

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1182

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133331). Claimant filed a timely request for hearing. On October 3, 2017, ALJ Griffin conducted a hearing, and on October 4, 2017, issued Hearing Decision 17-UI-93836, concluding the employer discharged claimant, but not for misconduct. On October 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wave Broadband employed claimant as a direct sales representative (DSR) from August 31, 2015 to August 9, 2017.

(2) The employer's DSRs were compensated based on sales commissions claimed and earned. The employer generally communicated its policies concerning entitlement to sales commissions in a variety of ways, including initial training, policy statements, emails, informal counseling, sales team meetings and other methods. The employer audited sales before paying out commissions claimed to verify the DSR was entitled to the commission in question.

(3) On February 23, 2017, after the employer received a complaint from a customer that claimant had completed a sale at a residence where only minors were present and without notating the price on the order form, the employer gave claimant a written warning for "violation of company policies." Exhibit 1.

(4) On March 7, 2017, after the employer received a complaint from a customer about the "unprofessional" manner in which claimant had installed equipment, the employer gave claimant another written warning for "violation of company policies." Exhibit 1.

(5) The employer expected its DSRs to refrain from "churning" an account, which it considered reestablishing an account at a previously serviced address as a new sale within a specified period of time after it has been disconnected, and then claiming another commission. Transcript at 41. On June 29, 2017, the employer gave claimant a verbal warning for "changing the names at a relative's residence,

repackaging and creating new accounts in an effort to receive multiple commissions four times in one year,” in apparent violation of its policy against “churning” and declined to pay him his last claimed commission. Exhibit 1.

(6) On July 7, 2017, after the employer received a complaint from a customer that claimant had sold and installed phone services without their knowledge, the employer gave claimant a written warning for “violation of company policies.” Exhibit 1.

(7) Throughout claimant’s employment, the employer had an unwritten policy that DSRs were prohibited from making sales to customers with outstanding balances. However, in July 2017, the employer had a “win back” program in effect, under which the employer allowed its DSRs to talk to customers who had recently disconnected in an effort to “win them back.” Transcript at 32. On July 17, 2017, claimant made a sale to a customer who had been disconnected in February 2017 due to an unpaid balance of \$164.69. Claimant made the sale and claimed a commission because he erroneously believed, after speaking to his direct supervisor and other DSRs, that the customer was eligible to purchase services under the employer’s “win back” program as long as the customer agreed to roll the customer’s past due balance into their new plan and then pay it off. Transcript at 59-60.

(8) In late July, the employer audited the July 17 sale on which claimant claimed a commission and concluded claimant had claimed a commission on an ineligible sale to a customer with a past due balance. On August 9, 2017, the employer discharged claimant for “repeatedly claiming commission earned on ineligible sales made outside of [the employer’s] required process, despite multiple warnings.” Exhibit 1.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for “repeatedly claiming commission earned on ineligible sales made outside of [the employer’s] required process, despite multiple warnings.” However, the employer did not discharge claimant until after the July 17, 2017 sale, presumably because, up to that point, the employer had concluded that claimant’s prior commission or policy violations did not merit discharge. Accordingly, the July 17 sale was the proximate cause of claimant’s discharge and the proper focus of the misconduct analysis.

The employer discharged claimant for claiming a commission on the July 17 sale after concluding the sale was ineligible for commission based on the fact it was made to a customer whose service had been disconnected for failing to pay an outstanding balance. However, at hearing, claimant explained that he believed that the sale was authorized under the employer's "win back" program after talking to his direct supervisor and other DSRs prior to completing it. Claimant explained, "[after] the conversation that I had [with his direct supervisor] as well and some of the other [salespeople]" he understood "that if a customer had...a low balance they would carry it onto...their new plan and pay it off." Transcript at 59-60. Given claimant's testimony, under the circumstances it is likely that claimant claimed the commission in question because he believed the sale was proper. Claimant's belief was plausible because he knew, based on the June 29 verbal warning he had just received regarding his recently claimed commissions, that the employer would carefully examine the sale before approving his commission. Accordingly, the employer failed to meet its burden to establish, by a preponderance of the evidence, that claimant consciously, i.e. willfully or with wanton negligence, claimed a commission on a sale that he knew or should have known was ineligible under the employer's policies and would violate the employer's expectations.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-93836 is affirmed.

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

DATE of Service: November 17, 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.

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.