

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1139**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 7, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 125626). The employer filed a timely request for hearing. On September 9, 2015, ALJ Wyatt conducted a hearing, and on September 10, 2015 issued Hearing Decision 15-UI-44137, affirming the Department's decision. On September 30, 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 relationship banker from April 9, 2012 until April 21, 2015.

(2) As a personal banker, claimant was responsible for analyzing customers' needs, recommending products and services that satisfied those needs and opening new accounts for customers.

(3) The employer expected claimant to open new credit card accounts for customers only if the customers were physically present in the branch or, if they could not arrange to be at the branch, to direct the customers to open the desired credit card accounts online at the employer's public website. If the customer applied for the account on the public site, the customer electronically acknowledged receipt of certain federally required disclosures about the credit card account before opening it. If the customer elected not to open the credit card account online, the customer needed to be present at the bank to apply for the account and to sign an acknowledgement that he or she had received the federally required disclosures before opening the account. Because of the required disclosures, new accounts could only be processed and opened by one of these two methods. Claimant was aware of the employer's expectations.

(4) The employer also expected claimant to refrain from falsifying bank records or providing dishonest information in response to the employer's inquires. Claimant was aware of this expectation as a matter of common sense.

(5) Sometime before January 22, 2015, claimant had intermittent problems with accessing the bank's records while using her computer. Also sometime before January 22, 2015, one of claimant's regular customers, who held both business and personal accounts at the employer's bank, asked claimant about opening a credit card account in the name of his business. Claimant provided information about the account to the customer, including the federally required disclosures. The customer told claimant that he wanted to speak with his wife before opening a business credit card account.

(6) Sometime before January 22, 2015, the customer who had inquired about the credit card account for his business came to the branch for claimant's assistance in opening the account. When claimant tried to access the bank's records to obtain an application for the customer, her computer failed. The customer then left the bank since he and claimant could not proceed with the transaction. Claimant perceived that the customer was inconvenienced by the visit to the bank because its purpose was not accomplished. Sometime shortly afterward, claimant called the employer's bankers' support team to obtain advice about opening credit card accounts when her computer failed. The support team told claimant that she could open such an account by accessing the employer's public internet website, where applications for credit card accounts were also available, rather than using the employer's intranet. Claimant was told that once she accessed the public internet site, she could then assist the customer in applying for the credit card account.

(7) Sometime on or around January 22, 2015, claimant telephoned the customer to inform him of the information she had received from the bankers' support team about how to proceed if her computer would not allow her access to obtain and process account applications. The customer told claimant that he was very busy with his own business matters and asked claimant if she could open the account for him, without his presence at the bank. Since the using the main internet site did not require the customer to sign disclosure documents, claimant thought there was no need for the customer's presence in the bank, and told the customer that she would open the account for him. Claimant thought that, since the customer had already been inconvenienced by one useless trip to the bank, it was good customer service to agree to open the account for him since he had an ongoing banking relationship with the employer. On January 22, 2015, claimant went to the employer's main website and applied for a credit card account for the customer's business. In the online application, claimant acknowledged, on the customer's behalf, that he had received in the electronic application process all of the federally required disclosures about the credit card account. Sometime after January 22, 2015, claimant applied for a sales incentive credit from the employer as a result of opening the account for the customer. Exhibit 1 at 6.

(8) Sometime before April 3, 2015, a security firm employed by the employer determined that the credit card account that claimant had opened for the customer on January 22, 2015 had no signed records accompanying it to show that the customer had received the required disclosures. On April 3, 2015, a representative from the security firm and the branch manager interviewed claimant about how she had opened the credit card account for the customer over two and a half months prior. Between January 22 and April 3, 2015, claimant had opened new accounts or transacted business on existing accounts for approximately 400 to 600 bank customers. Transcript at 30. Claimant did not recall the particular transaction, but did remember that the customer had spoken with her on a few occasions in the bank

about opening a credit card account and assumed she had followed her routine practices with that particular customer. Claimant told the investigator and the branch manager that the customer had been in the bank when the credit card account was opened, because that was her normal practice.

(9) After April 3, 2015, investigators from the security firm viewed the employer's video surveillance tapes from January 22, 2015. They observed that the customer had not been in the bank that day, which was the day that the credit card account was opened. The employer's credit card services team later determined that the customer's credit card account had been opened on January 22, 2015 through the employer's public website by someone using claimant's computer. Sometime later, the bank manager called the customer who had the credit card account and asked about how the account had been opened. The customer stated that he had requested that claimant open the credit card account over the telephone and she had done so. He emphasized his awareness that the account was being opened on his behalf.

(10) On April 15, 2015, the security firm investigator and the branch manager again met with claimant. They told claimant what the investigation into the opening of the credit card account had revealed. When claimant was given this information, she did not dispute it. Claimant was then able to recall that she had opened the account for the customer, at the customer's request, using the employer's public website and out of the presence of the customer. Claimant told the investigator and the bank manager this. When she was interviewed on April 3, 2015, claimant had been confused about what had happened over two months earlier because of all the intervening customer transactions she handled since the account was opened, the customer's previous visits to the branch about opening the credit card account, and her habitual practices in opening new accounts.

(11) From the time she was hired until April 21, 2015, claimant received no disciplinary warnings; her only violation of the employer's policies occurred on January 22, 2015. With the exception of her behavior on January 22, 2015, the branch manager perceived claimant to be an "outstanding, exceptional" and an "all around very capable" employee whose "customers loved her." Transcript at 16.

(12) On April 21, 2015, the employer discharged claimant for opening the credit card account for the customer without the customer being present on January 22, 2015 and for intentional deceit when she initially stated on April 3, 2015 that the customer was present when the credit card account was opened when he was not.

**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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(30)(b). The employer

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

Claimant agreed that she understood the employer required a customer's presence in the bank when the customer applied for a new account unless the customer made the application himself through the employer's publicly accessible internet site. Transcript at 38. While claimant took the position at hearing that the situation under which the customer's credit card account was opened was abnormal as a result of her computer not functioning, that the customer had a long-standing relationship with the bank and her, and she thought that the instructions she received from the bankers' support team allowed her to open the account for the customer online without the customer's in-person presence in the bank, her interpretation of these circumstances was not reasonable. That the situation was not usual and that the bank had an established relationship with the customer does not reasonably imply that claimant was allowed to disregard the employer's clear standards without consulting with a supervisor or manager. As well, the advice from the bankers' support team, which referred claimant to the public internet site to obtain an account application if she was unable to access the employer's intranet site for that purpose, was not reasonably construed as permission for claimant to apply for the account on the public site as if she was the customer, to execute an electronic acknowledgement that the necessary disclosures had been received by the customer when they had not and to make the application without the customer's physical presence in the bank. Although claimant's desire to assist the customer after he had wasted time at the bank in an unsuccessful earlier attempt to open the credit card account was understandable, she was obviously aware of her actions when she opened the account without the customer's in-person physical presence and without having the customer's acknowledgement that he had received of the federally required disclosure. Claimant reasonably knew or should have known that her conduct would probably result in a violation of the employer's standards for opening new accounts. Regardless of her intentions, claimant's behavior in opening the credit card account as she did on January 22, 2015 was a wantonly negligent violation of the employer's standards.

While the employer contended in its written argument that, in addition to her behavior on January 22, 2015, claimant engaged in a "willful and deliberate attempt to deceive" during her subsequent interviews with the security firm investigator and the branch manager on April 3 and April 15, 2015, this is not supported by the weight of the evidence in the record. Employer's Written Argument at 1. Claimant contended that she stated on April 3, 2015 that the customer was in the bank when she opened the credit card account for him because she was abruptly confronted about the events that occurred on January 22, 2015, she had no specific recollection of that transaction, which had occurred over two months prior, she remembered that the customer had come in to the bank asking about opening a credit card account a few times and, under the pressure of the interview, she assumed she must have followed her customary and usual practices when opening the account. Transcript at 30, 31. Assuming this was claimant's state of mind, she did not make her statement on April 3, 2015 for the purpose of deceiving the employer or fabricating an account of the transaction. Rather, she was attempting to provide what she thought, at the time, was an accurate statement of what happened in order to respond to the purpose of the interviewer. In the April 15, 2015 interview, when the employer disclosed the results of its investigation, claimant did not dispute them, which suggests that she had little recollection of the January 22, 2015 transaction on April 3, 2015. It is plausible that, by being told what the video revealed and what the customer had stated, claimant's memory was then sufficiently refreshed to allow her to recall more specifics of the events surrounding the opening of the credit card account. In that

subsequent interview, claimant gave an account substantially similar to the one she gave at hearing.<sup>1</sup> Despite this innocent explanation of the discrepancies between claimant's two statements, the employer contended that claimant was willfully dishonest during the interview on April 3, 2015, and apparently only corrected that statement when she was confronted with the results of the employer's investigation during the later interview on April 15, 2015. Claimant's and the employer's account of her state of mind when she made the conflicting statements on April 3 and 15, 2015 are both plausible and there is no reason to doubt the credibility of either party. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not meet its burden to show that claimant was intentionally dishonest or deceptive in the statements that she gave to the employer's representatives.

Regardless of her intentions in opening the account, claimant's behavior on January 22, 2015 was wantonly negligent and was misconduct unless otherwise excused. Behavior is potentially excusable as an "isolated instance of poor judgment" under OAR 471-030-0038(3)(b) if it was a single or infrequent occurrence in violation of the employer's standards rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The type of behavior that is excusable as an isolated instance of poor judgment also must not have exceeded "mere poor judgment" by, among other things, causing and irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, it is undisputed that claimant had not engaged in any behavior that the employer considered to have been a violation of the employer's standards other than on January 22, 2015 and in the employer's interviews relating to that day. Transcript at 9, 15-16. Since this decision finds that claimant's statements during the employer's interviews were not a willful or wantonly negligent violation of the employer's standards, her behavior in opening the credit card account as she did on January 22, 2015 was isolated act of wantonly negligent behavior. It meets the first prong of the test for behavior that is excused.

Claimant's behavior on January 22, 2015 was not the type that exceeded poor judgment or that would cause an employer to objectively conclude that it could not trust claimant to comply with its standards in the future. Here, claimant's professed motivation of avoiding further inconvenience to the customer and providing good customer service was understandable. The employer's investigation conceded that there did not appear to have been any fraudulent motive on claimant's part in opening the account or any attempt at personal aggrandizement, which corroborates that claimant's motivation was as she stated. The employer's witness also praised claimant and her work performance highly during the hearing and further stated that he had no reason to believe that she would ever knowingly violate any of the employer's policies. Transcript at 27. Based on these factors, and claimant's lack of prior violations, an employer would not conclude that, having been informed that her behavior on January 22, 2015 was unacceptable, it could no longer trust claimant, or that this single act made a continued employment relationship with her impossible. Having met all the requirements, claimant's behavior on January 22,

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<sup>1</sup> The employer's written argument asked EAB to give a clearer definition than the ALJ did about the difference between "an intentional lie and an unintentional lie," apparently to imply that if claimant's first account was inconsistent with her later accounts intentional deception must necessarily have been in operation. Employer's Written Argument at 1. However a "lie" connotes an intentional, willful falsehood or fabrication rather than a statement that is incorrect or mistaken for more innocent reasons. As discussed in the text, accepting claimant's state of mind was as she testified, her April 3, 2015 statement, although incorrect, was not made with the intention of deceiving the employer about the transaction on January 22, 2015.

2015, while wantonly negligent, was excused from constituting misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not meet its burden to show that it did so for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-44137 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: October 23, 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](http://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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