EO: 700
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

388
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0791

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #152941). The employer filed a timely request for hearing. On June 30, 2017, ALJ Meerdink conducted a hearing, and on July 3, 2017, issued Hearing Decision 17-UI-87120, affirming the Department's decision. On July 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Harney County School District #3 employed claimant as a teacher's aide for special education students of various ages from October 2015 through April 24, 2017.

(2) The employer expected its teacher's aides to refrain from using inappropriate language with students. The employer also expected teacher's aides to refrain from using "Corporal Punishment" with students, but were authorized to use some physical force when, in their professional judgment, such force was necessary to prevent a student from harming himself or others. Exhibit 1. Finally, the employer expected its teacher's aides to refrain from using "Restraint" or "Seclusion" with students unless confronted with an emergency situation in which the student's behavior posed a reasonable threat of imminent, serious, physical harm to themselves or others. Exhibit 1. Claimant was aware of the employer's expectations.

(3) In April, 2016, a high school senior with some brain damage who had been "molested" in the past kept touching claimant in a non-sexual way but getting in "his physical space" despite claimant's multiple requests to stop. Audio Record ~ 29:45 to 32:00. When he did not, claimant asked, "Could you please stop molesting me?" The senior denied that he was doing so but claimant explained it was "unwanted physical contact" which was the same. Claimant later explained that he made the statement to "shock" the senior into complying with his request to stop. The employer thought it was inappropriate and suspended claimant for several days while it put him through retraining.

(4) On April 10, 2017, claimant was walking by two second grade students when one of them asked, "What would you do if I punched you in the face?" Claimant responded, "That would suck balls– please don't do that." Another aide heard the comment and reported claimant. Claimant admitted that by making the statement, he "misspoke" and it was "a wrong thing to say." Audio Record ~ 28:00 to 30:00.

(5) One of the students claimant worked with was a special education fifth grader with a documented history of biting and kicking staff and students. The student in question wore a "pullup," essentially a diaper, and the school required him go into the bathroom often to determine if the pullup needed to be replaced. The school required the student to obtain a sign of some sort indicating he had permission to leave the classroom before he left for the restroom. On April 13, 2017, the fifth grader initially refused to return to the classroom after a playground recess until claimant persuaded him to do so. Once the fifth grader returned to the classroom, he left to go to the restroom without first obtaining the required sign. The student was directed to return to the classroom to obtain the sign. Instead the student became defiant, went limp, fell to the ground, and began thrashing about in the doorway to the classroom, refusing to get up or comply with instructions. Claimant considered the student's behavior unsafe and believed he posed a risk to others, especially to some nearby children. He also thought the student would calm down if he was in a quiet location and unobserved by other children, and thought moving the student would allow him to regain his composure. At that point, claimant grasped the student by the jacket, slowly dragged him by the jacket a short distance along the floor back into the classroom, while another teacher's aide held the door for them. Once there, the student regained his composure and had an uneventful remainder of the day.

(6) The employer became aware of claimant's actions, thought they were inappropriate and violated its Corporal Punishment and Use of Restraint and Seclusion policies. On April 24, 2017, the employer discharged claimant for the "inappropriate" use of language with students on April 10, 2017 and the "inappropriate" use of physical force with a student on April 13, 2017. Exhibit 1.

CONCLUSIONS AND REASONS: The employer discharged claimant for an isolated instance of poor judgement, which is not 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. 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for the "inappropriate" use of language with students on April 10, 2017 and the "inappropriate" use of physical force with a student on April 13, 2017. Considering the last incident first, we agree with the ALJ that the employer failed to show that claimant's conduct on April 13 constituted a willful or wantonly negligent violation of policies cited by the employer in its

discharge letter. At hearing, the employer conceded that claimant's conduct did not violate the Corporal Punishment policy because no pain was inflicted on the student. Audio Record ~14:30 to 16:30. Moreover, both policies allowed employees such as claimant to act with some amount of physical force if the student's behavior posed a reasonable threat of imminent, physical harm to themselves or others. Exhibit 1. Here the record shows that claimant moved the student in question only a short distance along the floor, without causing him any pain, for the stated reason that claimant was concerned that the student's behavior posed a risk to nearby students, which the employer did not dispute. Accordingly, the employer failed to show that claimant acted with indifference to the consequences of his actions for the employer on April 13, 2017; his conduct, therefore, was not willful or wantonly negligent.

Claimant's admitted statement to second graders on April 10 that punching him in the face would "suck balls" is another matter. At hearing claimant conceded that by making that statement, he "misspoke" and it was "a wrong thing to say." Accordingly, the record shows, as a matter of common sense, claimant knew or should have known at the time he made the statement that his statement would probably violate the employer's expectation that he refrain from using inappropriate language around students.

However, claimant's April 10 conduct was an isolated instance of poor judgment, and thus excusable under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct.[1] Although claimant was reprimanded in April 2016 for making an inappropriate comment to a high school senior, that incident occurred a year earlier, making claimant's April 10 statement an "infrequent" occurrence of using inappropriate language in front of students and thus excusable under the rule. Moreover, the employer failed to show that in April 2016, before the retraining that occurred after that incident, claimant knew or should have known that his statement to the high school senior probably violated the employer's expectation that he refrain from making inappropriate comments to students, particularly given that claimant explained that he made the statement under the circumstances presented because, based on his judgment and experience, he thought that particular student needed a "shock factor" in order to learn that it was not okay for him to randomly touch either claimant or other students. Audio Record ~ 29:45 to 32:00. Accordingly, the record shows that claimant although claimant may have been mistaken about whether or not he was acting appropriately in that instance, he was not consciously indifferent to the employer's interests when he made the statement in question.

In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). For the reasons explained, the employer failed to meet that burden here. The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct, and claimant is therefore not disqualified from receiving benefits.

DECISION: Hearing Decision 17-UI-87120 is affirmed.

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

[1] OAR 471-030-0038(1)(d)(A).

DATE of Service: August 14, 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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