

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0969

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 135331). The employer filed a timely request for hearing. On September 14, 2018, ALJ Schmidt conducted a hearing, and on September 18, 2018 issued Order No. 18-UI-116752, concluding claimant's discharge was for misconduct. On October 8, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Comcast Cablevision of Willow Grove, Inc. employed claimant as a retail sales professional from May 4, 2015 to June 22, 2018.

(2) The employer's sales integrity guidelines required that employees only add products, services and promotions to customers' accounts if the customers affirmatively agreed to acquire them. The guidelines also required employees disclose all charges to customers at the time of sale to ensure that customers understood their packages, features, pricing, etc.

(3) The employer's billing system did not allow customers' orders to close, and did not allow employees to collect commissions, unless the customers' accounts showed that employees had verified that customers had the equipment necessary to support the products and services listed on the order.

(4) The employer's billing system also included an "equipment placeholder" feature. The feature enabled employees to force-close customers' orders, but the employer did not intend that the equipment placeholder feature be used for that purpose.

(5) On April 22, 2017, the employer discovered claimant had used the equipment placeholder to close a customer's order. On May 2, 2017, the employer's assistant store manager met with her, asked her about using the equipment placeholders to sell phones, and "discussed that under no circumstances you would use a placeholder on an account." Transcript at 18.

(6) On March 3, 2018 and March 27, 2018, claimant used the equipment placeholder on two customers' orders. The employer concluded that use of the equipment placeholder indicated that the customers did not have the proper equipment to support the products or services they had ordered, and, in late March 2018, referred the matters to the security and human resources department for investigation.

(7) On June 6, 2018, claimant interacted with a customer who wanted to lower her monthly bill without losing certain fixed services. Claimant found an option for the customer, explained the option and effect on her monthly bill, put the order into the computer system, and refreshed the equipment screen to see if the customer's existing equipment would support the new services. Claimant thought that the system would prevent her from processing the customer's order if the equipment was not compatible with the new services, and told customers, "Let's try it out and see if it [the system] yells at me." Transcript at 28. The June 6, 2018 order claimant attempted "actually went through." *Id.* Claimant told the customer, "it looks like your equipment is going to work for this. It's letting me complete the order." *Id.* Claimant ended her interaction with the customer believing that she had explained the customer's new services and cost, verified that the customer's equipment was sufficient to support the services she had sold the customer, and closed the order.

(8) On June 11, 2018, claimant noticed that the June 6th order was still processing. She contacted the store manager to ask what to do. The store manager told claimant that the customer's order was still processing because her equipment was not compatible with the order.

(9) The employer investigated and concluded that claimant had failed to verify that the June 6th customer had the equipment necessary for the sale to go through. The employer thought claimant "had indicated [on June 11th] that she . . . had tried to use a placeholder to make the sale go through." Transcript at 8. On June 22, 2018, the employer discharged claimant for attempting to violate the sales integrity guidelines by failing to verify the customer had the proper equipment and trying to use a "placeholder" to close the sale. Transcript at 7-8.

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) (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.

The ALJ concluded that claimant's discharge was for misconduct. Order No. 18-UI-116752 at 2. The ALJ reasoned that the employer discharged claimant for three separate instances "of selling customers services without verifying that the customer had the proper equipment to use the services," when

claimant knew or should have known that doing so would violate the employer's expectations. *Id.* at 5. The record does not support the ALJ's conclusion.

The final incident that occurred before the employer decided to discharge claimant occurred on June 6, 2018. Although the employer's witness found it "hard to say" if the employer would have discharged claimant on the basis of the two March 2018 incidents if the June 6th incident had not occurred, the record suggests the June 6th incident was likely the proximate cause of the discharge. The first two incidents occurred in March 2018, and the employer discovered and began investigating them in late March 2018, but took no action to end claimant's employment as a result of them. In contrast, the employer discovered the alleged June 6th incident on June 11th, held an investigatory meeting on June 14th, and had decided to discharge her by June 22nd, just eleven days after discovering the incident. Under the circumstances, it is more likely than not that if the employer had intended to discharge claimant because of the March 2018 incidents, it would have done so prior to June 22nd. The June 6th incident therefore was the likely cause of the discharge in this case, and the proper focus of the misconduct analysis.¹

The employer alleged that claimant engaged in misconduct because she "attempted" to violate the sales integrity guidelines on June 6th by selling a phone product to a customer without verifying that the customer had the equipment necessary to support that product, and "tried to use a placeholder to make the sale go through." Transcript at 7-8. The employer's evidence did not support that allegation.

There is no dispute that claimant failed on June 6th to effectively verify whether the customer had the equipment necessary to support the product claimant sold to her. Had claimant completed verification, the order at issue likely would have closed within the employer's system, and the fact that the order was still processing five days later suggests that claimant did not. For claimant's failure to effectively verify the customer's equipment to be considered disqualifying misconduct, however, the record must show that claimant acted willfully or with wanton negligence. In this case, claimant thought on June 6th that she had completed the verification step because the customer's order "actually went through" the employer's system, which she sincerely believed could not occur if the customer did not have the necessary equipment. Claimant's belief in that moment appears to have been reasonable, as the store manager confirmed that claimant would have had to "look[] back" after the fact to find out that the customer's equipment was not adequate to support the services claimant had sold. Transcript at 37. In other words, claimant took steps to verify the customer had the correct equipment, misunderstood the effect of the customer's order going "through," and apparently did not know or have reason to know at the time of the June 6th transaction that she had, ultimately, failed to do so. Although claimant made a mistake, thereby failing to satisfy the employer's expectations, her mistake was not willful or wantonly negligent misconduct.

¹ Even if we had concluded otherwise, the outcome of this decision would remain the same. The employer alleged that claimant had violated its sales integrity guidelines on two occasions in March 2018, the employer did not have details about those situations at the time of the hearing beyond seeing that claimant "used the equipment placeholder" and concluding that "would indicate that they don't have the proper equipment" and claimant had "used" the "placeholder method" to "essentially close that sale." Transcript at 12-13, 16. The record is not clear as to what claimant did or why, or that she acted willfully or with wanton negligence. As such, the record does not show that the March 2018 incidents were disqualifying misconduct.

With regard to claimant's alleged "attempt" to use a placeholder to make the sale go through, the store manager initially testified that claimant "asked if she could put a placeholder on the account," and the senior security investigator later alleged that claimant "asked for if she could use this placeholder, and she was told that she could not." Transcript at 19, 22. However, the store manager later read the email claimant sent him about the transaction in question, in which she wrote, "I'm confused because the customer said hers was phone ready. But also the order shouldn't have let me close in the first place without an EMTA or at the very least a placeholder if it wasn't compatible." Transcript at 36. The email shows that claimant never actually tried to use a placeholder on June 6th, and did not ask if she could or should. Transcript at 29-30, 35. Claimant therefore did not "attempt" or otherwise suggest using a placeholder on June 6th, and did not violate the employer's expectations.

The employer has not established that claimant's June 6th failure to verify the customer's equipment was willful or wantonly negligent, and failed to prove that claimant "attempted" to use a placeholder in violation of the employer's expectations. Claimant's discharge therefore was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-116752 is set aside, as outlined above.²

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

DATE of Service: November 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. 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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² 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.