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BYE: 201802

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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0526

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 145137). The employer filed a timely request for hearing. On March 15, 2017, ALJ Frank conducted a hearing, and on April 14, 2017 issued Hearing Decision 17-UI-81049, affirming the Department's decision. On May 4, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered additional detail about the alleged incident that culminated in claimant's discharge and new grounds for claimant's discharge. However, the employer did not explain why it did not offer this new information during the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument.

FINDINGS OF FACT: (1) Pathway Enterprises, Inc. employed claimant from August 28, 2015 until January 1, 2017, last as a direct support specialist and lead worker. The employer operated a facility for developmentally disabled adults.

(2) The employer expected that claimant would not allow members of her family or friends to come to the workplace or to accompany her when she performed work duties off the premises with the employer's residents. The employer also expected that if claimant became unable to work an on-call shift after she had accepted that shift, she would call and notify her manager that she was no longer able to work the shift. Claimant understood the employer's expectations.

(3) Sometime around July 2016, the employer's residential director gave claimant permission to take her children on an outing to Crater Lake for the employer's residents because claimant did not have childcare that day. The director allowed claimant's children to ride in the same van with the residents to Crater Lake. On occasions subsequent to the Crater Lake outing, claimant's manager allowed

claimant's children to ride with the claimant and the residents on other trips or to come onto the workplace premises when claimant was working.

(4) On December 20, 2016, claimant and a coworker took four residents to lunch and then dropped one resident off to shop at a nearby store. Since claimant's mother and daughter had previously met the residents that claimant was transporting and the residents were excited about seeing claimant's family members, claimant decided to picked up her family members, drive them to the workplace with the residents and then transport them to her home after her shift ended. Claimant did not ask her manager for permission to allow her family members to ride with the residents.

(5) Sometime before January 2017, the employer's management informed claimant that since the employer was trying to control its costs in employee overtime, she was not allowed to contact managers on weekends unless it was an emergency.

(6) On Tuesday, January 3, 2017, claimant learned that due to snow it was likely that her daughter's school would not be open on January 5, 2017. Since that snow day was unscheduled, claimant had not arranged childcare for her daughter that day. Claimant sent a text message to her manager asking if she could bring her daughter with her to work on January 5, 2017. The manager replied, "That's fine. Just remember you're working and getting paid for it. Clients need 100% of your attention at all times." Audio at ~37:20. Claimant took her daughter to work with her on January 5, 2017.

(7) On January 6, 2017, one of claimant's coworkers reported to the employer's management that claimant had brought her daughter with her to work the day before. On Sunday, January 8, 2017, claimant was scheduled to be on-call and accepted an on-call shift. Later, when claimant realized she was not able to work the on-call shift as she had committed, she called a coworker to cover that shift. Claimant did not call her manager because of the employer's prohibition against calling managers on weekends unless it was an emergency. The coworker worked the shift in claimant's stead on January 8, 2017.

(8) On January 11, 2017, the employer discharged claimant for numerous alleged policy violations, including those on December 20, 2016, January 5, 2017 and January 8, 2017.

CONCLUSIONS AND REASONS: 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 connected with work. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

While the employer cited many alleged facts to justify its discharge of claimant on January 11, 2017, both in a memorandum to claimant dated January 11, 2017 and in its written argument, it did not raise most of them during the hearing. As to the issues that employer did not raise during the hearing,

claimant did not have an opportunity to respond to them. For reasons of due process, we limit our review of claimant's discharge to the reasons the employer's witnesses raised during their hearing testimony as the rationale for it.

With respect to claimant allowing her mother and daughter to ride in a van with the residents on December 20, 2016, there were ample grounds for her to believe that the employer would allow her to do so. The employer's residential director agreed that she allowed claimant to let her children ride in a van with the residents on the Crater Lake outing sometime around July 2016 and did not contend or suggest that she informed claimant that this permission was exceptional or limited only to that particular outing. Audio at ~40:20. As well, none of the employer's witnesses disputed that claimant's immediate manager had given her permission on other occasions to have her children ride with the residents when errands were being performed. Audio at ~32:43. On these facts, and since it appears that permission given to claimant was not expressly limited to particular occasions only, claimant could reasonably have inferred that the employer condoned her allowing her mother and children to ride with the residents in the van on December 20, 2016. As well, claimant's testimony at hearing that she thought there was nothing wrong with having her family members ride in the van that day was sincere, and appeared credible and plausible. To the extent claimant's behavior on December 20, 2016 violated the employer's standards, it was, at worst, a good faith error in failing to understand that the permission she had previously been given did not extend to the trip on December 20, 2016. The employer did not meet its burden to show claimant's actions on December 20, 2016 constituted misconduct.

With respect to claimant's actions in taking her daughter with her to work on January 5, 2017, the employer's witnesses did not dispute that claimant had requested permission in advance from her immediate manager and the manager had expressly allowed her to do so. Given that claimant had permission from a member of management, it is difficult to conclude that her behavior in taking her daughter to work on January 5, 2017 was a willful or wantonly negligent violation of the employer's standards as she reasonably understood them. On these facts, the employer did not meet its burden to show claimant's behavior on January 5, 2017 constituted misconduct.

With respect to claimant's behavior on January 8, 2017, when she failed to notify her manager that she was unable to work but arranged on her own for a coworker to cover her shift, neither the employer's human resources director nor the residential director disputed that claimant had been told that she was not to contact a manager on weekends unless it was an emergency, that January 8, 2016 was on a weekend, and that claimant's inability to work that day would not be considered an emergency unless she was unable to cover that shift herself. While a person who was claimant's coworker during the time period at issue testified that she had never heard that managers were not to be contacted on weekends absent an emergency, as claimant contended, that testimony is an insufficient basis on which to conclude that such an instruction was not given to claimant, particularly when the residential director and the human resources director were available and did not rebut claimant's testimony. Audio at ~ 29:90. On the facts in this record, that claimant believed she should not contact her manager about her inability to work on January 8, 2017 unless and until she was not able to arrange coverage of that shift herself, appeared reasonable and plausible. The employer did not meet its burden to show claimant's behavior on January 8, 2017 was a willful or wantonly negligent violation of the employer's standards.

For those reasons, the employer did not show that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-81049 is affirmed.

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

DATE of Service: June 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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