

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0720

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132839). Claimant filed a timely request for hearing. On June 1, 2017, ALJ Janzen conducted a hearing, and on June 2, 2017, issued Hearing Decision 17-UI-84750, concluding the employer discharged claimant, but not for misconduct. On June 14, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular, Inc. employed claimant, last as a technical support specialist, from April 6, 2015 to April 3, 2017.

(2) The employer expected claimant, as a technical support specialist, to respond to questions from and assist coworkers working as customer service representatives within and outside of her team. The employer also expected claimant to be courteous and helpful when doing so. Claimant was aware of and understood the employer's expectations.

(3) During claimant's employment, the employer regularly provided claimant with feedback concerning how she was performing her job. Some of the feedback was positive and some of the feedback was negative. Claimant attempted to and believed she was performing her job in accordance with the employer's expectations for her position.

(4) On March 27, 2017, the employer received a complaint from a customer service representative that was part of claimant's team that claimant was rude in responding to one of her questions. The employer suspended claimant while it conducted an investigation. During the investigation, several employees were interviewed and reported that claimant often appeared "kind of dismissive" and acted as if it was an inconvenience to assist the employees. Transcript at 7.

(5) On April 3, 2017, the employer discharged claimant for failing to meet its expectation regarding the quality of respectfulness toward coworkers it expected of its technical support specialists.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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.

In the present case, the employer discharged claimant for failing to meet the quality of respectfulness toward her team members and coworkers that it expected of claimant. During its investigation after the March 27 incident, the employer received feedback from several of claimant's team members and coworkers that claimant often appeared "dismissive" or that she considered them "a bother to her" when they asked her for assistance with a call or call issue. Transcript at 6, 7. However, prior to her discharge, the employer did not disclose to claimant the feedback it had received or give her any opportunity to respond to any negative comments made. At hearing, claimant credibly testified that she did recall some incidents where she may have appeared abrupt with a coworker, but that during those incidents, she was on "escalated" calls with customers that had asked to speak with a supervisor about a billing or service issue that had not been explained to their satisfaction by the customer service representatives initially spoken to and was probably focused on the call at hand. Transcript at 27. She also testified that she always intended to give the customer service representative she was speaking to the time that they needed to understand the correct approach to resolving problem calls. Transcript at 26, 27.

We agree with the ALJ that the record fails to show claimant consciously neglected to perform her responsibilities as a technical support specialist, or consciously engaged in other conduct she knew or should have known would probably result in her failure to meet the employer's expectations in that regard. Hearing Decision 17-UI-84750 at 3. In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence, meaning, to prove that it was more likely than not that the incident or incidents in question occurred as the employer alleged, and that whatever expectation claimant failed to meet was done with a willful or wantonly negligent mental state. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer presented only hearsay evidence regarding claimant's conduct toward coworkers, and the employer's witness admitted she did not witness any of the interactions on which the employer based its discharge decision. Transcript at 20. At best, the employer's evidence consists of unverified accusations from individuals who were not subject to examination at hearing, and which, viewed objectively, is no more than equally balanced against claimant's credible denial of conscious conduct. When the evidence is equally balanced, the party with the burden of persuasion, here the employer, has not satisfied its evidentiary burden.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Accordingly, claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 17-UI-84750 is affirmed.

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

DATE of Service: July 20, 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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