

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0541

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On February 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct connected with work (decision # 153612). Claimant filed a timely request for hearing. On March 16, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 26, 2018 at 8:15 a.m. On March 26, 2018, claimant failed to appear at the hearing, and ALJ Jarry issued Order No. 18-UI-105908, dismissing claimant's request for hearing for that reason.

On March 30, 2018, claimant filed a request to reopen the March 26th hearing. On April 17, 2018, OAH mailed notice of a hearing scheduled for May 1, 2018 to consider that and potentially other issues. On May 1, 2018, ALJ Frank conducted a hearing, and on May 9, 2018 issued Order No. 18-UI-109035, allowing claimant's request to reopen and concluding the employer discharged claimant, but not for misconduct. On May 29, 2018, the employer filed an application for review of Order No. 18-UI-109035 with the Employment Appeals Board (EAB). EAB considered the employer's written argument in reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to allowing claimant's request to reopen are **adopted**.

FINDINGS OF FACT: (1) Columbia State Bank, formerly West Coast Bank, employed claimant as a teller from June 24, 2010 to February 8, 2018.

(2) The employer expected its employees to exhibit "strong professionalism" on the job. Audio Record ~ 19:00 to 20:30. The employer's expectation was set forth in its written code of conduct that was provided to claimant at hire. Claimant also received written warnings regarding a lack of professionalism in July 2015 and January 2018 that set forth that its expectation regarding professionalism. The warnings cautioned claimant to consider the attitude she exhibited to others, the

audience with whom claimant interacted, and the need to remain positive and team oriented at all times. Claimant was aware of and understood the employer's expectation regarding professionalism.

(3) On January 19, 2018, it was reported that claimant complained after she was asked by a personal banker to take over a task because the banker had to leave for a personal appointment. However, claimant was interrupted by the personal banker while assisting other customers, did not refuse to assist the customer in question, and merely stated that she had often been forced to miss personal appointments when busy with customers. The personal banker never transferred the customer to claimant, and claimant was never questioned by the employer about the incident. Claimant did not consider at the time that she may have been violating the employer's expectation regarding professionalism when speaking to the banker.

(4) On February 2, 2018, it was reported that claimant was "disagreeable" after she was asked by the assistant manager to cash some savings bonds for a customer because another teller did not know how. Audio Record ~ 26:45 to 28:00. However, although claimant had a line of customers she was attending to at the time, she accepted the task and helped the customer, and merely asked the assistant manager, without being negative, why she did not just train the employee how to perform the task so the employee would know how.

(5) On February 5, 2018, it was reported that a personal banker received a change order request from a customer, asked a manager how to handle it, was told to bring it to claimant, and when the banker did so, claimant, who was attending to another customer, responded, "Why can't they come out and help?" Audio Record ~ 14:00 to 16:00. However, claimant had only asked if another employee could assist with the task as she was busy with a customer and did not consider at the time that she may have been violating the employer's expectation regarding professionalism when speaking to the banker.

(6) As a result of a report to management regarding the February 5 incident, the employer discharged claimant for violating its expectation regarding professionalism on January 19, February 2 and February 5, 2018.

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 connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) 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 a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, the employer's evidence about the facts concerning the final incidents, which was based strictly on hearsay, differed from claimant's testimony, who was a participant in the incidents in question. In the absence of evidence demonstrating that claimant was not a credible witness, her first hand testimony was at least as persuasive as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

The employer had the right to expect claimant to exhibit professionalism in the workplace and to consider, when speaking to others, the attitude she exhibited, the audience with whom she interacted, and the need to remain positive and team oriented at all times because claimant had been advised and counseled about professionalism in the past. However, regarding the incidents on which the employer based its discharge decision, the weight of evidence showed that on all three occasions, claimant was assisting other customers at the time, which was the employer's highest priority, did not refuse to assist any customer, and did not exhibit an overtly negative attitude to either a coworker or in front of a customer. The employer failed to show that claimant knew or should have known that her conduct on any of the occasions in question probably violated the employer's expectations regarding workplace behavior. Absent such a showing, misconduct under ORS 657.176(2)(a) has not been demonstrated.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of benefits based on her work separation from the employer.

DECISION: Order No. 18-UI-109035 is affirmed.

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

DATE of Service: June 29, 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. 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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