

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0610

Affirmed
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 # 84458). The employer filed a timely request for hearing. On January 31, 2017, ALJ Murdock conducted a hearing at which claimant failed to appear, and on February 3, 2017 issued Hearing Decision 17-UI-76235, reversing the Department's decision. On February 23, 2017, claimant filed a request to reopen the hearing. On April 21, 2017, ALJ Murdock conducted a hearing, and on April 28, 2017 issued Hearing Decision 17-UI-82126 allowing claimant's request to reopen and affirming decision # 84458. On May 18, 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.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion allowing claimant's request to reopen are **adopted**.

FINDINGS OF FACT: (1) Alpine Access, Inc. employed claimant as a customer care professional answering phone calls for one of its clients from November 3, 2014 until November 4, 2016.

(2) The employer expected that claimant would not avoid answering calls, and would not deliberately release or disconnect calls before they naturally ended for the purpose of terminating the interaction with the caller. Claimant understood the employer's expectations.

(3) On October 4, 2016, a caller asked claimant if the caller could speak to someone who was "higher up" than claimant. Claimant placed the caller on hold in preparation for transferring the caller to a supervisor. While the caller was on hold, the call was disconnected. On October 8, 2016, claimant took a call in which the caller asked claimant if he was "awake" because the caller had to repeat himself several times during the call. Transcript at 9. Claimant apologized to the caller and then the call was disconnected. Also on October 8, 2016, claimant took a call in which the caller asked that money be

refunded to him. With the caller's permission, claimant placed the caller on hold to obtain instructions on how to deal with the caller's request. While the caller was on hold, the call was disconnected.

(4) On October 9, 2016, claimant took a call in which the caller became "frustrated" because claimant had to ask the caller to repeat his email address more than once. Transcript at 10. Claimant asked the customer for clarification and the call was disconnected. On October 16, 2016, claimant took a call in which the caller asked to speak to a supervisor about the caller's account. The caller was "upset" and "yelling." Transcript at 11. Claimant told the caller that he needed to access the caller's account. When the caller asked again to speak to a supervisor, claimant did not respond to the caller. The caller then stated, "You're not going to answer me" and the call was disconnected. Transcript at 11. Also on October 16, 2016, claimant took a call in which the caller became "upset" because the caller was not able to hear claimant. Transcript at 11. When the caller asked claimant to repeat himself, the call was disconnected.

(5) On October 17, 2016, claimant became involved in a lengthy call with a caller who needed directions in using a website. The caller did not understand what claimant was telling him. The call was abruptly disconnected. On October 18, 2016, claimant took a call in which the caller asked for assistance. Claimant tried to help the caller, but told the caller that he was unable to read to the caller verbatim all of the articles that would be of assistance to the caller. When the caller asked to speak to a supervisor, the call was disconnected. On October 23, 2016, claimant took a call in which the caller wanted claimant to research an issue. Claimant told the customer he was putting the customer on hold to look into the issue. The call was then disconnected.

(6) Sometime around or after October 23, 2016, the employer's customer received a complaint about how claimant handled the call he received on October 18, 2016, described above. Thereafter, the customer performed an audit of calls that claimant had handled to date on and after October 1, 2016 and discovered the calls on October 4, 8, 9, 16, 17 and 23, 2016.

(7) During the period of October 4 through 23, 2016, claimant experienced difficulties with calls being spontaneously disconnected in mid-call without warning or any action on his part. Claimant reported these occurrences to the employer.

(8) Sometime before November 4, 2016, the employer's representatives discussed with claimant the way in which he had handled phone calls he received between October 4 and October 23, 2016. Claimant told the employer that he had been having problems with calls being dropped and thought it was attributable to some technical issues with the employer's computer software.

(9) On November 4, 2016, the employer discharged claimant for the way in which he handled the calls he took on October 4, 8, 9, 16, 17, 18 and 23, 2016, believing that claimant had engaged in call avoidance and phone manipulation by disconnecting the calls he received on those days.

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).

The employer contended that claimant deliberately disconnected the calls he received on 4, 8, 9, 16, 17, 18 and 23, 2016 to avoid continuing his interactions with the callers. Transcript at 8. Claimant denied that he had anything to do with terminating those calls, and testified that he thought they were involuntarily disconnected due to "technical issues" with the employer's software interface with his phone. Transcript at 21, 24-25. Claimant also testified that he reported to the employer that calls to him were being spontaneously disconnected around the time those disconnections occurred and later, after the employer began its investigation of claimant's calls. Transcript at 26, 27, 29-30. While the employer disputed claimant's explanation and that claimant ever informed it that he was having a problem with calls being disconnected, there is no reason in the record to find that one party is more credible than the other or to doubt the testimony of one party in preference to the other. When the evidence on disputed issues is evenly balanced, the uncertainty must be resolved in claimant's favor since the employer carries the burden to persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Based on burden to proof principles, we accept claimant's testimony as accurate about the problems he had with calls spontaneously being disconnected during the period of October 1 through 23, 2016, that he informed the employer of the problem and that he did nothing to disconnect the phone calls at issue. Since claimant had no control over a malfunctioning phone system and did nothing to initiate the termination of the calls, claimant's behavior in connection with those calls was neither a willful nor a wantonly negligent violation of the employer's standards. The employer did not meet its burden to demonstrate claimant's misconduct.

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

DECISION: Hearing Decision 17-UI-82126 is affirmed.

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

DATE of Service: June 19, 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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