EO: 990
BYE: 201922

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

273
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0804

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 92246). The employer filed a timely request for hearing. On August 8, 2018, ALJ Schmidt conducted a hearing, and on August 10, 2018 issued Order No. 18-UI-114725, reversing the Department's decision. On August 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument containing information that was not part of the hearing record. Claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) England Logistics Inc. employed claimant as a senior account manager from September 30, 2013 until June 5, 2018. Among other things, the employer provided transportation brokerage services to customers on a truckload or less-than-truckload basis.

(2) A third-party vendor usually provided insurance to the employer to ensure that the employer was paid for charges that customers incurred. However, due to a customer's financial condition and future prospects, the third-party vendor on occasion declined to provide insurance coverage for the customer's account receivable. In that circumstance, the employer's finance division would determine the limit of credit that the employer would extend to the customer based on an analysis of risk. The employer expected that the credit limit established by its finance division for a customer would be adhered to in all transactions involving that customer, and the employer's account managers and other employees were expected to turn away business from the customer if accepting that business would result in the accrual of charges exceeding the customer's credit limit unless and until the finance division raised the customer's credit limit. Claimant understood the employer's expectations.

(3) In February 2018, the employer's third party vendor refused to continue insuring the charges incurred by OP, a customer whose account claimant managed. As of early June 2018, the employer's finance division had through incremental increases authorized a credit limit of $250,000 for OP. As of early June 2018, the total outstanding unpaid charges that OP had accrued were near the credit limit of $250,000.

(4) Throughout the period of February to June 2018, the employer was very carefully monitoring the financial condition of OP, as well as incoming payments received from OP to assess whether there was sufficient credit available within the credit limit to allow the employer to accept loads for shipment from OP. Claimant was aware of OP's credit limit. As of June 2018, claimant and the general manager had discussed OP, OP's financial condition and shipments for OP on many occasions.

(5) Around June 4, 2018, the general manager informed claimant that he was going to participate with the vice-president of the finance division in a conference call on June 5 to collect information about OP's financial position from OP's chief financial officer. From those comments, claimant understood that the finance division might decide to increase OP's credit limit after the call. Around this same time, the general manager commented to claimant that the employer was trying to "figure out" what could be done to ship freight for OP and told claimant, "[D]on't turn anything [from OP] away yet." Transcript at 28. From these comments, claimant thought the general manager wanted him, in anticipation of an increase to OP's credit limit, to build loads that the employer would ship for OP.

(6) For convenience and to save time and effort, claimant had decided that the best approach for building the anticipated loads for OP was under OP's customer code because, that way, he could build those loads by duplicating information from prior loads that the employer had already shipped for OP. Had claimant built those loads in the employer's system for creating estimates and quotes for customers he would not have been able to do so by duplication. The employer's customer codes would not allow claimant to build a load if the charge for the load would cause the customer's credit limit to be exceeded. Therefore, claimant decided he would need to enter negative or credit amounts in OP's customer code for certain charges customarily associated with loads, which would have the result of appearing to increase the available credit, effectively bypassing the limitation of the credit limit and allowing him to build the loads in OP's customer code. Around June 4, claimant told the general manager exactly how he proposed to build those loads for OP. Transcript at 54. Claimant told the general manager that if he built the anticipated loads for OP, he would need to issue "some sort of credit to take out some charges [from OP's credit limit]" because the process of building those loads in OP's customer code would otherwise cause OP's credit limit to appear to have been exceeded. Transcript at 53-54. The general manager did not object to what claimant proposed to do, but only stated to claimant, "[J]ust make the numbers work." Transcript at 53. The general manager did not tell claimant that he disapproved of these actions.

(7) Also on June 4, in anticipation of the June 5 call, claimant sent the general manager screen shots of the loads from OP that could not be shipped at that time because there was not enough available credit. Claimant concluded the email, "Just an FYI of what we are looking at . . . Hopefully that phone call [about OP on June 5] does some good [in raising OP's credit limit]. I will take out the customer charges if it comes to that[.]" Exhibit 2 at 5.

(8) On June 5, 2018, before the conference call, claimant built twenty to thirty loads for OP in its customer code in the event that OP's credit limit was raised and the employer authorized shipment of those loads. Claimant built those loads in OP's customer code using the process that he had outlined to the general manager earlier. In total, claimant entered three credits to OP's account, $50,000, $10,000 and $5,000 under the category of accessorial charges, for a total of $65,000 in credits that provided enough credits to allow him to build the loads in OP's customer code despite the credit limit. Claimant sent screen shots to the general manager of the loads he had built for OP. Transcript at 55. The general manager did not respond expressing disapproval of what claimant had done. If the employer's finance division did not increase OP's credit limit on June 5, claimant intended to cancel the loads he had built under OP's customer code as he had stated he would do in the June 4 email to the general manager. The cancelation of those loads should result in the loads not being shipped, no shipping costs being incurred by the employer and actual credit not being extended to OP beyond the credit limit.

(9) On June 5, 2018, the director of credit observed that several loads to be shipped and unusual credits had been entered in OP's customer code by claimant that day. The director of credit reported these observations to the director of the finance division. The employer concluded that by entering the credits in OP's customer code, claimant had acted deliberately to circumvent the $250,000 credit limit the employer had established for OP and had intended to ship loads for OP that exceeded OP's credit limit. On June 5, 2018, the employer discharged claimant for entries he made that day in OP's customer code.

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) (January 11, 2018) 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 Order No. 18-UI-114725, the ALJ concluded that the employer showed that it discharged claimant for misconduct. The ALJ reasoned that by adopting the workaround that allowed him to build loads in the OP's customer code claimant acted with at least wanton negligence since he knew that he was entering orders in excess of the customer's credit limit. Order No. 18-UI-114725 at 3. The ALJ discounted claimant's explanation that he built the loads in the customer's code only because it was "convenient" for him to do so, that he thought the employer would raise the customer's credit limit that day and that he would have canceled the loads and they would not have been shipped if the employer did not sufficiently raise OP's credit limit. Order No. 18-UI-114725 at 3. The ALJ decided that claimant's explanation was not persuasive principally because "claimant's testimony relied on the conclusion that the employer expected him to violated its standard policies and procedures to produce an estimate that claimant could produce by other means." Order No. 18-UI-114725 at 3. We disagree.

Claimant's position, in essence, was that he entered the negative charges or credits to OP's account as a workaround to allow him the convenience of building anticipated loads by duplication in OP's customer code, and that, were OP's credit limit not raised, he would have canceled those loads. While the

employer argued that claimant did what he did to increase his commissions, the employer's witnesses did not present evidence demonstrating that claimant did not, in fact, intend to cancel the loads if the OP's credit limit were not increased or that claimant would receive commissions if the loads were canceled. Claimant further testified that he understood from statements made to him by his direct supervisor, the general manager, that the manager wanted him to build loads for OP that exceeded OP's credit limit in anticipation of a June 5 increase to the credit limit and that claimant explicitly informed the general manager that, for purposes of ease in work, he proposed to do so by duplication in OP's customer code, which would require him to at least temporarily enter credits so that the credit limit would not operate to prevent him from doing so. Claimant finally contended that the general manager did not express disapproval or reservations in response to being informed of his proposed method for building the loads. Transcript at 53-55. For his part, the general manager denied the accuracy of claimant's testimony. Transcript at 19-30, 68-73. The employer's upper management witnesses, the director of finance and the senior director, did not have first-hand information as to the substance of the communications between the general manager and claimant that led up claimant making entries in OP's customer code on June 5. Transcript at 41-43, 50, 79.

There is no reason in the record to doubt the credibility of either claimant or the general manager or the truth of either's testimony. Absent a reason to prefer the testimony of one witness over the other, the witnesses' testimonies must be given equal weight. Where, as here, the weight of the evidence on a disputed issue is equally balanced, the resulting uncertainty must be resolved against the employer since it is the party that carries the burden of proof in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Based on burden of proof principles, claimant's account of the interactions between the general manager and himself is accepted, as well as the substance of their communications. Given the facts as we have found them, the general manager knew how claimant proposed to build the loads in OP's customer code and knew that claimant would be at least temporarily entering credit amounts in OP's customer code to enable him to build those loads. Under the circumstances, it was reasonable for claimant to infer that the general manager approved of what he proposed to do in connection with the anticipated loads for OP. In light of the general manager's apparent authority, it was also reasonable for claimant to infer that what he was going to do in connection with building those loads was not only not prohibited by the employer, but condoned. While the employer might have desired absolute compliance with a credit limit that it had established, and would have prohibited claimant from entering the credits that he did as a temporary workaround of the credit limit to allow him to build the anticipated loads, that claimant believed that the employer condoned his actions, on this record, claimant's action is a good faith error at worst. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer did not meet its burden to demonstrate by a preponderance of the evidence that claimant was discharged for misconduct.

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

DECISION: Order No. 18-UI-114725 is set aside, as outlined above.

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

DATE of Service: <u>September 20, 2018</u>

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits 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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