

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0099

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 143841). Claimant filed a timely request for hearing. On January 18, 2017, ALJ Frank conducted a hearing, and on January 19, 2017 issued Hearing Decision 17-UI-75043, reversing the Department's decision. On January 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Embarq Management Company employed claimant as a sales and customer care representative from March 31, 2014 until November 3, 2016. Claimant worked remotely from his home answering calls from the employer's customers.

(2) The employer expected claimant to refrain from behavior undertaken to avoid customers' calls, including not using AUX phone codes that rendered him inaccessible to incoming callers, using closed keys that blocked him from receiving incoming calls and placing customers on hold for purposes other than to allow him to respond to customers' inquiries. The employer expected claimant to remain in the "ready state," or available to take and handle incoming calls, at least ninety percent of the time he was scheduled to work and to handle forty to fifty calls per eight hour shift. Claimant understood the employer's expectations.

(3) Sometime around August 4, 2016, claimant's supervisor issued a verbal warning to claimant based on the determination that he was available to take calls only 82.94 percent of the time he was working and that he placed customers on hold for excessively long periods of time. Exhibit 1 at 2. At that time, claimant's supervisor told him he was prohibited from using any AUX phone codes that rendered him unavailable to take customers' calls without approval from a supervisor. Audio at ~15:14. The employer required claimant to propose a plan to improve his performance and to adhere to that plan. For his performance improvement plan, claimant stated, "My action plan is to get myself to remain in available states to get as many contacts as possible." Exhibit 1 at 2.

(4) On August 22, 2016, claimant's supervisor issued a written warning to claimant based on the determination that claimant was available to take calls only 83.23 percent of the time he was working, placed customers on hold for excessively long periods of time and averaged only 34 customer contacts per day. Exhibit 1 at 4. In response, claimant stated, "My plan to correct [t]his is to improve my scores and get myself back on track for the remainder of the month." Exhibit 1 at 4.

(5) On October 12, 2016, claimant's supervisor issued a final written warning to claimant based on the determination that claimant was available to take calls only 85.20 percent of the time he was working. Exhibit 1 at 6. The employer concluded claimant was not meeting the employer's available expectation because, among other things, he was using AUX phone codes without supervisory approval and placing customers on hold for excessively long periods to avoid taking customers' calls. Exhibit 1 at 6. Claimant's supervisor told claimant he needed to improve the proportion of his work time that he was available to take customers' calls and reminded him that he was prohibited from using any AUX phone codes without a supervisor's approval. Audio at ~17:37; *see also* at ~14:45. As of October 20, 2016, claimant's availability had improved to 88.83 percent. Exhibit 1 at 9.

(6) On November 3, 2016, the employer discharged claimant for failing to improve his work performance after October 20, 2016. Exhibit 1 at 8.

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).

In Hearing Decision 17-UI-75043, the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned that claimant "repeatedly and continually used prohibited codes to render himself unavailable for customer calls" after the written warning that was issued to him on August 22, 2016. Hearing Decision 17-UI-75043 at 4. We disagree.

That claimant might not have met the employer's performance expectations as to the percentage of time he was available to take customers' calls is not sufficient, alone, to show that he engaged in misconduct. Rather, the employer must demonstrate that claimant's failure to achieve the employer's expectations was due to some willful or wantonly negligent behavior on his part. From the evidence the employer presented, the employer discharged claimant specifically for his failure to comply with the employer's standards after October 20, 2016 or, in other words, for his alleged call-avoiding behaviors after October 20, 2016. Exhibit 1 at 9.

After claimant was warned several times about his failure to meet the employer's availability expectations, the percentage of time he was available to take customers' calls steadily increased from 82.94 percent on August 4, 2016 to 88.83 percent on October 20, 2016. From October 20, 2016 through

November 3, 2016, the performance period that caused the employer to discharge claimant, the employer did not present evidence, as it had for claimant's behavior prior to October 20, 2016, that he actively avoided taking calls by, for example, making unauthorized use of AUX codes or closed key status, by putting customers on hold for excessively long periods, or by any other actions. Claimant testified affirmatively that during this period he obtained a supervisor's approval each time he used AUX codes and never entered into closed key status without approval. Audio at ~31:16, ~33:40, ~34:28, ~35:18, ~35:28. In view of claimant's rebuttal, and the employer's failure to present specific evidence, we disagree with the ALJ and conclude the employer did not satisfy its burden to show claimant willfully or with wanton negligence avoided customers' calls after October 20, 2016. On this record, the employer did not demonstrate that claimant engaged in misconduct for which it discharged claimant.

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

DECISION: Hearing Decision 17-UI-75043 is set aside, as outlined above.

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

DATE of Service: February 23, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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