

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0700**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 153910). Claimant filed a timely request for hearing. On June 21, 2018, ALJ Schmidt conducted a hearing, and on June 27, 2018 issued Order No. 18-UI-112114, affirming the Department’s decision. On July 12, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Providence Health employed claimant as a customer service specialist from December 2, 2013 to April 23, 2018.

(2) The employer expected claimant to be courteous with customers on the phone, and refrain from raising her voice to customers or cutting them off when they spoke. Claimant understood the employer’s expectation.

(3) On four occasions in 2017, the employer received customer complaints that claimant was rude. On February 28, 2017, the employer gave claimant a corrective action because of a customer interaction during which claimant hung up on a caller after he called her a “nigger.”<sup>1</sup> Claimant tried to be courteous to callers after being warned. A supervisor advised claimant about strategies that might help, including placing callers on mute or hold while she calmed down, before coming back to the calls feeling calmer.

(4) On December 11, 2017, the supervisor told claimant she would likely be discharged if she received another customer complaint.<sup>2</sup> After the December 2017 conversation with her supervisor, claimant made additional efforts to improve. She placed reminder notes around her workspace that said, “always listen to the customer,” “the customer has a voice,” “never argue with the customer,” and “calm down.”<sup>3</sup>

<sup>1</sup> Audio recording at 40:20.

<sup>2</sup> Audio recording at ~ 26:00.

<sup>3</sup> Audio recording at ~ 46:00-47:00.

(5) On April 17, 2018, claimant took a customer call. The customer disagreed with a letter she had received about having more than one insurer. During the call, claimant and the customer interrupted each other, spoke over each other, and raised their voices. Claimant attempted to calm down and de-escalate the call by placing the customer on mute and letting the customer speak while she calmed down. When claimant returned to the call to answer the customer's question, the customer interrupted her. Claimant spoke over the caller trying to respond to the caller's questions, but did not intend to interrupt the customer.<sup>4</sup> Another supervisor was standing in front of claimant during the call, and claimant told the supervisor, "I need help on this call."<sup>5</sup> The supervisor refused to help, and no other supervisors were on duty to assist claimant. Claimant "did [her] best" with the call, but ultimately the caller became so frustrated that she hung up on claimant.<sup>6</sup>

(6) The supervisor who had overheard claimant's April 17<sup>th</sup> call reported the call to claimant's supervisor. On April 18, 2018, claimant reported the call to her supervisor, and reported that the other supervisor had refused to help her with the call. Also on April 18, 2018, the customer called and spoke with another customer service representative, during which she discussed her call with claimant. A manager and supervisor listened to a recording of the April 17<sup>th</sup> call and concluded that claimant had not been courteous with the customer.

(7) On April 23, 2018, the manager and supervisor met with claimant about the call. Claimant agreed with them that, listening to the call after-the-fact, she had not been courteous enough with the customer. The manager told claimant that she was most likely going to be discharged the next day after she contacted human resources, and told claimant to go home and wait for a call. Claimant said she would rather pack up her things and leave that day, and the employer agreed.<sup>7</sup> Claimant's employment ended effective April 23, 2018.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (January 11, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The ALJ concluded that claimant voluntarily left work, finding it persuasive that claimant "resigned rather than waiting to be discharged [] based upon multiple firsthand accounts."<sup>8</sup> The ALJ found that, at the time claimant gathered her personal belongings and left work, after communicating that she did not want to wait for a "final decision," "the employer was willing to continue the employment relationship for at least one more day." The ALJ concluded that, because claimant could have continued to work for the employer for that additional period of time, the work separation was a voluntary leaving.<sup>9</sup> We disagree.

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<sup>4</sup> *Id.* at ~ 38:30.

<sup>5</sup> *Id.* at ~ 50:50.

<sup>6</sup> *Id.* at ~ 34:00.

<sup>7</sup> *Id.* at ~ 8:15.

<sup>8</sup> Order No. 18-UI-112114 at 3.

<sup>9</sup> *Id.* at 2-3.

For purposes of unemployment insurance, “work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). As of the supervisors’ conversation with claimant on April 23<sup>rd</sup>, however, there was, effectively, no more relationship between claimant and the employer. The supervisors had already decided to discharge claimant, and although they had to refer the matter to human resources, the employer’s witness testified at the hearing that it was both “highly likely” that claimant would be discharged and that the “chance” that claimant would *not* be discharged was “highly unlikely.”<sup>10</sup> That testimony, as well as the witness’s tone of voice while testifying to the latter and later comments about the likelihood of additional employment had the April 17<sup>th</sup> call been claimant’s only work performance problem, suggest it is more likely than not that there was no chance the employer would ever continue to employ claimant after sending her home from work early on April 23<sup>rd</sup>. The preponderance of the evidence in this record therefore shows that, at the time claimant collect her belongings and left on April 23<sup>rd</sup>, the employer most likely planned not to return claimant to work at any point in the future. The employment relationship had already ended at the time claimant gathered her personal items and left, making the work separation a discharge.

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) 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.

The employer discharged claimant because of her demeanor during a telephone call with a customer on April 17<sup>th</sup>. Claimant did not dispute that, in hindsight, she was not as courteous to the customer as she might have been. However, for claimant’s behavior to be considered misconduct, she must have been conscious at the time that her conduct was inconsistent with the employer’s expectations, and indifferent to the consequences of her conduct, under circumstances where she knew or should have known that her conduct would probably result in a violation of the employer’s expectations.

On April 17<sup>th</sup>, claimant engaged in a call during which she recognized that she was having trouble courteously helping the customer. In response, rather than simply being discourteous to the customer, claimant tried to be responsive to the customer’s questions, used reminders she had in her workspace to stay calm, listen to the customer and let the customer have a voice, followed her supervisor’s advice to put the customer’s call on mute for a little while to allow herself to calm down before returning to the call, and asked another supervisor to help her with the call, all to no avail. Claimant’s efforts to be courteous, use the resources she had, and try to transfer the call demonstrate that while she was aware that she was having difficulty dealing with the call, she was not indifferent to the consequences of being discourteous to the customer. At the time of the call, claimant thought, under the circumstances, that she was doing her best with the call and thought the way she handled the call was okay.<sup>11</sup>

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<sup>10</sup> Audio recording at ~ 10:15-10:35.

<sup>11</sup> *Id.* at ~ 34:00, 39:20, 41:30.

Although claimant did not dispute, in hindsight, that her behavior during the April 17<sup>th</sup> customer call was not consistent with the employer's expectations, at the time of the call she was doing the best she could to be courteous and help the customer. Her failure to do so, under the circumstances described in this record, was not willful or wantonly negligent, and her discharge was, therefore, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 18-UI-112114 is set aside, as outlined above.<sup>12</sup>

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

**DATE of Service: August 9, 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.

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<sup>12</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.