

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0269

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90842). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Shoemake conducted a hearing, and on February 19, 2016 issued Hearing Decision 16-UI-53388, affirming the Department's decision. On March 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Youth Villages employed claimant from August 14, 1996 to November 13, 2015 as a behavioral youth counselor.

(2) The employer provided mental health services for youths between the ages of 8 and 18 in a residential treatment setting. The employer expected claimant to provide proper supervision of youths and keep them free from abuse and neglect while in the employer's care. Staff members were equipped with a radios and the employer expected staff to call for assistance if an incident occurred with any youth. The employer provided claimant a handbook that included its expectations both at hire and in June 2011. Claimant understood the employer's expectations.

(3) The morning of August 1, 2015, claimant was supervising a group of six youths in one wing of the treatment facility. Claimant radioed her supervisor for assistance because the youths were beginning to wake up and the employer's policy was to have two counselors on duty if two or more youths were awake in the wing. Claimant was uncertain if her supervisor would be able to report to claimant's wing at that time. Two youths were lying on the floor in a common area and were talking and giggling. Claimant was sitting near them and could hear that their conversation was appropriate, and claimant did not see the youths touch each other. Claimant then heard one of the youths make a statement of a sexual nature. Claimant told the youth to stop, and radioed her supervisor again for assistance. Claimant's supervisor told claimant he was going to her wing. Claimant continued to try to monitor all six youths on her wing. The two youths had begun to engage in sexual activity involving exposure and inappropriate touching. Claimant's supervisor arrived within "a couple minutes" and addressed the youths' behavior. Transcript at 25.

(4) Claimant understood she was required to report the August 1, 2015 incident to the Oregon Department of Human Services Child Protective Services (CPS). Claimant reported the incident, and CPS conducted an investigation.

(5) On October 2, 2015, CPS concluded that claimant neglected the two children by failing to do more to stop the youths' inappropriate behavior during the August 1, 2015 incident. Claimant appealed the CPS decision, and CPS upheld its decision on November 13, 2015.

(6) Claimant had no prior warnings for failing to provide proper supervision of youths in her care.

(7) On November 13, 2015, the employer discharged claimant because the CPS investigation resulted in a finding of abuse and neglect in claimant's supervision of two children.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude 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. 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).

In Hearing Decision 16-UI-53388, the ALJ concluded that claimant's failure to intervene immediately was a wantonly negligent disregard of the employer's reasonable expectations.¹ The ALJ also concluded that claimant's conduct was too serious to be excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment.² We disagree with the ALJ, and conclude that claimant's conduct on August 1 did not amount to a willful or wantonly negligent disregard of the employer's interest.

The employer discharged claimant because the CPS investigation regarding the August 1, 2015 incident resulted in a finding of abuse and neglect in claimant's supervision of two youths in her care. The results of the CPS investigation are not dispositive on the issue of claimant's alleged misconduct. Regardless of the CPS finding, the employer has the burden to independently show that claimant engaged in willful or wantonly negligent behavior to meet its burden to establish misconduct under ORS 657.176(2)(a). See Appeals Board Decision 02-AB-0171 (February 12, 2002) (claimant not disqualified from benefits where, although Adult Protective Services investigation concluded that claimant's alleged

¹ Hearing Decision 16-UI-53388 at 3.

² *Id.*

abuse of client was substantiated, the employer did not present independent evidence establishing that claimant intentionally or consciously violated the employer's standards).

The employer's human resources manager alleged at hearing that claimant violated the employer's expectations by failing to radio for assistance when the incident began on August 1, 2015, and failing to intervene for ten minutes, allowing inappropriate conduct to continue between two youths. Transcript at 12, 33-34. However, the record shows that claimant radioed her supervisor for additional staff when the youths began to wake up, and told the two youths to stop and radioed her supervisor again for assistance when she first witnessed inappropriate conduct between them. Claimant was the only firsthand witness at hearing who was present during the August 1 incident, and testified that the sexual activity between the two youths did not last ten minutes from when she first became aware of any inappropriate activity between the youths, and that her supervisor arrived within "a couple minutes" after claimant called him to request assistance regarding the incident. Nor is there evidence to show that claimant was wantonly negligent in her supervision of the youths, where the record shows she was sitting near them, watching them and listening to them while they were laying on the floor. The record does not show that claimant's method of supervision was inadequate, or if it was, how claimant could have known it was inadequate under the circumstances.

During its investigation, CPS also questioned why claimant did not put herself between the two youths when the inappropriate activity began. Transcript at 27. Claimant argued persuasively at hearing that she was the only counselor in her wing when the two youths began to act inappropriately and she believed it was important to continue monitoring the other youths, including one youth in her wing who claimant believed posed a risk of harming other youths if he were left unsupervised. Transcript at 27. We infer from the circumstances of this case, and as a matter of common sense, that claimant had some discretion in making decisions affecting the youths under her care. Claimant observed conflicting risks, and after considering her options, chose the option that she believed posed less risk to the six youths in her care while she awaited assistance from her supervisor. Claimant's decision did not show a conscious disregard for the employer's expectation that she provide proper supervision of the youths and keep them free from abuse and neglect while in the employer's care. Absent such a showing, we conclude that the employer failed to show claimant willfully violated the employer's expectations, or was wantonly negligent in failing to intervene with the youths sooner on August 1.

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

DECISION: Hearing Decision 16-UI-53388 is set aside, as outlined above.³

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

DATE of Service: April 7, 2016

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.

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