

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0920

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On April 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142428). Claimant filed a timely request for hearing. On April 29, 2014, ALJ Wipperman conducted a hearing, and on May 5, 2014 issued Hearing Decision 14-UI-16815, concluding claimant's discharge was not for misconduct. On May 27, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer's representative wrote that the employer planned to submit written argument. However, no argument was received from the employer.

**FINDINGS OF FACT:** (1) Zumalogic, Inc. employed claimant as a call center representative from September 30, 2013 to March 14, 2014.

(2) The employer operated a call center and contracted with attorneys' offices to pre-screen individuals interested in attempting to obtain Social Security benefits. Claimant's job involved notifying individuals that their call was being recorded, obtaining the individuals' names and ages, ascertaining whether the individuals had attorneys representing them, and then asking specific questions. The employer trained claimant, and claimant understood, that the employer expected her to obtain answers to all the required questions, submit prepared documents to the individuals for signature, verify the signatures upon return of those documents, and then submit the signed documents for transmittal to the attorneys' offices.

(3) The employer performed quality assurance reviews of representatives' calls. In claimant's November 2013 quality review, the reviewer admonished her for failing to ask all of the required questions, frequently placing individuals on hold, speaking over individuals, being "not overly polite," and coughing without first muting the call. Transcript at 10. Claimant had been instructed to engage individuals on the phone and to listen to them, and the employer did not admonish or warn claimant against humming on calls or using humor to lighten individuals' spirits so they were more open to answering her questions.

(4) On February 10, 2014, the employer held a mandatory meeting with call center representatives. Claimant attended. The employer notified the representatives that it had received too many complaints from attorneys' offices about the representatives' work. The employer "made it very clear" that no additional "unprofessional conduct" would be allowed, and that representatives could be discharged if the employer received any additional complaints from attorneys' offices. Transcript at 7. The employer briefly described what was meant by "unprofessional conduct" by explaining that representatives were not there to "visit with" individuals on the phone, or "do anything other than get the information, process it, and get them off the phone." Transcript at 8.

(5) During a phone call on or about March 11, 2014, claimant "might have hummed" while she was typing an individual's information. Transcript at 20. She told the individual that she was going to make a "racket" so the individual knew she was still on the phone with them. *Id.* During the same call, claimant told jokes "to lighten [the individual] up so that they feel more comfortable, and they can actually talk to me." Transcript at 20-21. Individuals to whom claimant spoke were often in tears or emotionally distraught because of their serious health conditions, and claimant used humor to make the individuals feel better so they could participate in the calls. The individual on the phone with claimant did not object or complain about claimant's humming or jokes, or complain that she was being unprofessional. After what was probably the same call, claimant emailed some documents to the individual for the individual's signature. She reviewed the signed documents and noted that the signature did not look like a signature. Claimant had the person re-sign the documents before she submitted the signed leads for transmittal to an attorney's office.

(6) On March 11, 2014, the attorney's office that received the documents based on claimant's call reviewed the call then complained to the employer that claimant was "singing on the call, telling jokes, inappropriate jokes, during the call" and that the documents based on the call contained a "bad signature." Transcript at 5. On March 14, 2014, the employer discharged claimant because of the complaint from the attorneys' office.

**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.

The employer had the right to expect claimant not to make jokes during calls, not to hum during calls, and to refrain from submitting documents with "bad signatures." Claimant violated those expectations during the final incident. However, for claimant's violations to be considered disqualifying misconduct for purposes of unemployment insurance benefits, her violations must have been the result of willful or wantonly negligent conduct on her part. The employer bears the burden to prove by a preponderance of

the evidence that disqualifying misconduct occurred. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In this case, the employer failed to satisfy that burden.

The record fails to show that the employer notified claimant that she was not permitted to hum to assure individuals that she remained on the phone line even when not speaking, or that she was not permitted to use tactics she believed made individuals feel more comfortable disclosing the information the employer required her to obtain. Nor did the employer show that claimant's behavior was so patently offensive or unprofessional that claimant should have known as a matter of common sense that the employer would disapprove of the conduct. With respect to obtaining a "bad" the signature, claimant testified that she had the individual re-sign the documents after she rejected the initial signature, and, in the absence of evidence of the alleged "bad" signature, the record fails to show that claimant willfully or with wanton negligence disregarded the employer's expectation that she obtain a better one.

Absent a preponderance of the evidence that claimant willfully violated the employer's expectations, or that she disregarded the expectations because she was indifferent to the consequences of her conduct, the employer has not shown that claimant's discharge was for misconduct. Therefore, claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 14-UI-16815 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** July 8, 2014

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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