

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0558

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 104420). Claimant filed a timely request for hearing. On April 28, 2016, ALJ Shoemake conducted a hearing, and on May 6, 2016, issued Hearing Decision 16-UI-59055, affirming the administrative decision. On May 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Chehalem Youth and Family Services employed claimant as a youth treatment specialist from January 24, 2014 until January 27, 2016. Claimant worked in the employer's residential treatment program, providing direct care to adolescents.

(2) The employer contracts with the Oregon Department of Human Services (DHS) to provide services to children ages 11 to 17 in its residential treatment program. Any allegations of abuse of residents in the employer's program are investigated by the Oregon Office of Adult Abuse Prevention and Investigation (OAAPI), a department of DHS. The employer's contract with DHS requires that the employer must discharge any staff member against whom a finding of abuse is substantiated by OAAPI. Claimant knew and understood this requirement, because he was advised of it in the staff handbooks he received on November 21, 2014 and December 1, 2015.

(3) Sometime during the period from October 15 through 17, 2015, while claimant was working, a female resident reported that a male was outside the residence. Claimant was concerned because the employer had specific procedures regarding a situation such as this, and he leaned over the female resident to look out the window and see what was outside.

(4) Also during the period from October 15 through 17, 2015, while claimant was working alone in a residence, several female residents grabbed claimant's arms and legs and began to wrestle with him. While claimant was attempting to stop the girls' behavior and disentangle himself from them, one of the girls pushed another girl, causing her to hit her head on the television set and fall to the floor. The girl who had caused the injury subsequently apologized to the injured girl.

(5) The girl whom claimant leaned over to look out the window, and the girl who hit her head on the television set reported that claimant had mistreated them. These allegations were reported to OAAPI, and OAAPI investigated these incidents in November or December 2015. During the investigation, the employer was not permitted to discuss the incidents with claimant. After completing its investigation, OAAPI issued a report in which it found that the two girls' allegations of abuse by maltreatment in October 2015 were substantiated.

(6) On January 27, 2016, the employer discharged claimant because OAAPI found that allegations of abuse against claimant were substantiated.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant 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 because OAAPI found that the allegations of abuse against claimant were substantiated. Under the terms of the employer's contract with DHS, claimant's discharge was required. EAB must determine, however, whether claimant engaged in the conduct which resulted in the OAAPI investigation and findings, and if he did, whether that behavior constituted misconduct that disqualifies him from the receipt of unemployment benefits. The employer presented hearsay evidence regarding claimant's conduct –the conclusions in the OAAPI report that claimant had maltreated two residents between October 15 through 17, 2015. Claimant denied that he engaged in the abusive or inappropriate conduct with which he was charged. Absent a reasonable basis to conclude that claimant was not a credible witness (and we find none in this record), we conclude that claimant's firsthand denials are at least equal to the employer's hearsay evidence. In a discharge 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). Because the evidence regarding claimant's supposedly abusive behavior was, at best, equally balanced, the employer failed to show by a preponderance of the evidence that claimant abused or mistreated residents during the period from October 15 through 17, 2015.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-59055 is affirmed.

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

DATE of Service: June 10, 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. 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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