

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0252

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102100). Claimant filed a timely request for hearing. On January 15, 2014, ALJ Menegat conducted a hearing, and on January 23, 2014, issued Hearing Decision 14-UI-08952, concluding claimant was discharged, but not for misconduct. On February 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer accompanied its application for review with new information about “other incidents” besides the final incident that was the precipitating factor for claimant’s discharge. Written Argument at 1. We construe the employer’s submission as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it is relevant and material to our determination and the party was prevented by factors or circumstances beyond its reasonable control from presenting the information at the hearing. Because the new information would not have been material to our determination for the reason explained below, the employer did not make the required showing, and its request to have EAB consider the additional evidence is denied. We declined to consider claimant’s response to the employer’s submission for the same reason.

FINDINGS OF FACT: (1) Nye Beach Montessori employed claimant as a teacher from August 1, 2011, to October 22, 2013. Claimant typically taught children 2 to 4 years of age.

(2) The employer expected claimant to continually watch and never turn her back on the children she was supervising when they were out on the employer’s unfenced playground. Claimant was aware of the employer’s expectation.

(3) The previous day, on October 16, 2013, the employer's owner (Chapin) received a report from a parent (Greenawald) that when Greenawald arrived at the employer's school to pick up her 2 year old child, she observed her child walking away from the unfenced playground up a hill toward a slide while talking with a stranger and that claimant "did not realize" her child was over there because she "was looking down and talking to a child." Transcript at 5, 25. Greenawald also reported that as she headed toward her son, her son "kind of realized" he was away from the group, turned around and met her at the bottom of the hill. Transcript at 23. Greenawald did not confront the stranger or mention the incident to claimant on October 15 although she went over to claimant and told claimant she was picking up her child. When the employer questioned claimant on October 16, claimant denied that the reported incident occurred.

(4) On October 22, 2013, the employer discharged claimant for turning her back on Greenawald's child on October 15, 2013.

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 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. 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).

There is no dispute that the employer discharged claimant on October 22 based on the report the owner received from Greenawald. Greenawald told the owner that because claimant was inattentive, Greenawald's child wandered off from the playground area and talked to a stranger. That incident was, therefore, the precipitating factor or proximate cause of claimant's discharge and the focus of the misconduct analysis. Transcript at 11.

The employer had the right to expect claimant to continually watch and never turn her back on the children she was supervising when they were out on the employer's unfenced playground because claimant acknowledged that she had been made aware of that expectation. Transcript at 35. However, claimant denied that she violated this expectation and disputed that the incident reported by Greenawald even occurred. Transcript at 31, 38, 39. Greenawald, the only eye-witness to the alleged incident, asserted that she was "shocked" by what she saw when she arrived to pick up her child and decided that it was so serious that it needed to be reported to Chapin. Greenawald admitted she did not do so that day even though Chapin was on the premises or even that she mentioned the incident to claimant when she spoke to claimant about picking up her child. Transcript at 23-24. We agree with the ALJ that on this record both claimant and Greenawald were equally credible and that the employer's evidence that the

reported incident occurred did not outweigh claimant's evidence that it did not. Hearing Decision 14-UI-08952 at 4, 5. Moreover, even if the incident occurred as Greenawald reported, there was insufficient evidence on which to infer that claimant *consciously* violated the employer's expectation that she remain continually attentive and never turn her back on the children she was supervising because Greenawald testified that claimant was "looking down and talking to a child" when Greenawald looked over at her. Transcript at 25. Consequently, the employer failed to meet its burden to establish misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 14-UI-08952 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: March 10, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.