

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1325**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 144535). The employer filed a timely request for hearing. On October 14, 2015, ALJ Frank conducted a hearing, and on October 23, 2015 issued Hearing Decision 15-UI-46475, reversing the Department's decision. On November 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new facts that she did offer during the hearing. Although claimant stated that she "did not feel that I communicated my position well at all" at the hearing, she did not show that factors or circumstances beyond her reasonable control prevented her from reasonably offering this information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present in her written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Consumer Cellular, Inc. employed claimant as a customer service representative from February 2, 2014 until July 30, 2015.

(2) The employer routinely reviewed calls that customer service representatives participated in and scored them to determine the adequacy of their performance. The employer expected that would fail not more than one reviewed call in month, would have not more than one failed call in three consecutive months, and would have not more than one failed call in any four months during a twelve month period. Calls about a customer's problems might be failed if a representative did not orally "acknowledge" the reason that the customer had called the employer, did not confirm with the customer that the representative correctly understood the reason for the call, and did not affirmatively state that the representative would assist the customer. Audio at ~ 9:55. Calls in which a customer inquired about services might be failed if a representative did not follow the sales script and ask the customer if the customer wanted to sign up that day for the service and did not attempt to "overcome [the customer's]

hesitation” by, for example, stating that agreement to the service included a “risk-free guarantee” or that the service could be cancelled at any time if the customer was not satisfied with it. Audio at ~11:59, ~12:21. Claimant was aware of the employer’s call reviews, the criteria on which the calls were scored, the factors that might lead to a failed call and the guidelines for the permissible number of failed calls in a period of time.

(3) Claimant handled approximately 1,000 calls each month. Prior to May 1, 2015, the employer notified claimant that she was failing an excessive amount of reviewed calls. On May 1, 2015, claimant entered into a plan with the employer to improve her performance during calls that she handled. In that plan, claimant committed to cover all required items in the employer’s scripts, to create and consult a checklist during the calls to ensure that she did so, and to overcome customer’s hesitations or objections to sales by various means set out in the plan. Audio at ~16:00, ~16:22.

(4) Shortly before July 30, 2015, the employer reviewed and scored calls claimant had handled during July 2015. In one of the reviewed calls, claimant received a failing score of 0 percent because she failed to acknowledge to the employer’s satisfaction the reason that the customer had called and failed to state that she was going to assist the customer to resolve the perceived problem. In another one of the reviewed calls in which a customer inquired about one of the employer’s services, claimant received a failing score of 76 percent because the employer determined that she did not ask the customer to consummate the sale and, when the customer stated that the customer did not want to immediately sign up for the service, claimant did not try to overcome the customer’s unwillingness to sign up. As a result of these failed calls, claimant had failed two or more reviewed calls in seven months during a twelve month period.

(5) On July 30, 2015, the employer discharged claimant for the call scores she received on two of the reviewed calls during July 2015.

**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-46475, the ALJ concluded that the employer discharged claimant for misconduct because claimant had willfully violated the employer’s expectations about how she would handle calls and what she would say during those calls. Hearing Decision 15-UI-46475 at 4. The ALJ reasoned that claimant had admitted during the hearing that “in the interest of pleasant [customer] service, she had deliberately forgone the required sales attempts, or repeated attempts, upon hearing an

initial refusal or statement of the call's purpose" and this purported "admission" was apparently sufficient for him to conclude that she had done so during the two calls in July 2015 that are at issue here. Hearing Decision 15-UI-46475 at 4. We disagree.

At hearing, claimant's testimony was clear that she did not recall the two calls in July 2015 that led to her discharge. Audio at ~25:21, ~27:26. Claimant's testimony was equally clear that she had tried to comply with the employer's expectations during all customer calls. Audio at ~26:20, ~27:10, ~28:35, ~29:55, ~30:45, ~31:40, ~36:42. Claimant agreed that during some reviewed calls out of the 1,000 she received in a month, she might have overlooked some of the employer's required statements, but she was adamant that she had not done so willfully, with deliberate intention or with conscious knowledge she was not complying with the employer's standards. Audio at ~26:59, ~27:10, ~28:35, ~29:06, ~29:34, ~30:20, ~30:45, ~31:40, ~32:42. While claimant speculated that she might have become sidetracked during some calls from meeting the employer's call requirements due to the customer's "blurting" a great deal of information, becoming "rabid," or because the customer had at the outset of a call been insistent that he or she was not going to sign up for a sale, the ALJ was incorrect that claimant had thereby admitted that she was "deliberately" non-compliant with the employer's requirements. Audio at ~25:50, ~26:20, ~27:10; Hearing Decision 15-UI-46475 at 4. It appeared that the ALJ seized and characterized claimant's speculation as a "decision" not to comply with the employer's expectations on claimant's speculation. In addition, the ALJ cut off claimant's many attempts during the hearing to explain what she meant and finally accused claimant of "contradicting [herself]" when she tried to elaborate what might have led to reviewed calls on which she received a failing score. Audio at ~29:47, ~29:55, ~30:16. The ALJ effectively forestalled claimant from explaining herself or her state of mind. Viewing the record fairly, claimant's speculation was not admission or tantamount to an admission of how she handled the two calls during July 2015 or that she willfully disregarded the employer's standards during those calls. Because there was no reliable evidence that claimant's failure to comply with the employer's standards during the reviewed calls in July 2015 was the result of a conscious decision not to comply with the employer's standards, was undertaken with a conscious awareness that she was probably acting contrary to the employer's expectations or was the result of a deliberate decision not to comply with those expectations, the employer did not meet its burden to show that claimant's behavior was a willful or wantonly negligent violation of the employer's standards. While the employer may have shown that claimant did not comply with its expectations during the two reviewed calls in July 2015, it did not show that the non-compliance resulted from the required state of mind to establish disqualifying misconduct.

The employer did not show that claimant engaged in misconduct during the two calls in July 2015 that caused it to discharge claimant. The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 15-UI-46475 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** December 10, 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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