

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0828

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141933). Claimant filed a timely request for hearing. On June 10, 2016 and June 28, 2016, ALJ Vincent conducted a hearing, and on July 1, 2016 issued Hearing Decision 16-UI-63016, affirming the Department's decision. On July 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) All Care In Home Support employed claimant from June 3, 2015 to April 3, 2016.

(2) Claimant worked as caregiver for her boyfriend's grandparents. One of them had dementia and they both needed assistance with medications. They were not supposed to be left alone. Claimant was required to maintain her eligibility to work as a caregiver by, for example, not neglecting her clients or committing violations of the laws and rules applicable to the caregiving profession and being deemed ineligible to work as a caregiver by Adult Protective Services (APS). The employer expected claimant to be with her clients when scheduled to work unless she had notified the employer that she would not be.

(3) On February 11, February 12, March 9, March 17 and March 24, 2016, claimant left her clients during her scheduled hours. APS received a complaint that claimant was neglecting her clients, investigated it, and sustained the allegation. As a result of the APS finding, claimant was not eligible to work as a caregiver for her clients any longer, and, on April 3, 2016, the employer discharged her for neglecting her clients.¹

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant for misconduct.

¹ The employer also alleged that claimant was responsible for her clients' missing medications. Because we have concluded claimant committed misconduct connected with work based on the other allegations, however, we need not and to not include that allegation in our analysis of this work separation.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(c) (August 3, 2011) defines misconduct, in relevant part, to include the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation, so long as such failure is reasonable attributable to the individual.

The employer had the right to expect claimant to refrain from neglecting her clients, and conduct herself during work hours in a way that did not render her ineligible to work for the employer or be employed as a caregiver for her clients. Claimant admitted at the hearing that she left her clients during work hours on repeated occasions. Although she alleged that she did not know she was not permitted to do so, her allegation is implausible. Claimant's testimony was inconsistent, stating for instance that she left her clients on one occasion to collect her children, then stating it was to get her clients "treats," then again stating that it was to pick up her children but arguing that she left them only for a brief period. June 28, 2016 hearing, Transcript at 17-18. Claimant's testimony also suggested she knew she was not permitted to leave the clients alone, and, when testifying about the various reasons she left the clients, her testimony was defensive, arguing that she was justified in leaving them, or that she was not gone for very long, or that she had arranged for one of her friends to remain at the house when claimant was not present during her work shifts. *See e.g.* June 28, 2016 hearing, Transcript at 17, 18. It appears more likely than not that claimant knew, or should have known as a matter of common sense, that she was not permitted to leave her clients during her shifts, and did not reasonably believe it would be acceptable to the employer to leave them with her friends or, as she did in one instance, their dog washer. On at least five known occasions, however, claimant left her clients during her scheduled work hours, thereby neglecting them. As a result of claimant's conduct, and conscious indifference to the employer's expectation that she remain with her clients during scheduled work hours, APS sustained an allegation of neglect against claimant, and claimant lost the authority necessary to the performance of her job as a caregiver. For purposes of unemployment insurance benefits, claimant's wantonly negligent loss of that authority was misconduct. The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-63016 is affirmed.

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

DATE of Service: August 8, 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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