

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0974

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134245). Claimant filed a timely request for hearing. On July 27, 2017, ALJ Wyatt conducted a hearing, and on August 4, 2017 issued Hearing Decision 17-UI-89637, concluding that the employer discharged claimant, but not for misconduct. On August 11, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Powell’s Books, Inc. employed claimant from August 22, 2012 to May 31, 2017 as a cashier.

(2) The employer expected claimant to treat all customers with attentiveness, respect, courtesy and professionalism and to use positive body language, tone and verbal language when assisting customers. Claimant received training regarding the employer’s customer service expectations throughout his employment, including retraining regarding positive communication techniques on May 17, 2017. *See* Exhibit 1.

(3) On May 19, 2017, the employer received an email from a customer stating, “Just a heads up that cashier 1008 . . . is super rude and surly and perhaps better suited to a job that doesn’t involve working with customers.” Exhibit 1 at 15. Claimant was “cashier 1008.” The employer was unable to contact the customer regarding her complaint. The employer’s director of human resources viewed video, without audio, of the transaction that generated the customer’s complaint. From viewing the video, she felt that claimant did not meet the employer’s customer service expectations and appeared “generally disengaged” from the customer during his brief interaction with her because he turned away from her, yawned and took a drink of water and wiped his mouth with the back of his hand. Audio Record at ~ 15:54.

(4) On May 26, 2017, the employer discussed the incident with claimant and had his union representative present. Claimant did not remember the customer or transaction that generated the

complaint, but told the employer that he did not believe that he was “surly or rude,” and that his mannerisms were sometimes misinterpreted.

(5) On May 31, 2017, the employer discharged claimant because, based on what its supervisory staff viewed in the video from May 19, 2017, claimant did not meet the employer’s customer service expectations during his brief transaction with a customer.

CONCLUSIONS 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 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 establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer based its decision to discharge claimant on its interpretation of what its supervisory staff viewed in the video from May 19, 2017. The video contained no audio, but the employer found claimant’s actions of turning away from the customer, yawning, taking a drink of water and wiping his mouth during a brief transaction with the customer as evidence of poor customer service. The employer’s director of human resources testified that, “[the employer] cannot prove and did not prove that [claimant] was rude or surly, . . . but from [the employer’s] perspective, his body language and mannerisms were inconsistent with [the employer’s] expectations [regarding customer service].” Audio Record at ~ 18:02.

Claimant did not recall the interaction with the woman who complained about his customer service on May 19, and the employer did not show claimant the video or offer it as an exhibit. Audio Record at ~ 29:08. Thus, claimant was not able to specifically rebut the employer’s evidence regarding May 19. However, claimant testified that he was being “extremely conscientious” about the tone of voice he used and his “word choice” after the customer service retraining he received on May 17, 2017. Audio Record at ~ 33:46. Moreover, the employer’s observations of the video fail to show not only that claimant was “rude or surly”; they fail to show that claimant consciously engaged in conduct that he knew or should have known violated the employer’s customer service expectations. Claimant asserted, and we found persuasive, that he interacted with a high volume of customers and that, on occasion, a customer would “inevitably” react poorly to claimant, how he spoke and his vocal inflections in ways that were “beyond [his] control” and were, therefore, not conscious conduct. Audio Record at ~ 34:40. Additionally, as claimant also asserted, a yawn is generally involuntary and cannot be suppressed. Audio Record at ~ 35:31. Moreover, claimant also asserted that he sometimes drank water while waiting for a credit card transaction to process, and had never been told that he should not drink water while a customer was present. Audio Record at ~ 35:53.

The preponderance of the evidence shows that claimant tried to improve his customer service skills after his retraining on May 17, and that the employer’s dissatisfaction with his “generally disengaged” manner on May 19 was not the result of any willful or wantonly negligent behavior on claimant’s part.

Thus, the employer did not meet its burden to show that claimant engaged in misconduct on May 19. The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-89637 is affirmed.

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

DATE of Service: August 30, 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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