

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1082

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 152337). The employer filed a timely request for hearing. On September 2, 2015, ALJ R. Davis conducted a hearing, and on September 4, 2015 issued Hearing Decision 15-UI-43957, reversing the Department's decision. On September 11, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Alpine Access, Inc. employed claimant as a customer care professional from October 15, 2014 until June 16, 2015. Claimant worked from her home answering inquiries from credit card customers about their accounts.

(2) The employer expected claimant to refrain from mistreating customers, and to refrain from disconnecting a customer's call unless the customer was abusive and the customer had been given two warnings that the call was going to be terminated if the customer did not stop his or her behavior. Claimant understood the employer's expectations.

(3) Claimant took approximately twenty calls per hour from credit card customers, or approximately one hundred calls per day. The employer's guidelines were that call durations should average three minutes.

(4) On May 15, 2015, claimant received a call from a customer who wanted to confirm her credit card balance and the date by which it needed to be paid because the customer was participating in a credit card promotion. Claimant tried to explain to the customer how the promotion operated. The customer became confused and began to question claimant. Claimant told the customer that “if she stopped interrupting her when asking a question she would get her answer.” Exhibit 1 at 8-9. The call then disconnected.

(5) On June 1, 2015, claimant received a call from a cashier at a retail store who had a credit card customer in the store with questions about the balance owed on the customer’s credit card account since she was participating in a “no interest” promotion. Transcript at 12; Exhibit 1 at 9. Claimant reviewed the account while the cashier at the store relayed information to her from the customer. Claimant spent over ten minutes sorting out the account and reallocating the customer’s credit card payments so the customer could maximize her benefits under the promotion. Transcript at 13. Rather than continuing to supply information to claimant through the store cashier, the customer took the phone to speak directly to claimant, told claimant that her reallocation calculations were incorrect, and asked claimant, “How are you going to fix this?” Exhibit 1 at 9; Transcript at 13. Claimant then stated to the customer, “[W]hat do you think I have been doing for the last 10 minutes?” *Id.* The customer accused claimant of having been rude. The call then disconnected.

(6) On June 12, 2015, claimant received a call from a customer who asked why she had been contacted by the credit card company’s collections department. Claimant told the customer that the account was past due. The customer then asked for information about when the last credit card statement was issued and the address where it had been sent. Claimant told the customer that she could not provide that information because the customer was not the primary account holder. The customer became upset and asked to speak to a supervisor. Exhibit 1 at 9; Transcript at 18. Claimant said, “Absolutely.” *Id.* The call then disconnected.

(7) Between approximately June 1, 2015 and June 15, 2015, claimant experienced problems with her phone and calls were being disconnected for no reason. Claimant brought up this problem in “Main Chat,” the online chat room that the employer made available for its customer care representatives to discuss issues they were having with their work and to obtain advice about what they might do to solve them. Some of the representatives in the chat room told claimant they were experiencing similar problems with their phones.

(8) Sometime before approximately June 15, 2015, a credit card company contacted the employer to state that a cardholder had complained that claimant was “rude” to her and did not provide adequate assistance to her in using the credit card’s automatic system. Exhibit 1 at 10.

(9) On June 15, 2015, the employer received two additional complaints from the credit card company about the manner in which claimant had dealt with calls she received. Claimant’s team lead reviewed tapes of calls in which claimant had participated and discovered the calls of May 15, June 1 and June 12, 2015. The lead also audited claimant’s utilization reports between June 1 and June 12, 2015 and determined that it appeared that claimant had disconnected seven calls she received, often in mid-sentence. Exhibit 1 at 9, 11.

(10) On June 16, 2015, the employer discharged claimant for mistreating customers and for hanging up on them.

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. 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. 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).

In Hearing Decision 15-UI-43957, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that, although the testimony of each party's witnesses was in conflict about how claimant handled the calls at issue and whether she was rude or intentionally disconnected the calls, the employer's evidence was the more persuasive. Hearing Decision 15-UI-43957 at 3. To support his conclusion, the ALJ cited claimant's inability to recall some of the calls, the fact that the employer's team lead had reviewed tapes of the actual calls and the implausibility that claimant might have inadvertently disconnected some calls because "in each of the calls referenced by the employer, the disconnection happened just after a negative interaction with the customer." Hearing Decision 15-UI-43957 at 3. We disagree.

With respect to claimant's alleged rudeness during the calls, the employer's witness, the team lead, seemed to have no independent recollection of the calls and stated as much at the hearing. Transcript at 9, 10, 12, 17. The most reliable evidence available about the calls was the notes the team lead created contemporaneously with her review of the calls and claimant's recollections of them. The employer did not contend in any of these calls that claimant personally insulted the customers, used foul language, yelled or raised her voice or did anything that reasonably could be construed as abusive. Claimant's behavior during the call on May 15, 2015, when she asked the customer to stop interrupting her, was not unambiguous customer mistreatment. The employer did not rule out that claimant was merely trying stop and redirect the customer so the customer would listen to her explanation. Claimant's behavior during the call on June 1, 2015, when she referred to her activities to correctly reallocate the payments that had been received on the account, also was not unambiguously mistreatment. From the available evidence, it appears that claimant had spent a relatively long time on the call to sort out the customer's account, claimant had been interpreting information she received about the customer's account through the cashier and, when the customer spoke to her directly, the customer was apparently suggesting that claimant had not been helping her. Under these circumstances, claimant's somewhat rhetorical statement of "what do you think I have been doing for the last ten minutes?" can reasonably be interpreted as justifying her activities to the customer and not as attacking the customer. Nothing about what claimant said during the June 15, 2015 call, as described by the employer's witness, was even arguably rude or mistreatment. There was insufficient specific evidence about the customer call

underlying the first contact from the credit card company, sometime before June 15, 2015, to support a determination that claimant was rude or mistreated that customer. In sum, the employer did not meet its burden to show by the language that claimant used during the calls at issue, her demeanor or her method of expressing herself that claimant mistreated any of those customers.

With respect to claimant's alleged hanging up on customers before making three attempts to stop unreasonable or extreme behavior from a customer, the ALJ was incorrect that all of them occurred after a negative interaction with the customer. The call on May 15, 2015 might not have involved a particularly negative interaction with the customer when viewed in the context of the call and claimant's apparent need to communicate information to the customer. The same can be concluded about the calls on June 1 and June 15, 2015. In connection with the seven calls reviewed specifically for hang-ups, four of them were not sufficiently described to characterize what the nature of the interactions might have been, including several where for no discernible reason the phone disconnected mid-sentence or immediately after the customer identified himself or herself. Exhibit 1 at 10-11. The principal basis on which the ALJ inferred the hang ups to have been consciously initiated by claimant is not supported by the evidence in the record.

The employer's witness did not specifically rebut claimant's testimony that she disconnected calls using an icon on the tool bar of her computer and that she sometimes inadvertently clicked that icon when she was not intending to do so, or when she intended to click the icon to transfer the call to another person or department. Transcript at 41. Claimant's explanation for how she might have unintentionally disconnected calls is corroborated by the sequence during the call on June 12, 2015, when it makes no sense that she would intentionally disconnect the call right after stating that she was going to transfer it to a supervisor. While the employer's witness appeared to contend that it was not possible for the employer's phone system to malfunction and spontaneously disconnect customer's calls, the witness did not offer any evidence to support this contention or explain why it was impossible. Transcript at 54. The employer did not show that claimant's contention that she experienced such spontaneous disconnections before and during June 2015 was likely inaccurate and it did not rebut her testimony that she and other customer care professionals discussed this ongoing problem in the employer's chat room around early June 2015. Transcript at 42, 49-50, 54-55. Claimant's contention about the reasons her phone might have disconnected customers without her deliberate action was corroborated by the several inexplicable hang ups shown on the employer's call audit, often occurring very early in a call and without any apparent provocation. Exhibit 1 at 10-11. Claimant's two explanations for how the calls might have appeared to have been disconnected by her, when she did nothing or when she erroneously clicked the wrong icon on her tool bar, are not implausible and were not persuasively rebutted by the employer. Absent evidence ruling out claimant's explanations for why the calls might have been disconnected, the employer did not meet its burden to show that the calls were disconnected as a result of claimant's willful or wantonly negligent behavior. *See* OAR 471-030-0038(3)(c) (behavior is wantonly negligent only when a claimant is consciously aware of his or her behavior). As a result the employer did not demonstrate that claimant 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-43957 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 6, 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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