

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0823

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 145625). The employer filed a timely request for hearing. On June 11, 2015, ALJ R. Davis conducted a hearing at which claimant failed to appear, and on June 18, 2015 issued Hearing Decision 15-UI-40268, affirming the Department's decision. On July 8, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular Inc. employed claimant from September 9, 2013 to March 2, 2015 as a customer service representative in one of its call centers.

(2) The employer had job performance expectations for customer service representatives. The employer expected its representatives to take seven calls per hour. The employer also expected representatives to meet call quality standards including assuring each customer assistance during the service call, obtaining customers' email addresses, and verifying a customer's information before allowing the customer access to an account or to make purchases on an account. The supervisors listened to and scored six calls per month per representative. A representative was subject to discharge if he or she had a failing score on more than one call quality test in a month. Claimant understood the employer's expectations.

(3) On April 17, 2014, the employer gave claimant a "coaching" because he failed to verify a customer's information, and as a result, allowed an unauthorized person to make a purchase on a customer's account.

(4) Claimant failed to meet the employer's calls-per-hour requirement during six months out of twelve months during his employment. Claimant's supervisor coached claimant to keep control of the calls by "setting expectations with the customer," and to refrain from unnecessarily lengthy explanations and "lack of focus" during the calls. Audio Record at 11:03 to 11:43. At times, claimant showed improvement by meeting the calls-per-hour requirement, but would subsequently "lose his focus," repeat the same mistakes and fail to meet the calls-per-hour requirement. Audio Record at 12:03 to 12:24.

(5) On February 23, 2015, claimant failed a call quality test because he did not obtain a customer's email address or leave notes in the customer's account.

(6) On February 26, 2015, claimant failed two call quality tests. Claimant failed one call test because he did not assure a customer he would resolve the customer's issue during the service call. Claimant failed a second call test because he asked a customer for security information to access an account, but did not verify that the information he received from the customer matched the information on the account. The information was incorrect, but claimant gave account information to that person, resulting in a failure to safeguard a customer's information.

(7) On March 2, 2015, the employer discharged claimant because he did not meet the employer's performance requirements when he failed three call quality assurance tests in February 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ 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. 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 conduct and knew or should have known that his conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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 failing three call quality tests during February 2015. Regarding claimant's failure to request the customer's email address and assure the other customer he would assist the customer with his or her issue during the call, the record fails to show that claimant consciously failed to meet those requirements, or that he consciously engaged in other conduct he knew or should have known would probably result in his failure to do so. At hearing, the employer's manager attributed claimant's errors to a "lack of focus." Audio Record at 16:12 to 16:34, 20:49 to 21:05, 23:12 to 23:59. Claimant may have been careless, even negligent, but the record does not show his errors were willful or wantonly negligent as defined under OAR 471-030-0038(1)(c).

The employer also discharged claimant, in part, because claimant failed to use the information given to him by a caller to verify the caller was authorized to access an account, and as a result breached a customer's account security. Because claimant requested the account information from the caller and allowed the caller to make the purchase even though the information did not match the account information, we infer that claimant did not look at the account information to verify the person on the telephone was the account holder. More likely than not, claimant knew he did not check the account information. His conscious indifference to the employer's known security requirement was wantonly negligent.

However, claimant's conduct on February 26, 2015 was an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Only acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

Claimant had violated the employer's expectations in the past by repeatedly failing to meet the employer's calls-per-hour requirement. Although claimant intermittently met the employer's requirement, the record does not show that claimant consciously engaged in conduct that made his calls too long, or that claimant's failure to complete more calls was the result of indifference to the consequences of his actions, and not mere inefficiency resulting from lack of job skills. The employer therefore failed to establish that claimant violated the employer's calls-per-hour requirement willfully or with wanton negligence. Claimant had, at most, one prior instance of poor judgment on April 17, 2014, ten months earlier. Thus, although claimant's exercise of poor judgment on February 26 may not have been a single occurrence, it was an infrequent one, and, because his other performance issues were not willful or wantonly negligent, his conscious indifference on February 26 was not part of a pattern of willful or wantonly negligent behavior. Finally, claimant's conduct did not violate the law, was not tantamount to unlawful conduct, and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship. The employer did not assert, nor does the record show, that claimant's conduct otherwise made a continued relationship impossible.

In sum, the employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-40268 is affirmed.

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

DATE of Service: August 19, 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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