

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0498**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92716). Claimant filed a timely request for hearing. On April 27, 2018, ALJ Schmidt conducted a hearing, and on April 30, 2018 issued Order No. 18-UI-108409, affirming the Department's decision. On May 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) 1800Flowers Team Services, Inc., employed claimant from November 10, 2015 to March 10, 2018 as a customer service representative.

(2) Claimant answered more than 250 telephone calls from customers, including purchasers and recipients of products, each day.

(3) The employer had a confidentiality policy that prohibited its customer service representatives from providing a customer with another customer's address, telephone number or email address. The policy also prohibited customer service representatives from disclosing a customer's name if the customer had designated their gift as from "anonymous" or "secret admirer." Claimant understood the confidentiality policy.

(4) On March 1, 2018, claimant gave a customer another customer's name and full address.

(5) The employer monitors its customer service representatives' calls to assure they meet the employer's quality requirements. On March 5, 2018, the call monitoring team contacted human resources by email and sent the human resources representative a copy of claimant's call on March 1<sup>st</sup>, when she disclosed a customer's address to another customer. The human resources representative listened to the call recording and heard claimant give a customer's address to another customer.

(6) On March 10, 2018, the employer discharged claimant for violating its confidentiality policy on March 1, 2018. Human resources did not review the call with claimant. Claimant did not recall the telephone call at issue.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant's discharge was 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. 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 Order No. 18-UI-108409, the ALJ concluded that claimant's discharge was misconduct when she gave a customer confidential information on March 1, 2018. The ALJ reasoned that claimant's conduct was wantonly negligent because she understood the employer's confidentiality policy and, absent evidence to suggest a way that claimant could have unintentionally disclosed the address, claimant had to have been conscious of her conduct when she did so.<sup>1</sup> The ALJ also concluded that claimant's conduct was too serious to be an isolated instance of poor judgment because it created an irreparable breach of trust in the employment relationship.<sup>2</sup> We agree that claimant's conduct violated the employer's expectations, but disagree that it was misconduct.

The employer's testimony was persuasive that claimant violated its confidentiality policy by providing a customer with another customer's address. The employer provided scant information about the telephone call other than to assert that a customer asked for another customer's information, and claimant provided the customer's address. Audio Record at 10:16 to 10:43. However, the employer's witness did not recall what claimant stated during the telephone call with the customer. Audio Record at 13:09 to 13:42.

When misconduct under ORS 657.176(2)(a) is alleged, the employer has the burden to establish, by a preponderance of the evidence, that the claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or 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 her (or his) conduct and knew or should have known her conduct would probably result in

---

<sup>1</sup> Order No. 18-UI-108409 at 3.

<sup>2</sup> *Id.*

violation of standards of behavior the employer had the right to expect of her.<sup>3</sup> Although it is more likely than not that claimant disclosed a customer's address and thereby violated the employer's expectations, absent evidence that claimant was conscious of the conduct that resulted in her disclosing the address, her violation of the confidentiality policy cannot be considered wantonly negligent. Claimant testified that she makes 250 calls per day, did not recall giving one customer's address to another, and would not have knowingly done so. Audio Record at 28:46 to 29:35. Absent more detail about the circumstances of the telephone call, the record fails show claimant consciously provided a customer's information to another customer. Absent such a showing, the record fails to establish misconduct.

The employer failed to meet its burden to show that claimant's March 1 conduct constituted misconduct under ORS 657.176(2). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Order No. 18-UI-108409 is set aside, as outlined above.<sup>4</sup>

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

**DATE of Service: June 13, 2018**

**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](http://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.

---

<sup>3</sup> *See* OAR 471-030-0038(1)(c); *see also Appeals Board Decision*, 12-AB-0737, April 9, 2012 (absent evidence that claimant was conscious he was not paying close enough attention, his failure to pay attention was not wantonly negligent); *Appeals Board Decision*, 12-AB-0229, February 23, 2012 (absent evidence that claimant was conscious she was making a mistake at the time she made it, her mistake was not wantonly negligent); *Appeals Board Decision*, 11-AB-0810, March 24, 2011 (absent evidence that claimant was conscious that she was failing to be careful, the failure was not wantonly negligent); *Appeals Board Decision*, 11-AB-0777, March 17, 2011 (absent evidence that claimant was conscious of his failure to perform a task, the failure was not wantonly negligent).

<sup>4</sup> This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.