

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0549**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision #115917). Claimant filed a timely request for hearing. On April 16, 2015, ALJ Wipperman conducted an in person hearing, and on May 8, 2015, issued Hearing Decision 15-UI-38176, concluding that the employer discharged claimant, not for misconduct. On May 12, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Market of Choice employed claimant as a maintenance clerk from September 18, 2007 to January 30, 2015.

(2) The employer's policies require that its employees treat customers and each other with courtesy and respect. Claimant understood this expectation because it is stated in the employer's handbook, which claimant received and read when she was hired. On February 20, 2014, claimant signed an acknowledgement that she had received and read an updated edition of the employer's handbook which included the policy regarding courteous treatment of customers and coworkers.

(3) On November 8, 2013, claimant suffered a brain injury. As a result of this injury, claimant has a constant headache, stutters, and has a tendency to easily burst into tears. Also as a result of this injury, claimant has a poor short term memory and may involuntarily raise her voice when anxious or stressed. Transcript at 21-22.

(4) From February 21 through August 20, 2014, claimant's supervisors gave her numerous verbal warnings about her inadequate work performance and her discourteous and disrespectful behavior toward customers and other employees.

(5) On September 18, 2014, the store manager heard claimant yelling at another employee. The store manager warned claimant that she needed to treat her coworkers with respect and courtesy, and suspended claimant for a portion of her shift.

(6) On October 14, 2014, claimant met with the employer's human relations director and the store manager who talked with her about "the importance of conducting maintaining a professional manner, greeting employees, cooperating, maintaining a positive attitude, maintaining good employer/manager interaction." The human relations director warned claimant that she needed to make sustained improvement in these areas to keep her job, and claimant said she would do so. Transcript at 17.

(7) On December 30, 2014, claimant saw that a man getting out of the elevator was having difficulties doing so because a high chair blocked his way. Claimant asked a woman, with whom she was acquainted, to move the high chair. A member of the employer's human relations team observed this interaction, and concluded that claimant had behaved in a rude and condescending manner toward the woman. The human relations team member told claimant's supervisor, the store manager, about the incident and the manager gave claimant a written warning about her poor attitude. Transcript at 13. After receiving this warning, claimant contacted the woman she had asked to move the high chair and apologized to her. Transcript at 20.

(8) On January 28, 2015, the store manager's wife observed claimant telling elderly women who were using the store's community room that they could not rearrange the tables in the room because claimant's boss would get angry with her if the tables were moved. The store manager's wife thought that claimant spoke to the women in a rude and abusive manner. The store manager's wife then encountered claimant in the store restroom. Claimant told the store manager's wife that the only toilet not in use was broken, and that she could not understand why the employer did not fix it. Transcript at 6. Claimant also said that she was almost 60, and that she could not wait until she left her job once she turned 65. The store manager's wife thought claimant's remarks showed disrespect for the employer. Transcript at 11.

(9) On January 28, 2015, the employer discharged claimant for behaving in a rude and discourteous manner toward the women in the community room, and for demonstrating an attitude disrespectful of the employer in her comments to the manager's wife.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because of two interactions claimant had with customers on January 28, 2015. The employer concluded that on that date, claimant spoke rudely to customers in the

employer's community room, and spoke disrespectfully about the employer to another customer, the wife of claimant's supervisor, in the employer's restroom. The employer's evidence regarding these incidents consisted of the hearsay testimony of claimant's supervisor whose account of the events was based on what his wife told him. Claimant, probably as a result of the effects of a brain injury she suffered in 2013, could not remember what happened on January 28. Given claimant's lack of evidence regarding the final incidents that resulted in her discharge, we have relied on the account presented by the employer's witness of these events.<sup>1</sup>

Claimant's interactions with the customers on January 28, 2015 violated the employer's policy regarding courteous conduct. In order to conclude that these violations constituted misconduct, however, we must find that claimant's conduct was willful or wantonly negligent. Claimant's behavior was willful or wantonly negligent only if she consciously engaged in conduct she knew or should have known would violate the employer's expectations. Here, claimant asserted that she did her best to comply with her employer's directive regarding courteous treatment of customers; she testified that "I tried incredibly hard." Transcript at 23. The effects of the brain injury apparently hindered her ability to do so, however. Because claimant had problems with her short term memory, she found it difficult to remember the instructions and counseling given to her. She testified that even though her supervisor repeatedly told her his expectations in regard to her behavior, "I still couldn't pull that in –information up. So it wasn't like I was just (unintelligible) a willful intent to disobey [supervisor] and Market of Choice." Transcript at 22-23. She was unable to control the volume of her voice; she testified "I can't necessarily get control anymore." Transcript at 29. The record therefore fails to demonstrate that claimant's perceived rudeness on January 28, 2015 resulted from her deliberate or intentional disregard of the employer's expectation regarding courteous treatment of customers. Instead, the evidence shows it more likely than not that her behavior was involuntary because it was caused by the effects of her brain injury, which made her unable to remember instructions or control the volume of her voice.

Because the record fails to establish that claimant's behavior on January 28, 2015 was willful or wantonly negligent, we conclude that the conduct for which the employer discharged her was not misconduct. Claimant is not disqualified from the receipt of benefits based on this work separation.

**DECISION:** Hearing Decision 15-UI-38176 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service:** July 2, 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](http://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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<sup>1</sup> The ALJ concluded that based on his observations, claimant, her witness, and the employer's witness were credible. Hearing Decision 15-UI-38176 at 3.

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