

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1079

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 145716). The employer filed a timely request for hearing. On June 10, 2014, ALJ Triana conducted a hearing, and on June 18, 2014 issued Hearing Decision 14-UI-19883, concluding the employer discharged claimant for misconduct. On June 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) JP Morgan Chase Bank employed claimant from September 23, 2013 to April 16, 2014 as a personal banker.

(2) The employer expected personal bankers to refrain from making disrespectful or unprofessional comments to customers at work. Claimant understood the employer's expectations.

(3) On April 1, 2014, claimant was experiencing elevated heart rate and blood pressure while driving to work. Claimant went to work and saw there was no other banker on duty to assist a customer with a credit card dispute. The customer told claimant he had been unable to understand the customer service representative he contacted by telephone because the person did not speak English well. Claimant called a credit card service representative and also had difficulty understanding the person. Claimant was breathing heavily and trying to control her heart rate while she assisted the customer. The customer commented to claimant that she did not seem well. After claimant hung up the telephone with the employer's support team, claimant stated to the customer, "I hate it when we outsource." Transcript at 6.

(4) After assisting the customer, claimant went to a nearby pharmacy and tested her heart rate. The pharmacist was alarmed by claimant's heart rate and cautioned her that she might be having a heart attack. Shortly after, claimant was treated by paramedics and taken to the emergency room. Later that day, the customer claimant assisted in the morning complained to claimant's branch manager that the statement about "outsourcing" made her feel uncomfortable.

(5) On April 16, 2014, the employer discharged claimant for making an unprofessional statement to a customer.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, 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 a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-038(3)(b).

The employer had a right to expect claimant to refrain from making disrespectful and unprofessional comments to customers. The employer decided to discharge claimant after an incident that occurred on April 1, 2014, when claimant stated to a customer, "I hate it when we outsource," after assisting the customer who had experienced difficulties resolving a banking matter via "outsourced" customer service representatives.

The ALJ concluded that claimant's April 1, 2014 comment was wantonly negligent because claimant should have known the employer would find such a comment unprofessional and would not condone her making such a comment to a customer.¹ We disagree. To be wantonly negligent, claimant must have been conscious of her conduct, and acted with indifference to the probability that her conduct would violate the employer's reasonable expectations. Here, claimant was suffering from a heart condition at the time of the final incident. The ALJ described claimant as "not feeling well" on the date of the final incident, but reasoned that claimant was "well enough to regulate her statements to customers and keep them professional" because she did not call in sick and was making telephone calls and assisting customers.² However, claimant was ill before she arrived at the bank, was "breathing very heavy" and "trying to control her heart rate" while assisting the customer during the final incident, and shortly thereafter, paramedics treated her and took her to the emergency room by ambulance due to a possible heart attack. Transcript at 21 to 23. Claimant testified she could not remember much of the final incident, and that her memory was "in and out" due to her health at the time. Transcript at 22. The record shows that, more likely than not, claimant was not conscious she was engaging in conduct the employer would consider unprofessional during the final incident.

¹ Hearing Decision 14-UI-19883 at 4.

² *Id.* at 3.

Additionally, claimant testified that she had heard other bankers, including her bank manager, make negative comments about “outsourcing,” and the employer did not discipline them for doing so. Transcript at 36. The customer from April 1 approached claimant requesting assistance with a credit card dispute after having been unable to resolve the problem on the telephone because, the customer explained, the employer “outsources” its customer service staff to another country and the customer could not understand the representative. Transcript at 21. Claimant contacted a customer service representative with the customer, and also had difficulty understanding the representative. Transcript at 21. The preponderance of evidence fails to show claimant knew or should have known that her comment about outsourcing would violate the employer’s expectation that she refrain from making unprofessional comments to customers. The record does not show claimant’s comment was intended to be disrespectful, or was stated with an angry tone or inappropriate volume. There was no evidence the customer appeared upset or offended by the comment while claimant assisted him. Considered in the context of the situation, claimant’s comment did not rise to the level of being a willful or wantonly negligent violation of the employer’s expectations about workplace communications. Thus, the preponderance of evidence fails to show claimant’s behavior on April 1, 2014 was willful or wantonly negligent.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 14-UI-19883 is set aside, as outlined above.

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

DATE of Service: July 24, 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. 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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