EO: 700
BYE: 201744

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

353
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0060

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 64426). Claimant filed a timely request for hearing. On January 9, 2017, ALJ S. Lee conducted a hearing, and on January 12, 2017 issued Hearing Decision 17-UI-74568, reversing the Department's decision. On January 17, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular, Inc. employed claimant from February 10, 2014 until November 8, 2016, last as a lead worker III.

(2) Claimant's job involved responding to customers' requests as assigned. The employer assigned to claimant and others the requests to which they were to respond through a computerized system. That system organized customer requests in a work queue, and employees were expected to access the system by depressing a "play" key, which showed the next request to be acted upon. After activating the system, an employee could "close" the request that appeared, "pend" it to show it was being worked on but additional information was required to complete the response, work on it immediately, show it as being "solved" or assign it to him or herself to be worked on later. The employer expected employees to "touch" at least eight requests per hour. The employer expected employees to work on the customer requests as the system presented them, and not to manually select the requests they would work on or to assign requests to themselves outside of the system. Claimant understood the employer's expectation as it was explained to her.

(3) In February 2015, claimant's then-supervisor held a staff meeting. Claimant asked the supervisor about how best to process "port-out requests," which generally were requests to transfer phone service from the employer to another carrier. "Port-out" requests required much less time to handle than other types of requests assigned through the employer's system. Claimant's manager told her that she should "prioritize" the requests she received through the system and manage them "like it's your own business." Transcript at 30, 31.

(4) Beginning sometime after the February 2015 meeting, claimant started to handling "port-out" requests she accessed by assigning them to herself but to defer working on them until she had accumulated "batch" of them, usually between five or ten. Transcript at 28. Claimant thought it was more efficient and her productivity was enhanced by consolidating her work on "port-out" requests in this manner. Transcript at 27. When claimant accessed a "port-out" request that she intended to postpone working on, she then immediately accessed another request through the computerized system and worked on it. In a day when claimant deferred work on certain "port out" requests, she completed all work on the port-out requests by the end of that work day. Claimant was never advised that this method of handling her workload was contrary to the employer's standards.

(5) Sometime in approximately the middle of October 2016, a new supervisor was assigned to claimant's department. On November 7, 2016, the new supervisor noticed in the course of the work day that claimant had deferred work on 33 "port-out" requests, 20 of which she had not completed work on at the time of the supervisor's observation. The new supervisor spoke with claimant about her handling of the "port-out' requests and claimant explained that she was grouping the requests for work later that day, that she usually grouped about five to ten port-out requests and that she must not have been "paying attention" when she deferred work on as many as 33. Transcript at 24. At that time, the supervisor suspended claimant for non-compliance with the employer's policies by the manner in which she had handled the "port-out" requests.

(6) On November 8, 2016, the employer discharged claimant for how she had managed the "port-out" requests she accessed on November 7, 2016.

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 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. 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).

At hearing the employer initially contended that claimant had bypassed the employer's computerized assignment system on November 7, 2016 and had preferentially assigned the "port-out" requests to herself to create an inflated appearance of productivity. Transcript at 5, 7, 8, 9, 25. However, after claimant testified that she had not gone outside of, or misused, the employer's computerized assignment system to receive 33 "port-out" requests in one day, the employer's witnesses agreed that, although that was an "unusually" high number, the employer could not demonstrate that claimant had done so. Transcript at 41, 43. As well, since claimant testified, and the employer did not dispute, that when she batched port-out requests for later work, she always completed all work on them on the day they were initially accessed, and she would have done so on November 7, 2016 except for her suspension, it is difficult to see how the batching of port-out requests could have artificially inflated her apparent productivity. Transcript at 39. Based on this record, the only alleged misconduct that claimant might

arguably have engaged in on November 7, 2016 was that she did not complete all work each "port-out" request as she accessed it, but deferred working on them until she had gathered a number of them.

Claimant plausibly testified that her practice of "batching" together the "port-out" requests for later work was based on the advice of her former supervisor about how best to manage her workload and her own belief that by doing so she was more efficient and her productivity was enhanced. Transcript at 26, 27. Claimant had been grouping together "port-out" requests for over a year and a half without any objection or correction from the employer. In fact, claimant did not hide what she had done and readily admitted to the employer on November 7, 2016, immediately before she was suspended, that it was her practice to batch the "port-out" requests in the way she had done and why she did so. Transcript at 23. On this record, given that claimant was following what was a reasonable application of her former supervisor's advice about her everyday workload management, it cannot be concluded that her behavior in deferring work on "port-out" requests until she had batched together several of them was a wantonly negligent violation of the employer's standards. Even if, despite her supervisor's advice, the employer expected that claimant would complete all work on each port-out request before accessing the employer's system for a new customer request, claimant's reliance on what he supervisor said to her was, at worst, a good faith error in understanding the employer's standards. Good faith errors, by definition, do not constitute misconduct. OAR 471-030-0038(3)(b). The employer did not meet its burden to show that claimant's behavior on November 7, 2016 was misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-74658 is affirmed.

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

DATE of Service: <u>February 24, 2017</u>

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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