

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0213

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81223). Claimant filed a timely request for hearing. On February 1, 2017, ALJ M. Davis conducted a hearing, and on February 2, 2017 issued Hearing Decision 17-UI-76048, reversing the Department's decision. On February 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Sykes Enterprises, Inc. employed claimant as customer service agent in its call center from January 23, 2012 until November 7, 2016.

(2) The employer expected claimant to take only one 30 minute lunch break and two 30 minute rest breaks during each eight hours worked. The employer also expected claimant not to conduct personal business while on work-time. The employer further expected claimant not to take action for the purpose of avoiding customer calls, such as disconnecting calls, not answering calls, or failing to release calls after customers had disconnected from them. Claimant understood the employer's expectations.

(3) Claimant had Crohn's Disease. When claimant experienced a flare of Crohn's, he needed to use the restroom frequently and sometimes needed to leave work. As of October 2016, the employer had authorized a workplace accommodation for claimant due to Crohn's that permitted claimant to take breaks "as needed." As of the same time, the employer had authorized an intermittent leave for claimant that allowed him to take eight hours away from work every two weeks due to flares of his Crohn's, and to attend pre-scheduled physician's appointments.

(4) On October 21, 2016, the employer issued a final written warning to claimant for allegedly remaining on a phone line after the customer had disconnected from the call and pretending as if he were

still actively involved with the customer's call. The employer assumed he did so in order to avoid handling other customer calls.

(5) On October 31, 2016, claimant was on a customer call and needed to contact a supervisor to obtain permission to proceed with a request from the customer. Claimant was on hold for approximately ten minutes while waiting to be connected with the supervisor. During the time claimant was on hold, claimant accessed his personal PayPal account online through a window tab that was already open to determine if a deposit had been received into it. Claimant also accessed his email account at work to learn the status of a leave of absence request. Also on October 31, 2016, the employer reviewed claimant's timesheets. The employer discovered that between October 18 and 31, 2016, claimant had worked 36.7 hours but 15.5 hours of that time was coded as having been for lunches and breaks. The employer assumed that claimant had taken excessive lunches and breaks during that two week period.

(6) On November 7, 2016, the employer discharged claimant for his activities during the October 31 2016 call and for the lunches and breaks he had taken between October 18 and 31, 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 demonstrate claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's position at hearing was that the two alleged violations of its policies by claimant that it discovered on October 31, 2016 were the reason that it discharged him. Audio at ~8:36, ~10:23. Each alleged violation is addressed in turn.

With respect to the longer than expected lunch and rest breaks reported for claimant between October 18 and October 31, 2016, claimant denied he consciously took excessively lengthy breaks but contended that he probably forgot to clock in or log in after leaving for some breaks, possibly because he needed depart from the workplace due to symptoms of a Crohn's Disease flare. Audio at ~35:51. The employer did not present evidence that rebutted or tended to rebut claimant's plausible explanation. Because the employer's evidence failed to rule out that the length of time reported in the employer's records for claimant's breaks between October 18 and October 31, 2016 was inaccurate and resulted from his innocent failure to clock or log back in from a break, the employer did not meet its burden to show that the length of claimant's breaks was either a willful or a wantonly negligent violation of the employer's standards.

With respect to the call claimant handled on October 31, 2016, the employer contended that claimant violated its standards by staying on the phone line after the customer had disconnected, pretending he was still dealing with the customer and reviewing his personal emails and personal PayPal account. Audio at ~10:23. Claimant contended that he had put the customer on hold while seeking an authorization from a supervisor, denied accessing personal emails, but agreed that he reviewed his

personal PayPal account during that hold period and Audio at ~29:28, ~30:46. Neither party presented any evidence that corroborated the party's assertions. Since there is no reason in the record to doubt the credibility of either party, the evidence about whether claimant released the call and pretended to still be on the line, as opposed to being on hold for a supervisor, and accessed his personal emails is evenly balanced. When the evidence on a disputed issue is of equal weight, the uncertainty is resolved against the employer since it is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not demonstrate that claimant engaged in call avoidance by pretending that he was still involved with a customer call when he was not or that he accessed his personal emails. However, claimant conceded both that he accessed his personal PayPal account during that hold and that he knew such behavior violated the employer's standards. Audio at ~30:40, ~31:42. By accessing his personal PayPal account during work hours on October 31, 2016, claimant violated the employer's expectations with at least wanton negligence.

While claimant's behavior on October 31, 2016 might have been wantonly negligent, it will not be considered misconduct if it is excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be excused as an isolated instance of poor judgment only if it was a single or infrequent act in willful or wantonly negligent violation of the employer's standards, and if it was not the type of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038((1)(d)(A); OAR 471-030-0038(1)(d)(C). Here, the employer's witnesses testified that claimant's only violation of the employer's standards before October 31, 2016 had been on October 21, 2016, for which he was issued a written warning for failing to release a customer's call after the customer disconnected. Audio at ~17:12; Exhibit 1 at 5. Claimant testified at hearing and wrote on that warning that, although he thought he had disconnected (or released) the call at issue from his end, the employer's phone system sometimes failed to respond to attempts to release calls, had failed to respond in this instance, and he therefore had not consciously violated the employer's standards when he handled the call. Audio at ~24:26, ~25:01, ~26:54; Exhibit 1 at 5. The employer did not dispute that the employer's system sometimes malfunctioned as claimant described and that it might have done so during the call at issue. On this record, the employer did not show meet its burden to show that the manner in which claimant handled the call on October 21, 2016 was a willful or wantonly negligent violation of the employer's standards. Since there was no demonstrated willful or wantonly negligent violation by claimant before the behavior that claimant engaged in on October 31, 2016, claimant's willful or wantonly negligent behavior on October 31, 2016 was a single or infrequent willful or wantonly negligent act in violation of the employer's standards. Claimant's behavior on October 31, 2016 meets the first prong of the test to be excused as an isolated instance of poor judgment.

Claimant's behavior on October 31, 2016 also did not cause an irreparable breach of trust in the employment relationship and did not fall outside the types of behavior that may be excused as an isolated instance of poor judgment. That claimant might have briefly accessed his PayPal account via an already-open window during period of prolonged hold, in which he otherwise was doing nothing except waiting, was understandable and, viewed in context, a relatively insignificant violation of the employer's standards. The employer did not dispute claimant's testimony that his brief access to his personal PayPal account did not disrupt his work and did not interfere with his performance of it. Audio at ~31:16. On these facts, a reasonable employer would not have concluded that claimant's behavior on October 31, 2016 was of a type that caused an irreparable breach of trust in the employment

relationship, or signified that it could not trust claimant to conform his behavior to the employer's standards in the future. Having met both prongs of the test, claimant's willful or wantonly negligent behavior on October 31, 2016 is excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-76048 is affirmed.

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

DATE of Service: March 17, 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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