

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0017

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 150251). The employer filed a timely request for hearing. On December 17, 2015, ALJ Triana conducted a hearing, and on December 18, 2015 issued Hearing Decision 15-UI-49734, reversing the Department's decision. On December 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) National Electronics Warranty employed claimant as a case management representative from October 31, 2011 until October 27, 2015.

(2) The employer expected claimant to refrain from releasing or disconnecting customer calls and to allow only the customer to release or disconnect the call. Notwithstanding this expectation, until October 17, 2015, claimant thought she was permitted to release customer calls after the call was completed.

(3) On October 17, 2015, claimant's supervisor met with her about her performance. At that time, the supervisor told claimant that, because of the nature of the employer's phone reports that evaluated her performance, she should never release a customer call, even when the transaction with the customer was fully completed, but should allow the customer to disconnect the call. Claimant's supervisor also told her that the employer was placing a trace on her phone to document the manner in which she interacted with customers. Claimant was away from the workplace from October 18, 2015 until October 26, 2015.

(4) On October 22, 2015, claimant's supervisor and two other supervisors reviewed recordings of fourteen calls in which claimant had participated between October 2, 2015 and October 16, 2015. During two of those recorded calls, claimant answered the customer's calls and then, at some point, her phone became muted. Those two customers disconnected their calls when, apparently, they received no further responses from claimant. Eight of those fourteen customer calls were routed to claimant's

headset automatically, but claimant did not answer them and, sometime later, claimant released those calls.

(5) On October 27, 2015, the employer discharged claimant for intentionally releasing eight customer calls before they were completed between October 2, 2015 and October 16, 2015 and for intentionally avoiding two customer calls during this same period by muting her phone until the customer disconnected the call.

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 show 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-49734, the ALJ concluded that the employer demonstrated that it discharged claimant for misconduct. The ALJ reasoned that, since the employer showed that claimant had released eight customer calls and muted herself on two additional calls, it demonstrated that claimant's conduct was, at a minimum, a wantonly negligent violation of its expectations. Hearing Decision 15-UI-49734 at 3. We disagree.

With respect to the employer's expectations about releasing or disconnecting customer calls, the employer's witness testified that the employer had a "zero tolerance" policy prohibiting representatives from ever doing so, and then went on to testify that there were some occasions when, despite the employer's expectations, a representative needed to release a call. Transcript at 16. Claimant testified that, before October 17, 2015, she was under the impression that the employer did not prohibit her from releasing calls if the transaction with the customer was finished and, before learning of this "zero tolerance" policy, she had regularly released at least 85 percent of her calls and had never been warned about doing so. Transcript at 27. The employer did not dispute that this had been claimant's regular practice and that, despite many audits of claimant's phone performance, she was never cautioned against releasing calls under any circumstances until October 17, 2015. The mere fact that claimant released calls does not demonstrate misconduct. To establish misconduct based on releasing calls, the employer must show that claimant willfully or with wanton negligence released calls when she knew or should have known that the transaction with the customer had not been completed.

With respect to the two calls in which claimant's phone was muted in mid-call, the employer's witness testified that sometimes this accidentally occurred because the mute button on a representative's phones was next to the button that operated the headset, and the representative inadvertently pushed the wrong button. Transcript at 14; *see also* Transcript at 38. Inadvertent errors of this type are not misconduct

since, by definition, the individual was not aware of his or her behavior when the error was made and was not aware or reasonably should have been aware that he or she was probably going to violate the employer's standards. *See* OAR 471-030-0038(1)(c). The employer did not rule out that claimant accidentally pushed the mute button when she had intended to push the headset button or some other button on the phone and did not present sufficient evidence to show that doing so inadvertently twice in the two week period for which her calls were sampled was unlikely. The employer did not show that the two calls that were muted on claimant's phone could only have been attributable to claimant's willful or wantonly negligent behavior in violation of the employer's standards.

With respect to the eight calls that claimant never answered and then released, the employer's witness stated that was "confusion." Transcript at 14. The employer did not show that, under the circumstances, claimant was aware that those calls had come to her or that she released those calls knowing that she was disconnecting calls from customers. The employer also did not rule out that accidental errors or other inadvertent events caused those calls not to be answered or to be released. On this record, the employer did not show that claimant's behavior in connection with those eight calls was a willful or wantonly negligent violation of the employer's standards.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-49734 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 22, 2016

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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