

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0235

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95945). Claimant filed a timely request for hearing. On January 24, 2015, ALJ Buckley conducted a hearing, and on February 2, 2015 issued Hearing Decision 15-UI-34337, reversing the Department's decision. On March 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular, Inc. employed claimant as a sales representative from May 1, 2014 until January 5, 2015. The employer was a carrier that provided cell phone service to subscribers.

(2) Claimant sold cell phone services to customers who subscribed to service plans that the employer offered. Claimant was paid a bonus based on sales figures that she achieved.

(3) The employer expected claimant to refrain from falsifying her sales figures by adding services to accounts when customers had not requested them or by not cancelling services when customers requested. Claimant was aware of the employer's expectations.

(4) On December 31, 2014, claimant's supervisor monitored her performance that day by listening in on a call that she handled with a customer. Claimant was not aware that the call was being monitored. It "appeared" to the supervisor that claimant might have added a line of service to that customer's account when the customer had not consented to the additional line. Transcript at 6. Claimant's supervisor reported to the employer's management what she thought might have happened during that call and the employer decided to investigate other calls that claimant had handled.

(5) During its investigation of claimant's performance, employer representatives concluded that on two prior occasions claimant had added a second line of service to a customer's account when the customer had not consented to the addition. The employer's representatives also concluded that once, when the customer had requested cancellation of the employer's cell phone service, claimant had not done so, but had merely suspended the service for thirty days. During a second call, the representatives concluded that, when a customer had requested cancellation of his service, claimant had only cancelled the automatic pay option on the customer's account.

(6) During the period when the employer's representatives were investigating claimant's calls with customers, claimant handled approximately sixty to seventy phone calls each day. Transcript at 36.

(7) On January 5, 2015, the employer discharged claimant for intentionally manipulating her sales figures by not eliminating services when customers requested and by adding services to accounts when customers had not requested additional services.

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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant vigorously objected to the employer's contentions that she had ever added new lines of services to customers' accounts when they had not explicitly consented to her doing so or that she had failed to cancel services when customers insisted on a cancellation after she might have proposed a suspension of service as better meeting their ultimate objective. Transcript at 23, 24, 26, 27, 28, 29, 48. However, claimant was hampered at hearing in presenting more specific rebuttal evidence because she did not remember the calls to which the employer's witness referred as demonstrating her intentional falsification of information in customers' accounts and the employer never allowed her to listen to the calls at issue. Transcript at 21, 46. Aside from generally contending that claimant had intentionally manipulated her sales figures based on inferences that some employer's representatives had drawn from listing to claimant's customer calls, the employer did not present at hearing any first-hand testimony from claimant's supervisor or the employer's representatives, all of whom had actually listened to the calls at issue between claimant and the customers. Transcript at 45, 46, 47. The employer also did not offer into evidence recordings of the actual phone calls at issue, which might have allowed us to draw our own conclusions, because the employer's phone system was apparently not operating during those calls. Transcript at 46. Given the lack of specific evidence to rebut claimant's denials, the employer failed to meet its burden to establish, more likely than not, that claimant intentionally failed to abide by customers' instructions for the purpose of manipulating her sales figures. The employer did not establish that claimant violated its expectations or that she engaged in misconduct.

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

DECISION: Hearing Decision 15-UI-34337 is affirmed.

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

DATE of Service: April 21, 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 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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