EO: 200
BYE: 201703

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0417

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124721). Claimant filed a timely request for hearing. On March 24, 2016, ALJ Yee conducted a hearing, and on March 30, 2016 issued Hearing Decision 16-UI-56042, reversing the Department's decision. On April 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that a copy of that argument was provided to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For that reason, EAB did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) PDX Restoration LLC, doing business as ServPro of NW Portland and ServPro of Lake Oswego and West Linn employed claimant as a sales and marketing representative from May 27, 2015 until January 29, 2016. Adams Keegan, Inc., a professional employment organization, handled administrative matters for the employer relating to claimant's employment.

(2) The employer provided fire and water restoration, clean-up and remediation services to its customers. The employer constituted two franchises that had been purchased from ServPro to provide those services. The employer and other ServPro franchisees in the Portland Metropolitan area had exclusive territories in which they provided their services and in which other ServPro were not allowed to solicit business or to provide services. However, there was some "open territories" in Portland where ServPro franchises were allowed to compete against each other for business. In certain "emergency situations," a ServPro franchisee was also allowed to solicit business and provide services in what was otherwise the exclusive territory of another franchisee.

(3) The employer expected claimant not to disclose confidential franchise information to other competing business, including other franchisees. Exhibit 1 at 6, 7. Such confidential information generally included the employer's sales and production techniques and its dealings with insurance

companies. Exhibit 1 at 7. The parameters of claimant's duties of non-disclosure were set out in Section 3A of an employment agreement between claimant and the employer. Exhibit 1 at 6, 7. To the extent that agreement addressed the identity of ServPro customers it set out in Section 3B, claimant was prohibited from disclosing to others the names and addresses of customers or details about them for three years immediately following the termination of his employment. Exhbit 1 at 7. Claimant read the employment agreement at the time he signed it on May 27, 2015.

(4) Sometime before January 26, 2016, the employer's marketing manager met with claimant in a coaching session. The marketing manager commented to claimant that there were "significant gaps" in the records he had entered about his customer visits to solicit business. Transcript at 6. Claimant told the manager that the employer's electronic system would often not allow him to make entries. When the manager questioned claimant about his use of the employer's system, the manager determined that claimant knew how to use the system. The manager doubted claimant's explanation and suspected he had not tried to make the customer calls.

(5) Between approximately January 26, 2016 and January 28, 2016, claimant, the marketing manager and representatives from other ServPro franchises attended a training and conference. On approximately January 26 or 27, 2016, while at the conference, the marketing manager had a meeting with another person at which he had closed the door for privacy. That day, claimant was looking for the marketing manager to obtain the keys to the car that they had ridden in together to the conference because he wanted to drive to a nearby store. Claimant went up to a secretary and asked where he could find the marketing manager. The secretary pointed to a door and said the marketing manager was in the room behind it. The secretary did not tell claimant that the marketing manager should not be disturbed or try to stop him before he knocked on that door. After knocking on the door, claimant entered the room and asked the marketing manager for the keys to the car. The marketing manager was upset and thought claimant should have known that he did not want to be disturbed during the meeting because he had closed the door.

(6) At the conference, sometime after interrupted his marketing manager, but before January 28, 2016, claimant spoke with the marketing manager of the ServPro of Gresham franchise, a person with whom he was previously acquainted. The marketing manager told claimant she had found one of his business cards at the location of a recent fire in Gresham and asked him if he was soliciting business in the exclusive territory of ServPro of Gresham. Claimant asked the marketing manager if she was sure the fire was in Gresham's exclusive territory because he had been told that fires were "emergency situations" where no ServPro franchises had the exclusive right to solicit business relating to the fire and all ServPro franchises were allowed to compete for that business. Claimant's understanding that there were no exclusive territories for work that resulted from fires was based on what the employer's owner and marketing manager had previously told him and their failure to instruct him otherwise when they knew he was soliciting such business arising from fires in what was otherwise the exclusive territory of other ServPro franchises. Transcript at 32-33.

(7) Later during claimant's conversation with the marketing manager of ServPro of Gresham, the marketing manager asked him about the employer's business. Claimant told her the employer's business was "great" and that the employer was working at the MODA Center in Portland. Transcript at 25, 27. In fact, the employer was preparing a bid for the job at the MODA Center. Although claimant

thought the MODA Center was located in the employer's exclusive service territory, it actually was located in "open territory," where all ServPro franchises could compete for the business.

(8) Sometime before January 29, 2016, the employer learned claimant had mentioned to the marketing manager of ServPro of Gresham that the employer was working at the MODA Center. On January 29, 2016, the employer discharged claimant for not making route calls, for interrupting a private meeting between the marketing manager and another person at the conference and for divulging that the employer was working at the MODA Center, which the employer considered to be confidential information, to a ServPro franchise that might possibly compete for the MODA Center job.

CONCLUSIONS AND REASONS: 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. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

To the extent the employer contended it discharged claimant in part for failing to make his route calls, the employer did not show either that was the proximate cause of the discharge or that it involved claimant's willful or wantonly negligent behavior. At hearing, the employer's witness admitted the employer did not have information indicating claimant had not completed the route calls before it discharged claimant. Transcript at 17-18. That the employer did not actually discharge claimant for his alleged behavior in not making route calls is reinforced by the employer's knowledge of the "gaps" in claimant's records and its failure to act to discharge him at the time. As well, claimant testified that, regardless of the employer's contentions, he made all his route calls. Transcript at 35, 36. Since there was no reason in this record to doubt claimant's credibility of this issue, and the employer did not present independent evidence corroborating its contention, the evidence on this issue is, at best, evenly balanced. When evidence on a disputed matter in a discharge case is evenly balanced, the uncertainty must be resolved against the employer since it is the party who carries the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). As such, the employer did not meet its burden to show claimant did not make the route calls for which there were gaps in his records, and that his behavior was a willful or wantonly negligent violation of the employer's standards.

To the extent the employer discharged claimant for interrupting the marketing manager during a supposedly private meeting during the conference, the employer's witness testified that claimant should have known that he was prohibited from entering that meeting because the "culture" in the employer's organization was that if a door was closed the meeting attendees were not to be disturbed. Transcript at 15. Absent a clearer and more definitive communication of this expectation, it cannot be concluded that claimant should have been aware that a closed door signified such a prohibition. In addition, the employer agreed that the secretary who directed claimant to the door behind which the marketing manager was meeting might not have alerted claimant that the marketing manager was not to be disturbed and, by her actions, might have invited claimant to knock on that door and interrupt the meeting. Transcript at 34, 52. There is insufficient evidence in the record to establish claimant knew or

should have known under the circumstances that he was prohibited from interrupting the closed door meeting involving the marketing manager, and that his actions in knocking on the closed door and briefly interrupting the meeting was a willful or wantonly negligent violation of the employer's expectations.

To the extent the employer discharged claimant for divulging confidential information to the marketing manager of ServPro of Gresham when he mentioned that the employer was working at the MODA Center, it also did not meet its burden to show that such behavior was a willful or wantonly negligent violation of the employer's expectation. Claimant testified he thought the MODA Center was in the employer's exclusive territory and ServPro of Gresham could not compete with the employer for the work at the MODA Center. Transcript at 29, 30-31, 48. Significantly, claimant did not tell the manager from ServPro of Gresham that the MODA Center job was still open for bid since he did not know that it was or provide any details about the nature of the employer's work at the MODA Center. Transcript at 25, 28, 30. As well, the non-disclosure provisions of the employment agreement claimant signed did not clearly prohibit from disclosure the very limited type of information that claimant gave to the manager of ServPro of Gresham, and mentioned information about customers' identities only in connection with disclosure after employment had terminated. Exhibit 1 at 7. Further, the employer's witness testified that the employer had not specifically informed claimant of the type of information he was foreclosed from divulging, or that disclosure of information solely about the identity of a customer was forbidden. Transcript at 18, 21, 22, 53-54. For his part, claimant testified that he did not think a disclosure to another ServPro franchise that the employer was performing some work at the MODA Center, without any further detail, was confidential information that he was precluded from disclosing. Transcript at 28, 30, 31, 41. That claimant believed the information he disclosed to the manager of ServPro of Gresham was not confidential was plausible in light of the language of the employment agreement and the failure of the employer to more clearly inform him of the types of information that he was prohibited from disclosing. The employer did not meet its burden to show claimant knew or should have known that he was not permitted to disclose the identity of a customer for whom he thought the employer was working. Claimant's mere mention that the employer was performing work at the MODA Center was, under these circumstances, not a willful or wantonly negligent violation of an employer standard of which he was aware or reasonably aware.

Finally, claimant apparently solicited business in the exclusive territory of ServPro of Gresham as evidenced by his leaving his business card at the location of a fire in Gresham. However, the employer's witness commented in his testimony that under certain "emergency situations" claimant was allowed to solicit business in another franchisee's exclusive territory. Testimony at 51. The employer did not rebut claimant's testimony that he thought the fire for which he solicited business in Gresham fell within the exception for "emergency situations," and did not present any evidence that the employer ever informed claimant of when the emergency exception was applicable and when it was not. On this record, the employer did not demonstrate that claimant was aware or reasonably aware he was prohibited from soliciting business arising from the fire in Gresham or that his doing so was a willful or wantonly negligent violation of the employer's standards.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-56042 is affirmed.

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

DATE of Service: May 18, 2016

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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