

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1123**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103309). Claimant filed a timely request for hearing. On September 13, 2017, ALJ Seideman conducted a hearing, and on September 15, 2017 issued Hearing Decision 17-UI-92705, affirming the Department's decision. On September 18, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent it was relevant and based upon the record.

**FINDINGS OF FACT:** (1) Bank of America NT-SA employed claimant as a loan officer from approximately October 15, 2015 to June 9, 2017.

(2) The employer paid claimant commission based upon sales, with \$2,000 per month draw as guaranteed base pay. The employer deducted the draw from any commissions he earned. During months when claimant's commission earnings did not exceed the base pay, claimant accrued a draw deficit.

(3) Claimant had experience in the mortgage industry, but little experience as a loan officer working on the sales side of the industry. Because he lacked experience he also lacked industry contacts and received work based almost entirely based upon referrals from the employer's branch. Claimant underwent training with the employer, worked full time and tried to meet the employer's expectations, but he nevertheless struggled to meet them and the employer was dissatisfied with his performance.

(4) On March 24, 2017, the area sales manager gave claimant a warning for poor performance, removed him from the branch at which he had been working, and stationed him at his home. Claimant continued to work full time. On April 18, 2017, the area sales manager gave claimant a written warning for poor performance and told claimant at that time that his discharge was inevitable and that he would not be able to prevent it regardless what his future mortgage sales were.

(5) On May 19, 2017, the area sales manager notified claimant that he was being stationed at a new branch. Claimant and the area sales manager communicated about claimant's concern that it did not make sense for him to resume work outside of his home, and pay for his children to resume daycare, when he would inevitably be discharged. Thereafter, claimant did not resume working at a branch.

(6) On June 9, 2017, the employer discharged claimant for inadequate sales. By the time of his discharge claimant had gone months without his commission exceeding the guaranteed base pay and had accrued a \$7,000 or \$8,000 deficit.

**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) (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. 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The ALJ found as fact that after a year of training claimant's "struggles" to meet the employer's performance expectation "continued," that "because of [claimant's] substandard performance" the employer removed claimant from the branch at which he had worked and issued a warning to him, the employer notified claimant that he was being disciplined under the employer's progressive discipline policy, that claimant was then given a written warning, claimant's performance continued to be substandard, and the employer ultimately discharged claimant based upon his poor performance. Hearing Decision 17-UI-92705 at 1-2. The ALJ concluded that, although claimant was an inexperienced salesman, because the employer's area sales manager "felt that claimant very well had the ability to reach the goals, but wasn't applying himself," claimant therefore "had the ability" to perform the work and his "lack of performance" "was a wantonly negligent disregard of the employer's interest and constituted misconduct." *Id.* at 2-3. We disagree.

As a preliminary matter, while the ALJ was correct that the area sales manager did testify that he thought claimant had the ability to do the work he was hired to perform, the area sales manager also testified that he did not work at the same location as claimant, did not know whether or not claimant was trying his hardest to meet the employer's expectations, and explained, "I mean, I think it's a hard, you know – it's a 100% commission job so it can be a hard, hard – I mean, I think ultimately he tried, but um, it didn't, he wasn't able to get any closed loans." Audio at 12:40-13:03. Ultimately, the totality of the evidence in this record fails to show that claimant "had the ability" to meet the employer's expectations with regard to his performance. At all relevant times, claimant was an inexperienced salesman. He struggled to meet the employer's performance expectations throughout his employment,

despite an extensive training period, and, at the time of his discharge, claimant had been warned, removed from his branch, placed on progressive discipline, received a written warning, had a \$7,000 or \$8,000 draw deficit, and was discharged, all for failure to satisfy the employer's expectations with respect to his performance. Given that claimant's pay was commission based and his inadequate performance resulted in his receipt of only the guaranteed base pay rather than increased pay he would have earned from sales commissions, it appears that claimant had a significant self-interest in improving his performance, yet failed to do so over an extended period of time. We find it more likely than not that if claimant had the capacity to improve his performance, and, consequently, his take-home pay, he would have done so, and it was claimant's failure to meet the employer's performance expectations despite his efforts to do so that resulted in his discharge. Claimant's discharge was, therefore, due to inefficiency that was the result of a lack of skills or experience selling mortgages. Under OAR 471-030-0038(3)(b), a discharge for that reason is not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his discharge from work.

**DECISION:** Hearing Decision 17-UI-92705 is set aside, as outlined above.<sup>1</sup>

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 16, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

---

<sup>1</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.