

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0119

Affirmed ~ Confirmada
No Disqualification ~ No Descalificación

PROCEDURAL HISTORY: On October 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84448). Claimant filed a timely request for hearing. On January 6 and January 20, 2017, ALJ Wyatt conducted a hearing, and on January 27, 2017 issued Hearing Decision 17-UI-75572, reversing the Department's decision. On January 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Mt. Hood Community College employed claimant from September 2, 2010 until August 26, 2016, last as family worker associate in its Head Start program.

(2) On November 6, 2014, claimant was promoted to the position of a family worker associate. As a condition to maintaining this position, the employer required that claimant obtain a Head Start Association family services credential or an associate's degree in social services, mental health or a related field. The employer expected claimant would secure the required degree or credential within one year of the promotion. Claimant understood the employer's expectation.

(3) Sometime after November 6, 2014, claimant decided that she would enter into a program offered at Portland State University (PSU) to obtain the family services credential. However, PSU discontinued its program before claimant could enroll in it. On October 20, 2015, claimant met with her supervisor to discuss her progress in earning the degree or credential required for her position. Claimant told her supervisor that PSU had dropped the program in which she had intended to enroll. The supervisor told claimant she would investigate whether there were other programs claimant could take that would satisfy the employer's degree or a credential requirement. The supervisor told claimant she would have until June 2016 to complete the requirement. Afterward, claimant periodically inquired of her supervisor whether she had located an acceptable program for her. Sometime around January 2016, the supervisor informed claimant she had found an online program that satisfied the employer's requirement and claimant understood the supervisor would arrange to enroll her in that program. In February 2016,

claimant's registration in the online program was completed and her participation in that program commenced.

(4) After claimant started in the online program, she experienced difficulties in fulfilling its requirements. Claimant did not have a personal computer at home and either went to the local library after work hours to use the computers it had available to access the website for the online program or borrowed a tablet from an acquaintance to do so. The online program required claimant to download materials from and upload materials to the program's website in order to fulfill the requirements of the online program. However, claimant did not have a printer and could not print out the learning materials. Although claimant made some progress fulfilling those requirements, it was slower than she expected because her access to the electronics and equipment necessary for her to do so was limited.

(5) In June 2016, claimant met with her supervisor to discuss her progress in obtaining the credential she needed. Claimant explained her to supervisor that limitations had prevented her from obtaining the required credential, and the supervisor allowed her six additional weeks, from July 6, 2016 to August 17, 2016 to secure the credential. Although claimant tried, she was unable to obtain the credential by August 17, 2016.

(6) On August 17, 2016, claimant informed her supervisor she did not have the credential yet. After checking with the employer's management, the supervisor told claimant she was unable to extend the deadline by which claimant needed to have obtained the credential. The supervisor told claimant that the employer had decided to discharge her if she did not resign.

(7) On August 26, 2016, claimant resigned to avoid being discharged.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

The first issue this case presents is the nature of claimant's work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

While claimant did submit a resignation, it was only after she was informed that the employer would discharge her if she did not resign. At all relevant times, claimant was willing to continue working for the employer. By its actions, the employer notified claimant in no uncertain terms that it was unwilling to allow her continue working and her only option was in selecting what the work separation would be called. Because the circumstances under which claimant decided to quit show her resignation was merely nominal, precipitated by the employer's planned, inevitable and involuntary discharge, claimant's work separation was a discharge on August 26, 2016.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant did not obtain the online certification by the employer's deadline of August 17, 2016, and did not dispute that the employer had extended the deadline by which she was to obtain it more than once, the employer did not dispute that claimant encountered significant difficulties which impeded her from doing so. None of these impediments were attributable to claimant and it was not suggested that claimant did not attempt in good faith to complete the program needed for her to obtain the credential. While claimant might have been negligent in not taking additional steps to avoid the impacts of those impediments, ordinary negligence is not sufficient to disqualify a claimant from receiving unemployment benefits. In order to be disqualifying, claimant's willfulness or wanton negligence must be shown. Since it was not contended that claimant acted willfully to violate the employer's standards, for claimant to be disqualified from benefits it must be shown that claimant was indifferent to the consequences of her failure to take additional actions to try to overcome the impediments to her progress in obtaining the credential, and consciously aware that failing to take such steps would probably violate the employer's standards or, in other words, would result in her not earning the required credential by August 17, 2016. The evidence as it exists in this record is insufficient to show such conscious awareness on claimant's part. As such, the employer did not meet its burden to show claimant's failure to obtain the needed credential by August 17, 2016 constituted misconduct.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-75572 is affirmed. *Decisión de la Audiencia 17-UI-75572 queda confirmada.*

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

DATE of Service: March 2, 2017

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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.