

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1160**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 114257). The employer filed a timely request for hearing. On September 21, 2017, ALJ Triana conducted a hearing, and on September 26, 2017 issued Hearing Decision 17-UI-93281, affirming the Department's decision. On September 29, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Focus, LLC employed claimant as a sales representative from January 9, 2017 until June 12, 2017. The employer sold online marketing, advertising and business consultation services to clients.

(2) The employer expected claimant to generate at least \$3,200 in gross sales each month. Claimant understood the employer's expectations.

(3) For March 2017, claimant generated gross sales of approximately \$897. Sometime in March 2017, the employer issued a written warning to claimant for inadequate sales. For April 2017, claimant also generated approximately \$897 in gross sales. On May 2, 2017, claimant was tardy in reporting for work and received two written warnings, one for his tardiness and one for his inadequate sales performance in April 2017.

(4) For May 2017, claimant generated gross sales of \$1,600. The employer did not give claimant a warning for inadequate sales in May 2017.

(5) Sometime before June 12, 2017, the employer reviewed claimant's sales performance for June 2017 and determined that claimant had generated only \$199 in gross sales. Claimant was sick and absent from work on Friday, June 9 and Monday June 12, 2017. On June 12, 2017, the employer notified claimant by text message that he was discharged.

**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. Absences due to illness and mere inefficiency resulting from lack of job skills or inexperience are not misconduct. OAR 471-030-0038(3)(b). 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).

At the outset, the employer's witness contended that the employer discharged claimant due to his attendance and his failure to meet the employer's sales objective of \$3,200 per month for several months. With respect to claimant's attendance, the employer's witness was unable to identify any violations of the employer's attendance expectations by claimant that occurred after May 2, 2017. Transcript at 8. The employer did not dispute that claimant was absent from work on June 9<sup>th</sup> and June 12<sup>th</sup> due to illness, or assert that absences due to illness violated the employer's attendance expectations. Given these facts as well as the length of time that elapsed between the May 2, 2017 and June 12, 2017, the date of claimant's discharge, it does not appear that alleged attendance violations were the proximate cause of claimant's discharge.

With respect to claimant's failure to meet the employer's sales quotas, the employer did not dispute claimant's testimony that he "tried [his] hardest" to achieve the employer's sales goals and that he "did [his] best at the job." Transcript at 33, 34. Nor did the employer challenge claimant's testimony that, among the sales representatives in his department, he made the most phone calls in an attempt to meet the employer's expectations, or that the performances of all of the sales representatives fell short because the employer's objectives were not attainable and it was a "hard sell." Transcript at 30, 31, 33, 34. The employer failed to present any evidence suggesting or tending to suggest that claimant's inability to meet the employer's sales expectations was the result of willful or wantonly negligent behavior in performing his job duties as opposed to an inability to perform to the desired level due to a lack of job skills or experience. The mere fact that claimant did not meet the employer's sales goals, in and of itself, is insufficient to establish that claimant engaged in misconduct. *See* OAR 471-030-0038(3)(b). On this record, the employer did not meet its burden to show it discharged claimant for misconduct.

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

**DECISION:** Hearing Decision 17-UI-93281 is affirmed.

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

**DATE of Service:** November 1, 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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