

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0541**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 80909). The employer filed a timely request for hearing. On April 26, 2017, ALJ Frank conducted a hearing, and on April 28, 2017 issued Hearing Decision 17-UI-82082, concluding the employer discharged claimant for misconduct. On May 4, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) C R England, Inc. employed claimant from November 12, 2012 until February 15, 2017, last as a senior account manager.

(2) Before 2016, claimant had met the employer's expectations regarding the profit and volume of sales he produced for the employer. During 2016, compared to previous years, the number of claimant's customer accounts declined, claimant's accounts generated less profit for the employer, his number of outgoing cold calls soliciting new business decreased, and he did not obtain any new customers.

(3) In late December 2016, claimant and the employer agreed to 2017 goals for claimant, including the goal of making an "average [of] 50 cold calls per day" beginning on January 3, 2017. Exhibit 1 at 7. Claimant and his supervisor later agreed the 50 calls would include all claimant's outgoing calls. *Id.* The employer counted each employee's outgoing calls each day. In addition to making cold calls each day, claimant and the employer agreed claimant would meet certain profit goals by the end of 2017, keep his current customers, increase profits from his current customers, add new customers, submit one or two requests for proposals per month, and schedule conference calls with three specific prospective customers. Exhibit 1 at 8.

(4) During the period from January 3 through February 15, 2017, claimant met the goal of 50 outgoing calls on seven days, and was "close" to meeting that goal on "several" other days. Audio Record at 28:12 to 28:28. Claimant was on vacation for 11 days during that period. On January 3, 4, 5, and 17, 2017, claimant made eight, three, zero and 16 outgoing calls, respectively. *Id.*

(5) On some days, claimant did not meet the goal of 50 outbound calls because he did not have 50 potential new customers to call. Claimant requested additional clients to call from the employer. The employer told claimant it preferred for him to source his own leads. Some of claimant's customer communications were by email and cell phone and the employer did not record that activity as outgoing calls. In addition to making outbound calls, claimant spent time assisting his current customers with shipments in progress, creating lists of potential new customers to call, and researching and creating requests for proposals for customers.

(6) During January and February 2017, claimant did not generate the profit the employer expected from his current customers and did not obtain any new customers.

(7) On February 15, 2017, the employer discharged claimant for failing to meet its performance expectations.

**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).

In Hearing Decision 17-UI-82082, the ALJ focused on the employer's expectation that claimant make 50 outgoing calls per day, and concluded that claimant willfully violated the employer's expectations by neglecting his job duties because there were days when he had low call numbers, and because the ALJ found claimant's explanation that he lacked prospective customers to call unpersuasive.<sup>1</sup> The ALJ also found that claimant's conduct was repeated, therefore not an isolated instance of poor judgment.<sup>2</sup> We disagree and conclude claimant was discharged not for misconduct.

The employer discharged claimant because of his job performance. Claimant and the general manager agreed claimant would focus on a number of work goals beginning on January 3, 2017. By February 15, 2017, the employer determined claimant had failed to meet his goals regarding the amount of profit generated by claimant's accounts, acquiring new customers, and the number of cold calls claimant completed. On this record, the employer did not present evidence showing claimant had failed to meet the agreed goals regarding profits and new accounts, because those goals were annual goals for 2017, with no other date certain for completion of those goals, and the employer discharged claimant before the end of 2017. Nor did the employer present evidence that claimant failed to meet other agreed goals for 2017, namely, keeping his current customers, submitting one or two requests for proposals per month, and scheduling conference calls with three specific prospective customers. As such, we focus on

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<sup>1</sup> Hearing Decision 17-UI-82082 at 4.

<sup>2</sup> *Id.*

whether claimant was willful or wantonly negligent in failing to meet the employer's expectations regarding the number of outgoing calls he made each day.

With regard to the number of outgoing calls claimant made per day, it is undisputed that claimant failed to make 50 or more outgoing calls on multiple days between January 3 and February 15, 2017. However, we find the ALJ's conclusions about claimant's failure to make 50 calls on multiple days misplaced because the record does not show that claimant understood that making 50 calls per day was a requirement, rather than an on-average goal. The emails from claimant's supervisor to claimant, affirming claimant's 2017 work goals in writing, state that claimant's *goal* was to make an *average* of 50 cold calls per day, not a required minimum number of 50 per day. Exhibit 1 at 7, 13. On some occasions, claimant was not able to meet his goal because he did not have sufficient leads to contact. When claimant requested additional leads to call, he was instructed to source his own leads. Although the employer's general manager asserted that the employer had a marketing department that could provide claimant with leads, he acknowledged that the employer encouraged account managers to source their own leads. Audio Record at 36:43 to 37:12. Given claimant's testimony regarding the difficulty in finding prospective customers to call, the other duties he was also expected to perform, and his absence from the office for 11 days, the preponderance of the evidence fails to show that claimant willfully or with wanton negligence failed to meet the outgoing calls expectation.

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

**DECISION:** Hearing Decision 17-UI-82082 is set aside, as outlined above.<sup>3</sup>

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

**DATE of Service:** May 26, 2017

**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>3</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.