

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0661

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121129). Claimant filed a timely request for hearing. On May 12, 2015, ALJ R. Frank conducted a hearing, and on May 21, 2015 issued Hearing Decision 15-UI-38833, affirming the Department's decision. On June 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Edward D. Jones Company employed claimant as a financial advisor from March 31, 2014 through March 12, 2015.

(2) The employer prohibited employees from executing stock trades on behalf of clients residing in states in which claimant was not licensed to trade. The employer had policies to that effect and, on November 11, 2014, orally advised claimant of its policies. The employer also had a "snowbird policy," regarding its clients who spent summers in cold climates and winters in warmer clients, that required clients' addresses to be changed to reflect their physical location when they traveled for a longer period than a vacation lasted. Claimant was not aware of the "snowbird policy."

(3) Claimant worked with a client who lived in Oregon during the summer and Arizona during the winter. On October 29, 2014, claimant arranged to execute a stock trade for the client, but discovered that the client's address of record with the employer was in Arizona, a state in which claimant was not licensed to trade, and left a message for the client indicating he could not complete the stock trade for the client. On November 11, 2014, claimant spoke with the client, who told claimant that his permanent address was in Oregon, and asked claimant to correct his address in the employer's records and complete the trade. Claimant agreed, and did so. Unbeknownst to claimant, later the same day the client's wife called claimant's assistant, asked her to change the client's mailing address back to the Arizona address, after which the assistant changed all the client's addresses from Oregon to Arizona.

(4) The employer concluded on the basis of the address changes and claimant's knowledge that he was not authorized to do trades for clients in states in which he was unlicensed that claimant had intentionally changed the client's address to subvert the snowbird policy and execute an unlicensed trade for an Arizona client. On March 12, 2015, the employer discharged claimant.

CONCLUSIONS AND REASONS: We disagree and conclude that claimant's discharge was 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 Hearing Decision 15-UI-38833, the ALJ found that claimant "agreed" that he "changed the client's address of record to his own state for the express purpose of depicting a trade as proper and legal, made the trade and then changed the address of record back immediately," which was "deceptive and deliberate."¹ However, the ALJ's finding is contrary to claimant's testimony. The ALJ concluded that claimant committed misconduct, reasoning,

It is rather unlikely that claimant, a presumed professional on the job for a year, would have been unaware of the aforementioned [snowbird] rule. It is more unlikely that claimant would have genuinely believed that both his own and the employer's compliance with law and policy would be contingent on whimsically assigned, or ill-defined, address codes within the employer's computer system.²

We disagree.

The employer submitted copies of some of its policies into the record, but did not include a copy of the so-called "snowbird policy" that claimant was alleged to have violated, and the policies the employer did submit only applied to situations in which an employee could open a new account.³ Asked to describe the "snowbird policy," the employer's witness testified,

Employer: There is a snowbird policy that when clients go to another area, which frequently happens with people that live in the norther states, they go to Arizona, California, Florida and so on during the winter. If they are away from their home for periods

¹ Hearing Decision 15-UI-38833 at 4.

² *Id.*

³ *See* Exhibit 1; Transcript at 10.

of months at a time, the FEMA laws require us to change the address. Clients are required to receive their statement at the address where they are living.

ALJ: Okay. So how long - what's the window? How - how long do you have to - to be at your other place before you gotta change it over?

Employer: The general rule is two week's vacation. Addresses do not have to be changed. But if someone is gonna be residing in another state for several months, it does have to be changed.⁴

Claimant testified that he was not aware of the snowbird policy.⁵ When asked how he would be aware of it, the employer's witness testified that claimant "had actually had a discussion with one of our attorneys, who handles the snowbird policy, on November the 10th, and at that time * * * our attorney who handles the snowbird policy . . . explained to him that you cannot solicit clients who are living out of state, unless you hold a license there."⁶ However, the witness later indicated that claimant was not soliciting clients at issue in this case, did not discuss the clients at issue here with the attorney on November 10th, did not discuss the snowbird policy with the attorney, and that the attorney had just assumed that claimant would apply the things said in the context of a discussion regarding a different client, who was not a snowbird, to the clients at issue in this case.⁷ In other words, the record does not include evidence that the employer notified claimant of its snowbird policy, much less that claimant understood it, and the fact that claimant had a discussion with the attorney who handled the employer's snowbird policy does not mean that they discussed the snowbird policy. Ultimately, the record fails to show that the employer had an applicable policy to the situation at issue of which claimant was aware.

Claimant testified that he believed the employer's records showing his clients' Arizona address was an error, because, based on his work experience, he reasonably believed "that a permanent address has precedence over a - a motor home where a temporary address is."⁸ He presented evidence that his client had requested claimant correct his address of record with the employer to reflect his permanent residence in Oregon.⁹ Given that claimant was not aware of the employer's snowbird policy, changing the address at the client's request was no more than an inadvertent mistake. Given that, to the best of claimant's knowledge and based on his client's statements, he executed a stock trade for an Oregon client and was licensed to do so, he did not willfully or consciously violate the employer's expectations when he executed that trade.

Finally, the ALJ's conclusion that claimant showed knowledge of his culpability when he "changed the address of record back immediately" is not supported by the record. The preponderance of the evidence shows that claimant's assistant was responsible for changing the client's permanent address from

⁴ Transcript at 12-14.

⁵ Transcript at 21.

⁶ Transcript at 14.

⁷ Transcript at 15, 16.

⁸ Transcript at 22.

⁹ Exhibit 2.

Oregon to Arizona, and shows that she did so the day after claimant completed the trade, without claimant's knowledge.¹⁰ The fact that the employer's witness testified, "I don't believe that she [claimant's assistant] changed the address" is not adequate to overcome claimant's testimony to the contrary, particularly since the same witness testified earlier in the hearing that she had not undertaken any action to verify that claimant was responsible for changing the client's address back to Arizona.¹¹

The preponderance of the evidence the employer presented fails to demonstrate that claimant knew or understood the snowbird policy. Rather, it appears that he changed the client's address at the client's request and in good faith, executed a stock trade under an Oregon license for a client he believed resided in Oregon, and did not thereafter change the client's address of record back to the client's Arizona address. In so doing, claimant's conduct might have violated the employer's snowbird policy, but not with the willful or wantonly negligent mental state necessary to disqualify him from unemployment insurance benefits. Therefore, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-38833 is set aside, as outlined above.

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

DATE of Service: July 22, 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.

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¹⁰ Transcript at 24, 25; Exhibit 2.

¹¹ *Compare* Transcript at 8, 28.