
State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

816
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0892

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81847). Claimant filed a timely request for hearing. On July 20, 2016, ALJ Frank conducted a hearing, and on July 27, 2016 issued Hearing Decision 16-UI-64547, concluding the employer discharged claimant, but not for misconduct. On August 1, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular, Inc. employed claimant from November 26, 2012 to May 15, 2016 as a team support specialist.

(2) Claimant's primary job duty was to provide support to his coworkers by explaining the employer's policies and assisting with troubleshooting. The employer expected claimant to be courteous and convey an enthusiastic, positive attitude when he performed his job duties. Claimant understood those expectations.

(3) Claimant was diagnosed with attention deficit disorder (ADD) before he started working for the employer in 2012. Claimant's doctor advised him that making impulsive statements was a symptom of ADD. Claimant also experienced side effects from his ADD medication, including trouble sleeping and irritability.

(4) On April 30, 2016, claimant's coworker approached claimant while he was assisting three or four other coworkers with a question about a customer request. Claimant told the coworker, "it's right here," and pointed at the portion of the employer's policy that addressed the coworker's question on the computer screen. Exhibit 1 at 7. The coworker was upset by the interaction and reported to her supervisor that claimant's tone and body language was rude and that claimant did not give her his full attention.

(5) On May 15, 2016, the employer discharged claimant for allegedly being rude to a coworker on April 30, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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).

The employer discharged claimant because it was dissatisfied with claimant's alleged demeanor during an interaction between claimant and a coworker on April 30, 2016. The employer's witness alleged at hearing that claimant was rude and "made the [coworker] feel like she wasn't intelligent" when he responded to the coworker's question about a customer situation. Exhibit 1 at 7-8. The employer had a right to expect claimant to be courteous to his coworkers, and claimant understood that expectation. However, the preponderance of the evidence fails to show claimant's conduct on April 30 was, in fact, rude or discourteous, or that claimant was conscious of his demeanor and indifferent to the consequences of it.

The employer's evidence that claimant was rude to his coworker was based on hearsay evidence about claimant's demeanor and manner of speaking to the coworker, and the coworker's subjective response to the interaction. The employer's witness testified that a supervisor told her that the coworker was "visibly upset" after telling her that claimant "spoke down to her [and] was very rude and curt" on April 30. Exhibit 1 at 8, Audio Record at 15:41 to 15:59. Claimant, however, testified that he did not intend to be rude to the coworker or recall being rude to her. Claimant's testimony does not show that he behaved as the employer alleged or that his conduct was clearly objectionable, such as if he raised his voice or used sarcastic or foul language toward his coworker. Nor does the record show that claimant's conduct of providing a brief answer and pointing to the written answer to the coworker's question was discourteous under the circumstances where claimant was assisting multiple employees at the same time during a busy day of the month. Additionally, where, as here, the information claimant supplied was firsthand, it is entitled to more weight than the employer's hearsay evidence, particularly when the employer's evidence was *double* hearsay, filtered through a supervisor's impression of what the coworker said and felt on April 30. Thus, the preponderance of the reliable evidence shows that claimant was not rude to his coworker, but was merely trying to efficiently assist multiple coworkers at the same time.

Moreover, even had EAB concluded that claimant's conduct on April 30 was rude and violated the employer's expectation, the record does not show claimant consciously engaged in such conduct. Claimant testified that he was assisting three or four other coworkers at the same time, feeling "completely overwhelmed," and trying to "assist and move on to help the others." Audio Record at 26:51 to 27:24. To the extent claimant's reaction to his coworker on April 30 was unsatisfactory to the

employer, the record shows that it was more likely than not that claimant did not make a conscious decision to react to his coworker in the manner that he did, and that claimant's conduct was attributable to the impulsivity and irritability claimant sometimes experienced due to his ADD.

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

DECISION: Hearing Decision 16-UI-64547 is affirmed.

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

DATE of Service: August 26, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.