

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0329

*Reversed
No Disqualification*

PROCEDURAL HISTORY: On November 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct (decision # 93641). The employer filed a timely request for hearing. On March 8, 2016, ALJ Turner conducted a hearing, and on March 9, 2016, issued Hearing Decision 16-UI-54643, concluding that the employer discharged claimant for misconduct. On March 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Zones, Inc., a company that provided information technology solutions and services to customers, employed claimant as an onsite inside sales representative from August 4, 2014 until October 5, 2015. Claimant's job duties included working onsite with one of the employer's vendors, serving the employer's customers, and assisting in various assigned projects.

(2) On August 17, 2015, claimant's supervisor placed him on a 90 day performance improvement plan. The plan noted as areas of concern claimant's use of foul and insulting language in the workplace, his inability to work cooperatively with his colleagues, and his failure to complete assigned projects by established deadlines. The plan directed claimant to exhibit professionalism in the workplace by refraining from the use of foul language and respecting the opinions of others, and to complete a specific project by August 31, 2015.

(3) After he was placed on the performance improvement plan, claimant "toned down his language" and "worked really hard trying to get everything done right on time." Transcript at 21-22. Claimant completed a number of trainings, and met weekly with his supervisor to discuss his work performance. Although claimant completed the project he was assigned by August 31, his supervisor was dissatisfied with the results and required that claimant perform additional work on the project. As a result, claimant did not satisfactorily complete the project until September 8. Transcript at 23.

(4) Claimant's supervisor concluded that claimant had continued to use foul language while on the plan, and noted that he failed to complete the assigned project by August 31. On October 5, 2015, the

employer discharged claimant for failing to fulfill the requirements of the performance improvement plant.

CONCLUSION AND REASONS: We disagree 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. 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. 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).

In Hearing Decision 16-UI-54643, the ALJ concluded that the employer notified claimant of its reasonable expectations in the August 17 performance improvement plan – to refrain from using foul language and to complete work by established deadlines – and that his failure to comply with the requirements of this plan “constituted at least a wantonly negligent disregard for the employer’s reasonable standards of behavior.” Hearing Decision 16-UI-54643 at 3. We disagree. Inadequate performance, in and of itself, is insufficient to establish willful or wanton negligence. To establish willful or wantonly negligent behavior, an employer must prove that a claimant consciously engaged in conduct he knew or should have known probably violated the employer’s expectations. The record in this case is devoid of any such evidence. To the contrary, claimant testified that after he was placed on the performance improvement plan, he stopped using foul language, participated in a number of trainings designed to help him address deficiencies identified in the performance improvement plan, and “worked really hard” to complete work on time. Because the record fails to show that claimant consciously engaged in conduct he knew or should have known probably violated the employer’s expectations, we conclude that the employer did not meet its burden to demonstrate that the conduct for which it discharged claimant was willful or wantonly negligent.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-54643 is set aside, as outlined above.

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

DATE of Service: April 20, 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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