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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0619

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 134550). The employer filed a timely request for hearing. On May 2, 2016, ALJ Murdock conducted a hearing, and on May 6, 2016 issued Hearing Decision 16-UI-59092, concluding claimant's discharge was for misconduct. On May 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' arguments when reaching this decision.

FINDINGS OF FACT: (1) Lane County School District 4J employed claimant as a substitute educational assistant from November 23, 2013 to March 7, 2016.

(2) The employer developed concerns about claimant's work performance, conduct with others and accountability based on some of her substitute assignments. Prior to January 2016, the employer excluded claimant from substitute assignments in approximately three of its buildings based on those concerns. Claimant was aware of only one exclusion, and disputed the basis for it. Claimant had not otherwise been warned for her job performance or told that her job was in jeopardy.

(3) The employer expected claimant to use the changing table to change infants' diapers, and claimant understood that expectation. On January 15, 2016, claimant began changing a four-month-old baby's diaper using the changing table. The baby soiled the changing table. Claimant moved the baby from the changing table to finish putting on the baby's pants because the table was too wet to use. Claimant stood the baby on her feet on the floor, supporting her with one hand, and used her other hand to pull up the

baby's pants. Claimant lost her one-handed grip on the baby, the baby tipped backwards out of her grip and fell to the floor, hitting the back of her head. Claimant felt certain that she was holding the baby in a safe manner and had previously used the same method to put pants on other infants without incident.

(4) Claimant reported the incident to the employer and notified the baby's parents that the baby had fallen and hit her head. Claimant's report stated that the child was on the floor and had hit her head while rolling or turning over. The employer investigated. The employer gathered statements from others who alleged claimant had been changing the baby on her lap instead of the floor, and that the baby had fallen and hit her head from lap height instead of floor height. The employer concluded that the baby had been on claimant's lap when she fell, that claimant violated the expectation that she use the changing table to change the baby, and that claimant had falsified her report about the incident by stating that the baby was on the floor when she hit her head rather than reporting she had fallen from lap height.

(5) On March 7, 2016, the employer discharged claimant. Although the employer felt claimant had engaged in a pattern of conduct with respect to her work performance, relationships with others in the workplace and accountability, the January 15th incident was the primary reason for the discharge.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude 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. The employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer must, therefore, prove that claimant acted as alleged and that she did so with a willful or wantonly negligent mental state.

The ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that the employer's version of events, that claimant was changing the baby from her lap, was more persuasive than claimant's version of events, because it would have been "illogical" for claimant to support the baby in a standing position while pulling up the baby's pants. Hearing Decision 16-UI-59092 at 3. We disagree. The ALJ characterized claimant's assertion "that she supported the baby in a standing position . . . [t]hat would mean she had to use one hand for support of the baby and one hand to put pants on" as "illogical," and, therefore, concluded that her version of events was not true, while the employer's version of events (that she changed the baby on her lap) was, more likely than not, true. However, "illogical" means "not showing good judgment: not thinking about things in a reasonable or sensible way: not logical."[1] The fact that an act might have been illogical does not make the retelling of it untrue.

[1] *See* http://www.merriam-webster.com/dictionary/illogical.

Although the employer also alleged that claimant's claim to have changed the baby from a standing position on the floor was untrue based on hearsay from others and claimant's own report to the employer and parents after the event, the record does not support that allegation. As a preliminary matter, the employer's witness was not present at the time of the baby's injury on January 15th. The employer did not submit any written statements or reports documenting what the individuals who purported to witness the January 15th event stated to the employer when interviewed, and did not have its witness read any such statements into the record, nor did the employer have any of those individuals participate in the hearing as a witness. As a result, the employer's evidence of claimant's misconduct consisted entirely of hearsay.

The employer's witness's testimony about the hearsay did not include sufficient context for us to determine whether the people interviewed had been watching claimant change the baby in her lap before the baby fell, whether they thought that was odd or inappropriate, whether they said anything to her, or whether they initially noticed claimant and the baby after the baby's fall. Absent that sort of context, we conclude that the hearsay was not reliable evidence of claimant's or the baby's position before the baby fell. Regarding claimant's allegedly inconsistency with respect to her incident report to the employer and the baby's parents, the employer alleged that claimant reported the baby was on the floor and rolled or turned over, whereas her testimony at the hearing was that the baby was on the floor and tipped over. Although claimant apparently did not use the exact same words to describe the incident in each retelling, it does not appear that claimant's statements were so different as to be inconsistent. Absent another reason to believe that claimant was not a credible witness, we conclude that claimant's testimony was credible, and had at least as much weight as the employer's hearsay evidence.

The employer has not, therefore, proven by a preponderance of the evidence that claimant held the baby on her lap while pulling up the baby's pants, or that the baby fell from lap height when claimant lost her grip, nor has the employer proven that claimant lied in her post-incident report to the employer and the baby's parents. It is more likely than not that claimant held the baby in a standing position on the floor, supporting her with one hand while using the other to pull up the baby's pants. It is more likely than not that the baby overbalanced and fell backward, hitting her head on the floor, as claimant described. Although it might not have been logical for claimant to choose to hold a four-month-old baby in that position, or might have been preferable had claimant chosen to hold the baby in a different position the employer considered safer, claimant testified that she had used that method to hold babies while pulling up their pants on numerous occasions in the past without incident. Given the circumstances, it is more likely than not that the baby fell due to an accident, and not because claimant willfully or with wantonly negligence held the baby or pulled its pants up in a manner that she knew or reasonably should have known would cause injury to the baby, or that she was indifferent to the consequences of dropping the baby. Claimant's conduct was, therefore, not willful or wantonly negligent.

Because the employer did not show that claimant acted willfully or with wanton negligence with respect to the baby's fall or that she lied in the report, the employer has not shown that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-59092 is set aside, as outlined above.[2]

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

DATE of Service: June 21, 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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[2] 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.