

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1305**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 143123). The employer filed a timely request for hearing. On October 25, 2017, ALJ Lewis conducted a hearing, and on October 26, 2017, issued Hearing Decision 17-UI-95536, affirming the Department's decision. On November 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Sears Home Improvement employed claimant, last as a district general manager, from February 12, 1999 to August 17, 2017.

(2) Claimant managed the employer's Portland, Oregon home improvements office. One of his responsibilities was to hire and manage "sales project consultants" (SPCs) that sought outside sales to customers for home improvement projects. Exhibit 1. Claimant also hired and managed field sales trainers whose job was to help train SPCs. A primary employer expectation for claimant, as district general manager, was that he achieve and maintain a sales staff that met an employer-imposed number of SPCs out in the field.

(3) The employer's corporate office set staffing and profit standards for each district office based on their own projections. Staffing standards often changed throughout the year.

(4) Claimant was expected to acquire new SPCs using a variety of methods suggested by the employer including daily calls to recruiters, attending company purchased career fairs, refreshing a Craigslist ad weekly, attending home shows to search for possible new sales staff, weekly referral meetings with

current staff and blocking out daily time to focus on recruitment efforts. High turnover in sales staff was typical in the industry. In claimant's district, SPCs typically were employed between six and twelve months. Based on claimant's experience at local job fairs, it was especially difficult to attract SPCs in the Portland market due to compensation for the position being commission only with no guaranteed wage.

(5) On April 4, 2017, claimant was counseled by his area manager about his staffing numbers being under the corporate imposed standard for "Q1", which was 17. Exhibit 1. Between February 26 and March 27 his district SPC numbers went from 16 to 11. However, in March the employer began counting field sales trainers as a 0.5 SPC whereas previously they were counted as a full SPC. The employer gave claimant until May 15, 2017 to reach a new goal for SPCs of 21 and if he did not reach that goal he would be placed on a performance improvement plan (PIP). Despite the apparent staffing shortcomings, for Q1 of 2017, claimant earned a substantial sales bonus for exceeding the employer imposed goal for profitability.

(6) By May 15, 2017, claimant's district had 13 SPCs. Because he had not met his staffing goal, the employer placed him on a PIP and set his goal at 22 SPCs for the period of the PIP which was to run through August 15, 2017. Claimant was advised that if he did not meet his employer imposed staffing goals, he faced possible termination of employment.

(7) Claimant used all the methods suggested by the employer to acquire new sales staff and improve his SPC numbers except personally attending home shows because he was already working sixty hours or more every week. However, he delegated the task of attempting to attract new SPCs at the home shows to a field representative who was physically present at the home shows and handed out flyers regarding potential employment as a sales consultant.

(8) Despite claimant's efforts to acquire SPCs during the period of his PIP, he did not meet the employer's staffing goals set out therein. On August 17, 2017, the employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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 standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of the 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably violate a standard of behavior the employer had the right to expect her. The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

We agree with the ALJ that the record contains insufficient evidence that claimant's failure to meet the employer imposed staffing goals set out in his PIP or even earlier was either willful or the result of

conscious indifference to the employer's interests or staffing goals. Hearing Decision 17-UI-95536 at 3. The employer's area manager essentially admitted as much when he testified at hearing that during the period in question, claimant hired the potential sales consultant candidates worthy of being hired and sincerely attempted to accomplish the employer's goals regarding SPCs. Audio Record ~ 28:00 to 29:00. Accordingly, on this record, although claimant's failure to meet those goals was a sufficient reason for the employer to make its discharge decision, without more, it was insufficient for the employer to meet its burden to establish misconduct, as defined under ORS 657.176(2)(a).

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

**DECISION:** Hearing Decision 17-UI-95536 is affirmed.

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

**DATE of Service:** December 12, 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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