

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0947

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 94748). The employer filed a timely request for hearing. On August 3, 2015, ALJ Seideman conducted a hearing, and on August 5, 2015 issued Hearing Decision 15-UI-42547, affirming the Department's decision. On August 7, 2015, 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 to the extent it was based on the record when reaching this decision.

FINDINGS OF FACT: (1) PlayDate PDX LLC employed claimant from January 30, 2014 to May 29, 2015 as a manager.

(2) Before February 7, 2015, claimant worked for the employer as an operations manager. On February 7, the employer made one of its owners the operations manager, and changed claimant's role to that of senior assistant manager. Claimant's duties included managing labor costs by modifying staff levels during his shifts.

(3) The employer expected employees to refrain from falsifying company documents. Claimant understood the employer's expectation as a matter of common sense. The employer also expected assistant managers to refrain from writing letters verifying employee hours and compensation on behalf of the employer.

(4) On April 9, 2015, an employee asked claimant for a letter from the employer stating the employee's rate of pay and that she worked "around 20 hours a week" (Exhibit 7) for use with her application for

government food benefits.¹ The employee worked an average of 20.51 hours per week during March 2015, and worked 38.61 hours during the first two weeks of April 2015.² Exhibit 8 at 2.

(5) Claimant had assisted with writing an employee verification letter before. The employer did not tell claimant he was no longer permitted to write such a letter when he was demoted to the senior assistant manager position. Claimant reviewed the number of hours the employee had worked, and verified she was then working an average of 20 hours per week. On April 10, 2015, claimant wrote a letter to the Oregon Department of Human Services (DHS) stating the employee worked an average of 20 hours per week.

(6) On or about May 28, 2015, the employer reviewed claimant's electronic mail at work and learned the claimant had written the August 10, 2015 letter to DHS. The employer reviewed the payroll summary and saw that, from January 2014 through February 2015, the employee who was the subject of the letter often worked less than 20 hours per week.

(7) On May 29, 2015, the employer discharged claimant because it did not give claimant permission to write the April 10 letter to DHS, and because claimant allegedly provided false information to DHS.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant 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.

The employer discharged claimant, in part, because claimant wrote a letter on behalf of the employer regarding an employee's hours and wages without having permission to do so. The employer had a right to expect claimant to refrain from writing letters on behalf of the employer without the employer's permission. However, claimant testified at hearing that he wrote the letter because he had been given the task of writing an employee verification letter before, and the employer did not tell him he was no longer permitted to write such a letter. Audio Record at 32:04 to 32:28. Claimant also asserted that the operations manager was not there when the employee requested the letter, and claimant understood the employer expected him to perform the operations manager's duties in her absence. Audio Record at 41:30 to 41:49. Moreover, as senior assistant manager, claimant's duties included managing labor costs by modifying employees' hours. Based on claimant's duties, the employer's expectation that claimant

¹ OAR 461-135-0570 limits student eligibility for the Supplemental Nutrition Assistance Program (SNAP) to otherwise eligible students working *an average of 20 hours or more per week*. Italics added.

² The record shows the combined total hours for first two weeks of April 2015, and does not show how many hours the employee worked during only the first week of April 2015. Exhibit 8 at 2.

refrain from writing a letter about an employee's hours was not a matter of common sense. The preponderance of the evidence fails to show claimant knew or should have known from prior warnings, experience, training, or common sense that writing the letter probably violated the employer's expectations. Absent such a showing, the employer failed to establish that claimant violated its expectations regarding the scope of his authority willfully or with wanton negligence.

The employer also discharged claimant for allegedly providing false information in the letter he wrote to DHS on April 10. The employer argues that claimant "fabricated" the information in the letter because he did not have access to the payroll or scheduling system for information to write the DHS letter. Employer's Argument. However, although claimant testified that he did not have access to the payroll summary admitted at hearing (Exhibit 8), claimant testified that he "had looked up [the employee's] hours in our system that we used" and verified that the employee was working an average of 20 hours per week. Audio Record at 33:26 to 33:46. The employer's own payroll summary, admitted at hearing (Exhibit 8), corroborates claimant's testimony because it shows the employee did, in fact, work an average of 20 hours per week during March 2015, and may have worked 20 hours or more during the first week of April 2015. The letter to DHS is not in the record. Absent evidence showing the letter verified the employee's hours for a time period other than March 2015 or the first week of April 2015, the record fails to show that claimant provided false information by stating the employee worked an average of 20 hours per week, or that claimant intended to or was expected to verify anything but the employee's average hours at the time he wrote the letter. The employer therefore failed to establish that claimant violated the employer's expectations, let alone that he did so willfully or with wanton negligence.

The employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-42547 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 15, 2015

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.