

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0933

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143228). Claimant filed a timely request for hearing. On May 13, 2014 and May 16, 2014, ALJ L. Lee conducted a hearing, and on May 23, 2014 issued Hearing Decision 14-UI-18332, reversing the Department's decision. On May 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 14-UI-18332, the ALJ admitted into evidence as Exhibit 1 certain documents that the employer offered at the hearing. Although these documents are readily identifiable in the general record, they were neither marked as an exhibit nor do they appear in the hearing record. To correct this error, EAB has marked the documents as EAB Exhibit 1 and admitted that exhibit into the hearing record. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit any such objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such objection is received and sustained, EAB Exhibit 1 will remain part of the record.

FINDINGS OF FACT: (1) Crawler's Critterz, Inc. employed claimant as an infant teacher in its preschool program from January 6, 2014 until March 21, 2014. Claimant worked in the employer's nursery taking care of children under the age of 15 months.

(2) The employer expected claimant to cooperate reasonably with the employer's in resolving workplace concerns. Claimant was aware of the employer's expectations as a matter of common sense.

(3) During the time she worked for the employer, claimant became increasingly frustrated when her supervisor, a lead teacher and an assistant director, regularly left the nursery for significant periods of time, which claimant believed resulted in inadequate staffing for the number of infants in the nursery.

Claimant was also frustrated when the supervisor changed an infant's diapers but did not initial the diaper-changing chart. Claimant further disliked the frequent, unannounced tours of the nursery by parents that the employer allowed, which often resulted in claimant needing to remove the infants from the nursery and disrupted the infants. Claimant thought that her supervisor was not approachable and intimidating. Claimant thought that her supervisor told her an excessive number of times that she was going to be discharged for work-related infractions.

(4) On February 3, 2014 and March 12, 2014, claimant's supervisor issued written warnings to her. EAB Exhibit 1 at 2, 3. Both warnings pointed out that claimant had a "negative" attitude in the workplace. *Id.*

(5) On March 19, 2014, claimant asked the employer's director if she could meet with him to discuss concerns about her job and her supervisor. During this meeting, as claimant raised her concerns with the director, claimant became very emotional and upset and started sobbing. Throughout the meeting, claimant was "visibly shaken." Transcript at May 13, 2014 Hearing (Transcript 1) at 18; *see also* Transcript of May 16, 2014 Hearing (Transcript 2) at 42, 50, 81. When claimant mentioned to the director that she had spoken to other staff members and they also had experienced difficulty working with the supervisor, the director told claimant that speaking with other employees about her supervisor violated the employer's policies against workplace gossip and disparagement. While claimant was sobbing and still upset, the director asked claimant if she "was willing to work on the issues" that both of them had raised during the meeting. Transcript 1 at 17; *see also* Transcript 1 at 8, 10, 17; Transcript 2 at 17, 89. Claimant said nothing in response to the director's question because she was crying. Transcript 2 at 42. Although she had said nothing, the director thought he heard claimant respond "no." Transcript 1 at 10, 17; Transcript 2 at 16, 89. The director did not ask claimant to explain the response that he thought claimant had made. Instead, the director then asked claimant twice if she was leaving work. Transcript 1 at 10, 11, 17; Transcript 2 at 17-18, 24. Still sobbing, claimant did not speak in response to this question. The director thought he saw claimant "half-shake" her head "no," while looking at the floor. Transcript 1 at 11; Transcript 2 at 17-18. At that point, the director said, "Let's take a breather." Transcript 1 at 10. The director told claimant to take the rest of the day off as well as the next day and "to expect a phone call." Transcript 1 at 10.

(6) On March 20, 2014, the employer decided to discharge claimant because it believed that she had expressed an unwillingness to try to resolve the workplace issues that were brought up at that March 19, 2014 meeting. That day, the employer called a third-party company that handled its human resources matters and asked that third-party to notify claimant that she was discharged.

(7) On March 21, 2014, the third-party contacted claimant and told her that she 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. 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. The employer carries 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).

Although the employer's witness, the director, discussed at hearing several alleged violations of the employer's policies that he contended claimant had committed, he clearly testified that the reason that the employer discharged claimant was because it thought claimant had expressed an unwillingness to cooperate with the employer in resolving the issues raised at the March 19, 2014 meeting. Transcript 1 at 8, 9, 17, 18; Transcript 2 at 6-23, 24, 26-27, 37. EAB customarily focuses its analysis on the proximate cause of claimant's discharge in determining whether claimant was discharged for behavior that constituted misconduct. See *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred). Based on the director's testimony, it appears that the proximate cause of claimant's discharge was the director's perception that, by her responses on March 19, 2014, claimant had manifested an intention not to cooperate with the employer in resolving certain workplace issues. It is fundamental to the employment relationship that an employee has an obligation to cooperate reasonably with an employer's efforts to address problems in the workplace. A refusal to do so ruptures the employment relationship and violates the standards of behavior that the employer has a right reasonably to expect even if the employer did not clearly articulate this expectation. As a matter of common sense, claimant understood that the employer had this expectation.

The issue in this case is whether claimant's behavior during the March 19, 2014 meeting, reasonably construed, manifested her intention not to cooperate with certain workplace problems that she and the director had identified at that meeting. As described by all witnesses, the atmosphere in which the meeting took place was highly emotionally-charged. Claimant sobbed throughout the meeting, and we infer that claimant was unable to maintain any level of composure. Transcript 1 at 10, 12, 18, 20; Transcript 2 at 42, 44, 50, 81, 84. Claimant's testimony that she was not able to respond orally to the director's questions when he asked them at the meeting was plausible, as was her testimony that she did not respond to any of the questions and did not shake her head "no." Transcript 2 at 41, 42. It is difficult to conclude that, given claimant's emotional state, she was consciously refusing to respond to the director's questions or that it was reasonable for the director to rely on any responses that he thought that claimant might have made at the meeting without asking for further clarification from her. Although the director testified repeatedly that claimant answered "no" when he asked her if she was willing to work out the issues brought up at the March 19, 2014 meeting, this statement is not confirmed by the discharge notice that the employer prepared, which did not state that claimant had made any such clear statement. Transcript 1 at 10, 17; Transcript 2 at 16, 90; EAB Exhibit 1 at 1. Because the discharge notice is fairly detailed, it is unlikely that the employer would have omitted such a statement if claimant had actually made it. In addition, the employer's administrative assistant, who was present at the March 19, 2014 meeting expressly for the purpose of taking notes, testified that her notes did not include any response claimant might have made to the director's question about her willingness to work

on the issues that had been brought up at the meeting and, although the administrative assistant had the impression that claimant was not willing to do so, she did not independently recall that claimant had "flat out" refused to cooperate. Transcript 2 at 81, 83. The testimony of the administrative assistant is not corroboration for the director's testimony that claimant had clearly stated "no" when he asked if she was willing to work toward a resolution of workplace issues. Because claimant testified that she did not refuse to cooperate, as well as the undisputed emotional atmosphere during the March 19, 2014 meeting and the inability of the employer's administrative assistant to corroborate the director's testimony, the employer did not meet its burden to show that, by her statements during the March 19, 2014 meeting, claimant expressed her unwillingness to work with the employer to correct workplace issues. Transcript 2 at 41-42. The employer did not demonstrate, more likely than not, that claimant engaged in misconduct by refusing to cooperate reasonably with the employer's efforts.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-18332 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: July 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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