

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0620

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 131833). Claimant filed a timely request for hearing. On May 11, 2017, ALJ S. Lee conducted a hearing, and on May 18, 2017, issued Hearing Decision 17-UI-83776, concluding that the employer discharged claimant, but not for misconduct. On May 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTERS: On the application for review, the employer's representative wrote: "We requested to play the call into record, but were not provided the opportunity to do so." The employer's representative is apparently referring to a March 12, 2017 telephone call during which the employer alleges that claimant, a customer account advisor, spoke rudely and discourteously to a customer. The employer discharged claimant because it determined that her conduct during this phone call violated the standards of behavior it expected of its employees. To the extent the employer's statement is an argument, we will not consider it because the employer failed to certify that it provided a copy of this argument to the other party, as required by OAR 471-041-0080(2)(a) (October 29, 2006). Even if we had considered the argument, it would not have changed the outcome of this decision.

During the hearing, the employer's witnesses offered to make the audio recording of the March 12 call available to the ALJ, an offer that the ALJ did not accept. Transcript at 6 and 28. The hearing notice that the parties received for the May 11 hearing stated that the documents enclosed with the notice would be the only ones considered at the hearing, and instructed the parties that "[i]f you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to the ALJ..." Notice of Hearing at 1. The employer did not provide a recording of the March 12 telephone call to the ALJ and claimant prior to the hearing. Nor did the employer attempt to offer a recording of the March 12 call into evidence at the hearing or ask the ALJ to allow the employer to play it; the employer's witnesses merely asserted that the recording was available to the ALJ. Transcript at 6 and 28. Given that the employer's witnesses provided testimony about what claimant said during the March 12 call, as well as notes regarding the contents of the call (Exhibit 1), the ALJ had a sufficient

evidentiary basis for reaching the decision she did and did not err by not accepting the employer's offer to play an audio recording of the March 12 telephone call.¹

At the hearing, the ALJ admitted documents submitted by claimant as Exhibit 2. In this record this exhibit was not marked, however. We have therefore marked Exhibit 2 based on the ALJ's description. Exhibit 2 consists of the following pages: a cover letter and letter of explanation written by claimant (2 pages); an 11/8/16 performance evaluation (5 pages); and commendations regarding claimant's work from managers and customers (7 pages).

FINDINGS OF FACT: (1) Consumer Cellular employed claimant as a customer account advisor from October 3, 2012 until March 14, 2017. Consumer Cellular is a wireless telephone provider whose customer base is primarily individuals over 50 years old. Claimant's job duties included taking telephone calls from customers regarding issues with their telephones and bills for service, and helping customers to resolve these problems.

(2) The employer expected that its employees would treat all customers with respect and courtesy. If a customer became belligerent, the employer had a "stop, help, stop scripting" procedure employees were expected to follow to attempt to stop the customer's inappropriate behavior and move the call to resolution. Exhibit 1. This "stop, help, stop scripting" procedure was available to employees online. Claimant knew about and understood the employer's expectations regarding courteous service, both as a matter of common sense and because she had received and read a copy of the employer's policy when she was hired. Claimant was also aware that the "stop, help, stop scripting" policy was available online.

(3) Claimant's supervisor had "conversations" with claimant about problem calls claimant had with customers on February 16 and 19, 2016; July 13, 2016; August 1, 2016; September 27, 2016; and January 12, 2017. These conversations were intended to help claimant improve her performance and were not considered a form of discipline.

(4) On January 12, 2017, claimant received a call from a customer who was having difficulties using a new telephone. Claimant and a TSS, her lead worker, attempted to help the customer, but were unable to do so because the telephone was new to them and they were unfamiliar with its operation. Claimant interrupted the customer several times during the call, and at one point, demanded that the customer listen to her. The customer ended the call by hanging up; he then called back, and spoke to another of the employer's representative to obtain the help he needed. Exhibit 1.

(5) On January 13, 2017, claimant received a call from an angry customer who began yelling at claimant. Claimant yelled back at the customer, and did not follow the "stop, help, stop scripting" procedure. Claimant did not have a copy of the policy immediately available and, due to the heated nature of her interaction with the customer, did not feel she had the opportunity to look for the procedure it online. Transcript at 26-27.

¹ We also note that the employer did not submit an audio recording of the March 12 phone call to EAB and ask that EAB consider it as new information, which EAB may consider if the party offering the information demonstrates that the information is relevant and material to EAB's determination and that circumstances beyond the party's control prevented the party from offering the information at the hearing. OAR 471-041-0090(2) (October 29, 2006).

(6) On January 13, 2017, the employer reprimanded claimant in writing for “unsatisfactory work performance” in regard to her January 12 and 13 calls with customers. The reprimand warned claimant that “[f]ailure to correct this problem and/or future problems will result in future disciplinary action, including suspension without pay and/or possible termination.” Exhibit 1.

(7) On March 13, 2017, claimant received a call from a customer who needed help changing the time on her telephone. Because claimant was unsure that the customer could hear her, claimant talked loudly. The customer told claimant that she could not understand claimant, and asked claimant to get someone else to help her. Claimant asked a TSS for assistance; the TSS told claimant she was too busy to help and instructed claimant to transfer the call to a supervisor. While claimant was waiting for the call to be transferred to a supervisor, she said “this is fucking ridiculous,” referring to the behavior of the TSS. Claimant believed her phone was on mute when she made this comment.

(8) On March 14, 2017, the employer discharged claimant for discourteous treatment of a customer during the March 13 call, and failure to follow the appropriate procedure in attempting to resolve the customer’s problems.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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. 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. Isolated instances of poor judgment, good faith errors and mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant knew that the employer expected her to treat the mainly elderly customers she was responsible for assisting with courtesy and respect. The employer discharged claimant because it concluded that claimant failed to meet this expectation during a March 13, 2017 call from a customer, during which the employer alleged that claimant spoke loudly to the customer, and repeatedly interrupted the customer. The employer also alleged that when the customer said she could not understand claimant, and asked to speak to someone she could understand, claimant “should have continued to help the customer, using the resources available to her, reaching out to her TSS or Supervisor for advice if needed.” Exhibit 1.

Concerning claimant’s interaction with the customer during the March 13 phone call, the employer failed to meet its burden to show that claimant’s inability to satisfy the customer was the result of willful or wantonly negligent conduct. Claimant testified that she tried to reassure the customer, and, because the customer told claimant she was old, “was talking louder just to try to make sure she heard me

because I wasn't a hundred percent sure. I wasn't trying to be rude to her." Transcript at 15. Claimant's actions do not demonstrate a conscious indifference to the employer's expectation that she treat customers with respect and courtesy; to the contrary, they show that she attempted to fulfill these expectations, but was unsuccessful in doing so. Claimant's problems with the customer resulted from a lack of job skills in dealing with this customer, and not a deliberate refusal to comply with the employer's policy that she treat customers with courtesy and respect. Claimant's interaction with the customer therefore did not constitute misconduct.

Concerning claimant's alleged failure use "the resources available to her, reaching out to her TSS or Supervisor for advice if needed," the employer provided no evidence or testimony regarding what procedure it expected claimant to follow in "reaching out to her TSS or Supervisor" for assistance. Claimant provided un rebutted testimony that she did, in fact, consult with her TSS about the problematic phone call and was instructed to transfer the call to a supervisor. The employer therefore failed to demonstrate that claimant failed to meet its policy or expectations in regard to obtaining assistance from a lead worker or supervisor.

Concerning claimant's comment "this is fucking ridiculous," a reference to the refusal of the TSS to assist her with the caller, claimant made the remark when she believed her voice was muted. Claimant's comment was therefore meant to be a private criticism, and not intended not to be shared with anyone; it was only overheard because of her error in failing to take the steps necessary to mute her voice. A good faith error is not misconduct. OAR 471-030-0038(3)(b).

In sum, the employer failed to meet its burden to demonstrate it discharged claimant for misconduct. She is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-83776 is affirmed.

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

DATE of Service: June 14, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.