

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0664

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 104126). The employer filed a timely request for hearing. On May 3, 2017, ALJ Snyder conducted a hearing, and on May 11, 2017 issued Hearing Decision 17-UI-83099, affirming the Department's decision. On May 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Action Window & Gutter Cleaning, LLC employed claimant as an outside salesperson from January 18, 2016 until November 19, 2016.

(2) The employer expected claimant to perform his work with reasonable effort and diligence. Claimant understood the employer's expectations as a matter of common sense.

(3) Claimant's job required him to contact property owners and managers to solicit sales for the employer's business. In April 2016, the employer authorized a leave of absence for claimant to enable him to enter an alcohol rehabilitation program. Claimant returned to work approximately one month later.

(4) When claimant returned to work after the leave of absence, his sales performance steadily "ramped up." Audio at ~15:25. The sales claimant generated in any particular month varied depending principally on the weather during that time of year and miscellaneous other factors, with September through January generally being the employer's busiest months. In August 2016, claimant had a "tremendously good" month and generated \$29,108 in sales. Audio at ~34:50. In September 2016, claimant had an "outstanding month" and generated \$62,270 in sales. Audio at ~35:19. In October 2016, claimant had an "okay month" and generated \$39,651 in sales. Audio at ~33:45, ~35:27.

(5) On November 18, 2016, claimant told his supervisor he would prepare a job estimate for one of the employer's customers and then neglected to do so for several days. On November 28, 2016, claimant's supervisor prepared the estimate and sent it to the customer. Claimant's supervisor thought claimant

was not making reasonable efforts to make sales for the employer in November 2016. From November 1, 2016 through November 28, 2016, claimant generated \$25,942 in sales. Audio at ~27:15. Since November was traditionally one of the employer's busier months for sales, claimant's supervisor thought claimant should have generated more in sales and his sales efforts were inadequate in that month.

(6) On November 29, 2016, the employer discharged claimant due to inadequate work efforts.

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 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. 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).

Claimant's supervisor testified that after claimant generated only \$4,212 in sales and his cell phone usage plummeted in November 2016, the supervisor concluded claimant had "basically stopped working" and discharged him. Audio at ~10:40, ~13:09, ~39:65. Claimant disputed the supervisor's testimony, testified that he actually generated \$25, 942 in sales in November 2016 and, although he did not know his precise minutes of phone use in that month, testified that the effort he put into his work in November 2016 was no different from that in the previous months of 2016. Audio at ~26:17, ~27:15. There is no reason in the record to question either party's credibility, to doubt the accuracy of either party's testimony or to prefer the testimony of one party over the other. Where, as here, the evidence of on disputed issues is evenly balanced, the employer has failed to meet its burden. Because the employer did not show that it was more likely than not that claimant's productivity in November 2016 was excessively deficient or that any drop in his productivity in that month was the result of a willful failure to work or wantonly negligent work efforts, claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-83099 is affirmed.

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

DATE of Service: June 29, 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. 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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