EO: 200
BYE: 201845

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0224

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 121204). Claimant filed a timely request for hearing. On February 13, 2018, ALJ Wyatt conducted a hearing, and on February 16, 2018 issued Hearing Decision 18-UI-103515, affirming the Department's decision. On March 2, 2018, 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) Acosta Sales and Marketing employed claimant from February 29, 2016 until November 15, 2017 as a merchandiser.

(2) The employer expected claimant to travel to stores containing two client brands and spend time in the stores responding to questions and issues regarding the product lines. The employer expected claimant to begin and end each store call in or near the store. Claimant used an electronic tablet to submit information about the store calls she made. The employer was able to access global positioning system (GPS) information from claimant's tablet to allegedly show claimant's location when she began and ended each store call. The employer expected claimant to refrain from providing false information about completing store calls and her location when doing so.

(3) The employer also expected merchandisers to refrain from keeping their tablets in "airplane mode" while working. Claimant did not know from prior training, experience or common sense that the employer prohibited her from keeping her tablet in "airplane mode" while she worked.

(4) Since late 2016, claimant had recurring problems with insufficient battery life in her tablet. Claimant reported the problem to her supervisor and the employer's technology staff. Claimant followed their suggestions to extend battery life, but the problem persisted. Beginning in April 2017, claimant would usually put the tablet in "airplane mode" so the tablet would use less battery power. Claimant put her tablet in airplane mode while she worked, and turned her airplane mode off when she was at home transferring the data she collected while working.

(5) On October 25, 2017, the employer held a telephone meeting to clarify its expectations regarding its expectation that merchandisers be onsite when completing store calls. Claimant attended the meeting.

(6) In November 2017, the employer conducted an audit of claimant's GPS data from September 5, 2017 through October 31, 2017. The data allegedly showed claimant's location when she began and ended the store visits she reported having completed during that time. Of 300 store calls, the GPS data showed claimant began or ended her store calls at the respective stores for only 37 of the store calls. From November 1 through November 8, 2017, another audit showed claimant began and ended only 20 of 29 store calls at the stores.

(7) On November 15, 2017, the employer discharged claimant for allegedly providing false information to the employer about completing onsite store calls.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude 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 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because it concluded that she did not complete the store calls onsite as she reported from September 25 through November 8, 2017. Claimant denied the employer's allegation and testified that she did complete all the store calls by visiting the stores. Transcript at 43, 46. The employer relied primarily on GPS data showing that claimant allegedly began and ended the majority of her store calls at her home, rather than at the stores. However, claimant had ongoing problems with the battery in her tablet, and often used the tablet in "airplane mode." Claimant asserted that the GPS data was inaccurate because she turned her tablet on and off airplane mode at home, potentially causing the GPS to record her store calls as beginning and ending at her home. Transcript at 41-42. We find claimant's explanation no less persuasive than the GPS information provided by the employer. Absent a reason to disbelieve claimant or the employer's witnesses, the evidence of whether

claimant began and ended her store calls at the stores is no better than equally balanced, and the employer has thus failed to establish that it is more likely than not that claimant failed to complete her store calls, or failed to begin and end the calls onsite at the stores. Moreover, to the extent the employer discharged claimant because she kept her tablet in airplane mode, allegedly concealing her location from the employer, the employer did not show that claimant knew or should have known from prior training, warnings, experience or common sense that doing so violated the employer's reasonable expectations.

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

DECISION: Hearing Decision 18-UI-103515 is affirmed.

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

DATE of Service: <u>April 3, 2018</u>

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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