

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-1198**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 151640). The employer filed a timely request for hearing. On June 12, 2014, ALJ Monroe conducted a hearing, and on June 23, 2014 issued Hearing Decision 14-UI-20160, affirming the Department's decision. On July 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

**FINDINGS OF FACT:** (1) Ontrack Inc. employed claimant as its healthy babies and daycare supervisor and director from August 13, 2013 to March 26, 2014.

(2) The employer expected employees to refrain from "mishandling," "rough handling," "roughhousing" or "manhandling" a child, "corporal punishment," or "anything that's beyond sort of nurturing touch." Transcript at 5, 7, 22.

(3) On March 24, 2014, claimant was sitting on the floor, and a child was playing with a toy in front of her. A child with a history of biting other children approached, attempted to play with the child's toy, and bit the child. Claimant told the child who had bitten the other child, "No," lifted him by his armpits, and sat him down on the other side of her. Transcript at 38. The child was a "little stunned" at being moved and "teared up," but did not cry. Transcript at 19, 30-31. Claimant then picked up and comforted the child who had been bitten, and explained to the other child that it was not "okay" to bite other children. Transcript at 31. After the child who had been bitten calmed down, claimant let both children go play separately. Claimant believed her conduct complied with the employer's expectations regarding the handling of children.

(4) On March 25, 2014, claimant told the employer's human resources director and its operating manager that she sat the child down "forcefully." Transcript at 33-34. Claimant stated that she had done the same thing when the child had bitten another child a few days earlier, and that she would do so if the child bit a child again, because that was the correct way to handle a child who repeatedly bit other children. On March 26, 2014, claimant mailed the employer a letter stating that although she had said she "forcefully" sat the child down, it was more accurate to say that she sat the child down "sternly" or "abruptly." Transcript at 34.

(5) The employer discharged claimant for violating its expectations regarding the physical handling of children.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its expectations regarding the physical handling of a child on March 24, 2014. At hearing, claimant provided the only first-hand testimony regarding her handling of the child. Absent a basis for concluding that claimant was not a credible witness we found facts in accordance with her testimony. Claimant testified that she sat the child down "forcefully" only in that she "force[d] him to move" by picking him up "plac[ing] him down" on the other side of her. Transcript at 31. Claimant further testified that she believed she handled the child in accordance with the employer's expectations, and had no reason to believe otherwise. Transcript at 32-38. Although the employer's executive director disputed that testimony,<sup>1</sup> we find the evidence on that issue, at best, equally balanced. The employer therefore failed to show that claimant consciously handled the child in a manner she knew or should have known probably violated the employer's expectations. The record instead shows that claimant's conduct was, at worst, the result of a good faith error in her understanding of those expectations. Good faith errors are not misconduct.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 14-UI-20160 is affirmed.

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<sup>1</sup> Transcript at 22-23, 39-41.

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

**DATE of Service: August 12, 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](http://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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