

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1419

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140403). Claimant filed a timely request for hearing. On December 1, 2016, ALJ Ballinger conducted a hearing, and on December 2, 2016 issued Hearing Decision 16-UI-72184 affirming the Department's decision. On December 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) US Bank National Association employed claimant as a teller coordinator from March 30, 2015 until September 9, 2016.

(2) The employer had an incentive program which allowed tellers to accrue referral credits each time the teller referred a customer to a personal banker and the customer ultimately purchased a bank product or service from the banker. The tellers were entitled to receive a financial incentive if at least 24 of the customers they referred to bankers in a calendar quarter made qualifying purchases.

(3) The person who managed claimant's branch prior to July 2016 allowed tellers to claim a referral even when they had not spoken to or referred a customer to a banker, if they had participated in the transaction by which the customer purchased the bank product or service from the banker. Around early July 2016, the employer placed a new manager at the bank branch where claimant worked. The new

manager expected claimant and other tellers to refrain from claiming a referral unless they had actually spoken to a customer about bank products or services and had actually referred that customer to a personal banker. Claimant was not told and did not understand that practices under her prior manager did not meet the employer's standards or that the new branch manager would not allow those practices.

(4) Sometime before September 7, 2016, a customer met with the branch manager of claimant's bank and the customer decided to open up a new account. Claimant took the opening deposit for the new account from the customer. Believing she was allowed to do so, claimant claimed a referral for based on that transaction.

(5) On September 7, 2016, the branch manager discovered claimant had claimed a referral for the customer that had opened the new account with the branch manager. The branch manager believed that claimant had not previously spoken to the customer about bank products or services or referred the customer to the branch manager to discuss products or services and, as a result, that claimant was prohibited from claiming a referral based on the branch manager's interpretation of the employer's standards for the financial incentive program. On September 7, 2016, the employer discharged claimant for claiming that customer referral.

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 connected with work. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(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).

In Hearing Decision 16-UI-72184, the ALJ concluded that the employer discharged claimant for misconduct. In reaching his result, the ALJ largely discounted claimant's explanation that, based principally on the customary practices in her branch under her former manager, she believed it was appropriate for her to claim a referral credit even if she had not had a conversation with the customer. The ALJ first reasoned that "[t]he branch manager testified persuasively that the employer did not tolerate violations of its policy and the policy clearly prohibits the conduct that led to claimant's discharge." Hearing Decision 16-UI-72184 at 4. The ALJ further reasoned that "[g]iven the repeated opportunities claimant had to review the employer's policy, claimant's testimony regarding her understanding of the policy was not persuasive." Hearing Decision 16-UI-72184 at 4. The ALJ also disregarded a statement from one of claimant's coworkers that described the actual practices that went on in claimant's branch in connection with claiming referrals since "nothing in the coworker's statement contradicts the employer's evidence regarding its expectations or its attitude toward violations of its policy." Hearing Decision 16-UI-72184 at 4. We disagree.

While the new manager testified at hearing with certainty about her understanding of the employer's written policies, the requirements for claiming a referral and how she thought claimant should have been aware of them, she stated quite frankly, "I was only her manager for a couple of months. I can't speak

to when there was another manager. But when I came onboard there was an expectation.” Transcript at 10-11. Notably, the new manager did not dispute claimant’s testimony about the circumstances under which her former manager allowed tellers to claim referrals, that her doing so in the final incident would have been permitted by her former manager, that she had been trained to do so and that she was never informed otherwise at any time. Transcript at 13, 14, 17, 18, 20, 21, 24, 25. Nor did the new manager dispute or suggest that the statement of claimant’s coworker about the customary branch practices in claiming a referral, which tended to corroborate claimant’s, was inaccurate. The new manager also did not contend that at any time during her tenure she notified claimant or claimant’s coworkers that the ongoing practices in that branch were not a correct interpretation of the employer’s policy, or that she was going to enforce her own understanding of those policies. As well, although the new manager testified vaguely and generally that claimant should have been familiar with the employer’s code of ethics, having read it at hire and reviewed it on a yearly basis, it is not at all clear that such a code would necessarily contain the rules or requirements of a specific program like the referral incentive program or the circumstances under which claimant was allowed to claim a referral, nor was it clear that familiarity with the code would have led to different behavior from claimant during the final incident. Transcript at 6, 7. On this record, while the new manager might well have thought she understood the requirements for claiming a referral, the employer did not demonstrate that *claimant* was aware or reasonably should have been aware of the employer’s requirements for claiming a referral, the new manager’s interpretation of when referral was properly claimed, or that the procedures or expectations with respect to referrals had changed from what allowed under the former manager. To the extent that the employer expected claimant to have had a conversation with a customer and referred the customer to a banker before she claimed a referral, claimant’s belief that she was entitled to claim a referral without having done so appears sincere and plausible in light of undisputed practices in the branch in which she worked. A good faith error of the type that claimant made and under the circumstances that she made it, does not constitute misconduct. *See* OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 16-UI-72184 is set aside, as outlined above.

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

DATE of Service: January 27, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

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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