

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1327

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134451). Claimant filed a timely request for hearing. On November 1, 2017, ALJ S. Hall conducted a hearing and issued Hearing Decision 17-UI-95921, concluding the employer discharged claimant, but not for misconduct. On November 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

EVIDENTIARY MATTER: In Hearing Decision 17-UI-95921, the ALJ made an evidentiary ruling that "Exhibit 1, offered by the employer, was admitted into evidence because it was not received by claimant prior to the hearing." However, the ALJ, in fact, ruled that Exhibit 1 was *not* admitted in to the record for that reason. Audio Record ~ 11:45 to 14:30. We write this for clarification and further note that the employer was allowed to testify to the contents of Exhibit 1 as it saw fit.

FINDINGS OF FACT: (1) Sykes Enterprises, Inc., a customer service outsourcer, employed claimant as a customer service agent from April 7, 2014 to July 13, 2017.

(2) The employer expected its customer service agents to be professional at all times in taking calls for clients, including maintaining focus on the call at hand and the call status of their work station, and performing their work duties while clocked in. Claimant was aware of the employer's expectations.

(3) On March 9, 2017, a customer called in to claimant's work station and heard claimant talk about politics and drinking with a coworker for approximately eight minutes before claimant noticed that she had a customer on the line. Claimant had had problems with her call station changing her call status

without her input, and claimant believed she had changed her call status to “break” when her call station took a live call without her knowledge. Audio Record ~ 30:00 to 32:00. The employer gave her a written warning for failing to maintain professionalism and focus on her work station and work duties, and cautioned her that a future violation could lead to discipline, up to and including termination of employment.

(4) On July 7, 2017, claimant’s supervisor held a team meeting during which he encouraged claimant to remain professional at all times because new customer service agents would be watching her because of her experience. He specifically encouraged her to avoid speaking negatively or interrupting other employees when they were taking calls. About one hour after the meeting, the supervisor observed claimant talking to at least two other coworkers and none of them were taking calls. The supervisor concluded he had seen “enough.”

(5) On July 13, 2017, the employer discharged claimant for allegedly being unprofessional while at her work station on July 7, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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 standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of the 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably violate a standard of behavior the employer had the right to expect her. The employer has 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).

We agree with the ALJ that the record contains insufficient evidence that claimant’s conduct on July 7 was either willful or the result of conscious indifference to the employer’s expectation that she remain professional at all times while at her work station. Hearing Decision 17-UI-95921 at 3. Although claimant was observed talking to coworkers while near her workstation and none of the customer service agents in question were taking calls, the employer did not establish that the agents in question were not on an authorized break or that the customer service agents were not talking about a work issue. Claimant did not believe she was violating any employer expectation at the time. Audio Record ~ 33:00 to 35:00. Accordingly, on this record, although the employer’s conclusion that claimant was being unprofessional while at work was a sufficient reason for the employer to make its decision to discharge claimant, without more, it was insufficient for the employer to meet its burden to establish misconduct, as defined under ORS 657.176(2)(a).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-95921 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: December 15, 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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