

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1012**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 95141). The employer filed a timely request for hearing. On August 11, 2016, ALJ Menegat conducted a hearing, and on August 12, 2016 issued Hearing Decision 16-UI-65505, affirming the Department's decision. On August 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Sinclair Television of Oregon, LLC employed claimant from January 6, 2014 to April 12, 2016.

(2) Claimant worked for the employer as an account executive. Claimant's job involved selling television and internet commercials for the employer's television station. Transcript at 7. The employer expected him to generate new leads for television, digital and social media advertisements and to manage existing accounts. Claimant's position was considered an outside sales position, and his pay was based solely on commission.

(3) During claimant's first year of employment his performance generally satisfied the employer's expectations and claimant was ranked among the "top 100" salespersons across the country with respect to billing. Transcript at 22. Approximately one year prior to claimant's discharge, the employer transferred claimant to work at a different television station, in a position the employer viewed as "[a]lmost the exact same job." Transcript at 29. Nevertheless, claimant struggled after the transfer and his performance declined.

(4) In 2015, claimant failed to meet any of the employer's key performance standards. On January 27, 2016, claimant entered a performance improvement agreement with the employer, under which he agreed to meet his sales goals and the employer's performance standards. The employer required claimant to show improvement within the 90 days following the agreement.

(5) In connection with the performance improvement agreement, the employer provided claimant with a number of suggestions for improving his performance. The employer offered additional training and one-on-one sessions. In an effort to improve his work performance and satisfy the employer's expectations, claimant wrote down a list of everything he did throughout each day then reviewed and discussed the list with his supervisor. Claimant met with his supervisor to review his work and performance on a near-daily basis. Claimant proposed new techniques that he thought might help him improve his sales and performance. Claimant understood the employer expected him to improve his work performance and he understood his job would be in jeopardy if he failed to do so. Claimant's performance did not improve as a result of his efforts, and he did not know why his efforts were failing or what more he could do to improve.

(6) In April 2016, the employer reviewed claimant's sales and performance since the performance improvement agreement. The employer concluded that claimant had not made any sales during the current and previous quarters. The employer concluded that although claimant attended work and appeared to do work while there, "[e]ven with coaching and management support" claimant's performance had declined. Transcript at 11, Exhibit 1. The employer concluded that the decline was due to "a lack of initiative as well as a blatant disregard to wanting to improve his performance." Transcript at 11, Exhibit 1. On April 12, 2016, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ 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. Inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for failing to make sales and adequately manage his accounts, despite being on a performance improvement agreement, undergoing additional training and engaging in one-on-one meetings with his supervisors in an effort to improve his performance. There is no real dispute in this record that during the 90-day period preceding claimant's discharge he did not generate any new business or significantly improve his performance with respect to sales or account management, which constituted a violation of the employer's standards. However, the record fails to show that the violation was the result of willful or wantonly negligent behavior attributable to claimant as misconduct.

The employer suggested in its exhibit and at hearing that claimant's failure to achieve the results it desired was the result of his "lack of initiative" and "blatant disregard to wanting to improve his performance." However, claimant testified, and the employer agreed, that claimant frequently met with his supervisor. The employer did not dispute that claimant kept daily lists of his activities and met with

his supervisor to review them. It does not make sense that claimant would show a blatant disregard for or not want to improve his performance, given that claimant's pay was based entirely on commissions, which, we presume, necessarily had to come from business generated by new accounts and retention and management of existing accounts. Given that and claimant's efforts to improve his performance, the record fails to substantiate that claimant demonstrated a lack of initiative or blatant disregard for improving his performance as the employer alleged. Moreover, although the employer's witnesses did not believe that claimant's transfer from one station to another should have had an effect on claimant's work performance because the jobs were so similar, the employer did not dispute that claimant was among one of the employer's top 100 performers prior to the transfer but struggled after the transfer to meet any of the employer's expectations. Considering the totality of the circumstances, we conclude it is more likely than not that claimant was unable, due to a lack of skills or experience required of him in the job he held at the time of his discharge, to meet the employer's expectations. Inefficiency resulting from lack of job skills or experience is not misconduct.

The employer discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his discharge.

**DECISION:** Hearing Decision 16-UI-65505 is affirmed.

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

**DATE of Service:** September 29, 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](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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