

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1413

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 16-UI-72947). The employer filed a timely request for hearing. On December 13, 2016, ALJ R. Frank conducted a hearing, and on December 14, 2016 issued Hearing Decision 16-UI-72947, affirming the Department's decision. On December 16, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Roth IGA Foodliner employed claimant, last as a deli clerk, from June 9, 2015 to August 20, 2016.

(2) The employer expected claimant to provide good customer service to customers and avoid engaging in behavior that resulted in customer complaints. Claimant understood the employer's expectation.

(3) Customers repeatedly complained to the employer about claimant. On June 4, 2016, a customer who had interacted with claimant commented to an employee, about claimant, "what is her problem?" Exhibit 1. On June 8, 2016, the employer held a deli meeting, which claimant attended, during which the employer discussed customer service complaints. On June 13, 2016, June 17, 2016, and June 27, 2016, three customers complained about claimant's behavior toward customers and a coworker. Exhibit 1. On July 5, 2016, the employer issued claimant a written warning. On August 10, 2016, three people complained that claimant's behavior was "rude" and she had provided "poor customer service." Exhibit 1. The employer issued claimant a final written warning.

(4) After the employer warned claimant about the complaints she tried to change her behavior so she would not receive complaints. Claimant did not know which coworkers or customers had considered

her behavior rude or complained about her, or specifically what it was about her behavior that they disliked, so she tried to smile at everyone and be nice to them. The employer observed that claimant made an effort to change her behavior after receiving the warnings.

(5) On August 11, 2016, a customer complained to an employee that claimant did not talk to her while helping her, talked to someone else and was rude to her. Another customer said claimant did not make eye contact with her, talked to another customer while helping her, and “threw her food at her.” Exhibit 1. On August 16, 2016, a customer complained to an employee that claimant was “rude,” “upset at him” and “had a bad facial expression,” and that he would not use the deli if claimant was working there in the future. Exhibit 1.

(6) On August 18, 2016, the employer discharged claimant because of the customer complaints.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant’s discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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 has the burden to prove that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because, after giving claimant a final written warning based on her repeated receipt of customer complaints, the employer received additional complaints about her. The complaints were fairly consistent, with allegations that claimant was “rude,” spoke with other customers instead of the customer she was helping, did not make eye contact, or had a displeasing facial expression. It appears based on evidence of those complaints that claimant’s demeanor or behavior toward customers was not consistent with the standards of behavior the employer expected of her. In order to establish misconduct, however, the employer must not only prove that claimant was, for example, rude or had a “bad” facial expression. Rather, the employer must also prove that claimant was willfully rude, meaning with intent to violate the employer’s expectations, or engaged in the behavior out of a conscious indifference to the standards of behavior the employer had the right to expect of her. The employer did not meet that burden in this case. Claimant testified, and the warnings the employer submitted into evidence corroborates, that claimant was not told the identity of the individuals who complained about her. The complaints were vague, for example, some alleging she was “rude” without explaining how it was that she demonstrated rude behavior and none identifying the complainant or detailed circumstances under which customers perceived claimant as rude. Moreover, both claimant and the employer’s witness testified that after receiving warnings as a result of the customer complaints, claimant made efforts to change her behavior and still continued to receive the complaints, making it

unlikely that the customer complaints were the result of claimant's willful or wantonly negligent behavior.

For those reasons, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-72947 is affirmed.

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

DATE of Service: January 12, 2017

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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