm whether she was allowed to undertake the actions that she did in November 2014 (including storing information about the customer at her locked desk), it appears that claimant had no doubts about the propriety of her behavior given the customer's needs and the past assistance that she had provided to him. Transcript at 8, 24. It does not appear that under the circumstances known to claimant she believed that more investigation was required before deciding to act to pay the customer's bills for him. Moreover, the employer's witnesses glossed over the conflict between the employer's expectation that claimant provide good, attentive and caring customer assistance, which we infer, and the employer's desire that claimant not engage in actions that could potentially expose it to liability. While the employer might have desired that claimant strike a different balance between these competing objectives, and not provide the type and level of customer assistance that she did, nothing in this record shows or tends to show that claimant did not sincerely believe that she was acting properly and furthering an important employer objective of providing good customer service.

In its written argument, the employer asserted that claimant's behavior at issue during November 2014 cannot be excused as a good faith error if it was wantonly negligent. However, the employer's argument

confuses the *objective* standard for determining if behavior is wantonly negligent with the *subjective* standard for determining if the belief that motivated claimant's behavior was a good faith error. That a claimant might have acted with wanton negligence does not necessarily preclude that claimant's actions were in good faith and based on a mistaken belief that the employer would allow an exception under the circumstances to the uniform application of its standards. Under the standards enunciated in *Goin v. Employment Department*, 2013 Or App 758, 126 P3d 234, the existence of one does not mutually exclude the other. The employer also argued in its written argument that claimant should be considered to have engaged in misconduct because "this hearing is solely about claimant's actions not whether if she felt she was doing the right thing for a customer" and because "claimant's actions exposed the employer to possible future legal action." However, *Goin* sets forth the standards for determining whether claimant's behavior was excused from constituting misconduct as a good faith error, and EAB will not disregard its holding that the focus of the inquiry is whether or not claimant subjectively believed that she was "acting rightly" when she undertook the behavior that she did and not solely whether or not her actions in fact violated the employer's standards. As well, the relevant issue in evaluating whether claimant engaged in misconduct is claimant's awareness and state of mind when she acted. See OAR 471-030-0038(3)(a); OAR 471-030-0038(1)(c). What claimant thought about the propriety of her behavior when she acted is highly relevant to her state of mind and the inquiry about whether she engaged in misconduct. In this regard, misconduct is a conclusion that disqualifies a claimant from unemployment benefits. It is not intended as an all-encompassing label for any behaviors that might conceivably have a negative impact on an employer's interest regardless of claimant's mistaken but sincere belief that she was actually furthering at least one overriding employer interest by her behavior.

To the extent that claimant's behavior was wantonly negligent, it was excused from constituting misconduct as a good faith error. The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-36099 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: June 16, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.