

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1843

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84958). Claimant filed a timely request for hearing. On November 26, 2014, ALJ Hoyer conducted a hearing, and on November 28, 2014 issued Hearing Decision 14-UI-29547, affirming the Department's decision. On December 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular Inc. employed claimant as a customer service representative at its call center from September 5 to October 1, 2014.

(2) The employer discharged claimant for allegedly ignoring and then hanging up on several customers on September 28, 2014.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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).

The employer discharged claimant for allegedly ignoring and then hanging up on several customers on September 28, 2014. In Hearing Decision 14-UI-29547, the ALJ acknowledged that the employer provided only “second-hand hearsay testimony” to support that allegation, which claimant denied, asserting that she could not hear the customers, and complied with the employer’s expectations by reading the employer’s “dead air script” before hanging up.¹ However, the ALJ found claimant’s first-hand testimony less credible, asserting that, “Although claimant initially asserted that she had read the “dead air script” on September 28, when confronted with the [employer’s assistant manager’s] rebuttal testimony as to what [claimant’s supervisor] overheard and observed in this regard, claimant declined to refute that testimony.”² The ALJ therefore found in accordance with the employer’s hearsay evidence that claimant ignored and then hung up on the customers, and concluded that doing so was misconduct.³

In her rebuttal testimony, however, the assistant manager merely repeated prior testimony that claimant’s supervisor stated that claimant ignored and then hung up on the customers without reading the dead air script, adding only that if claimant had read the script, claimant’s supervisor would have heard her over her headset, and was close enough to overhear claimant without the headset. Transcript at 40-41. However, claimant already had denied ignoring the customers and hanging up on them without reading the dead air script, and attributed her supervisor’s alleged failure to hear her read the script over the headset to reported problems with claimant’s telephone. Transcript at 29-31, 33-35. We do not find claimant’s mere failure to specifically address the assistant manager’s bare assertion that claimant’s supervisor was close enough to overhear claimant without her headset a reasonable basis for concluding that claimant was not a credible witness. Given the employer’s failure to call claimant’s supervisor as a witness subject to cross-examination, or offer recordings or transcripts of the phone calls into evidence, we find the evidence as to whether claimant ignored and then hung up on the customers, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant engaged in the conduct for which she was discharged. Absent such a showing, the employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-29547 is set aside, as outlined above.

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

DATE of Service: January 13, 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 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

¹ Hearing Decision 14-UI-29547 at 4.

² *Id.*

³ *Id.* at 2, 4-5.

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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