

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0234**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81253). Claimant filed a timely request for hearing. On February 18, 2016, ALJ S. Hall conducted a hearing and issued Hearing Decision 16-UI-53273, concluding the employer discharged claimant, but not for misconduct. On February 26, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). In her argument, claimant asserted that the ALJ erred in excluding two photographs claimant offered into evidence at the hearing. However, the photographs are not material to our decision. Thus, to any extent the ALJ erred in excluding the photographs, such error was harmless. OAR 471-040-0025(5) (August 1, 2004). EAB did not consider the photographs when reaching this decision.

**FINDINGS OF FACT:** (1) Beaverton School District 48J employed claimant as a school bus driver and supervisory aide from May 30, 2008 to October 14, 2015.

(2) The employer expected claimant to refrain from unprofessional interactions with students. Claimant sometimes had difficulty complying with that expectation when students spoke to her in a disrespectful manner or otherwise misbehaved. On December 2, 2014, the employer gave claimant a written warning for unprofessional interactions with students. On May 1, 2015, the employer gave claimant a "last and final" written warning, in part, for unprofessional interactions with students. Exhibit 1 at 2.

(3) On October 7, 2015, claimant was involved in an accident while riding her motor scooter to work. The scooter slipped out from underneath claimant as she made a right turn. Claimant's head hit the curb hard enough to damage her helmet, and the scooter landed on top of her. Claimant determined that she did not need medical attention, but notified the employer that she would be unable to report for work.

However, the employer sent an employee to pick claimant up and bring her to work. Although visibly shaken by the accident, claimant felt compelled to work because the employer was short-staffed that day. While driving her morning bus route, claimant had a near collision with a speeding vehicle, which caused her more distress. Claimant cried throughout her work day.

(4) At one point, claimant asked two students who had misbehaved in the past what they wanted as a reward for their improved behavior. One of the students asked to no longer be subject to assigned seating. The student's request confused claimant because she had not subjected the students to assigned seating. Claimant told the student, "I never gave you assigned seats. I did say were not to sit next to each other for the mere fact that this is going on . . . ."<sup>1</sup> The student responded, "I did not know."<sup>2</sup> Claimant asked the other student, "Do you want to tell her what I said or do I have to repeat it?"<sup>3</sup> The other student asked claimant to repeat it. Claimant stated:

This is why I do not want you guys sitting next to each other. What part of facing forward do we not grasp? Do you want to go there? Do you really want to go there right now? Do I look like I am in the mood for an argument today?<sup>4</sup>

One of the students asked what they were doing wrong. Claimant replied:

Guess what . . . that is two more weeks your [sic] three isle [sic] banned from each other. Wow . . . you know how to make friends. Why is it my elementary and middle school kids get it? You guys never get it. Wow . . . you think you are so clever.<sup>5</sup>

(5) The employer discharged claimant for unprofessional interactions with the students on October 7, 2015.

**CONCLUSIONS AND REASONS:** We agree with 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. In a discharge

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<sup>1</sup> Exhibit 1 at 11.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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 had a right to expect claimant to refrain from unprofessional interactions with students. Claimant understood the employer's expectations, and knew or should have known that her interactions with the students on October 7, 2015 probably those expectations. On October 11, 2015, however, claimant asserted to the employer that she was visibly "shaken" after her motor scooter accident that morning, and "not in the right frame of mind" when interacting with the students after the accident and her near collision with a speeding vehicle. Exhibit 2 at 2. At hearing, she testified that she was so distraught after the accident and near collision that she cried throughout her workday, wearing sunglasses so that students would not notice. Audio Record at 32:45. Claimant characterized her interactions with the students as "muddled moment" resulting from "frustration," "stress" and being "shaken up." Audio Record at 36:00. Although she acknowledged that her behavior was inappropriate, she asserted that she did the best she could under the circumstances. Audio Record at 36:30-37:30.

Given claimant's testimony, the record fails to show she deliberately violated the employer's expectations, or that her conduct was the result of indifference to the consequences of her actions, and not the emotional distress she was experiencing after her motor scooter accident and near collision with a speeding vehicle. Absent such showings, the employer failed to establish claimant violated its expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 16-UI-53273 is affirmed.

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

**DATE of Service:** April 1, 2016

**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](http://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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