EO: 200
BYE: 201815

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

862
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0933

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 130231). Claimant filed a timely request for hearing. On July 7, 2017, ALJ Sgroi conducted a hearing, and on July 17, 2017, issued Hearing Decision 17-UI-88120, affirming the administrative decision. On August 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Royal Legacy Academy, a facility that offers sports programs, classes and activities for children and adults, employed claimant as director of after-school programs from September 1, 2016 until April 14, 2017.

(2) The employer had five 15 person vans that staff members used to transport children to the employer's programs and activities. Any employee was permitted and insured to drive these vans. Due to insurance restrictions, only the owner, an employee who was listed as a driver on the owner's insurance policy, and employees who were at least 24 years old were permitted to use the employer's owner's vehicle. Claimant was unaware of any limitations on the age of employees allowed to use the owner's vehicle.

(3) On April 14, 2017, the employer's owner was out of town. On that day, one of the employees who normally transported children to the employer's programs and activities contacted claimant, whom she believed to be in charge during the owner's absence, and said she was ill with a migraine and unable to drive the children. Claimant contacted a 19-year old employee, who agreed to replace the ill employee and transport the children. Because the 19-year old employee did not feel "safe" driving the large 15-person vans, claimant told her she could use the owner's vehicle to transport the children. Audio recording at 21:32. Claimant discussed this assignment with the employer's gym manager, who approved it.

(4) The employer's owner learned that claimant had allowed a 19-year old employee to drive her personal vehicle, and on April 14, 2017, discharged claimant because she believed that claimant had

knowingly violated the employer's policies by permitting an employee who was not authorized or insured to drive her personal vehicle.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because it believed that claimant permitted a 19-year old employee to use the employer's owner's personal vehicle in violation of the employer's policy, which required that only the owner, an employee who was named on the insurance policy, and employees who were at least 24-years old were permitted to drive the owner's vehicle. At the hearing, however, the owner and claimant disagreed as to whether claimant was aware of the age restriction on employees allowed to use the employer's vehicle. The owner testified that at on at least two occasions – in September 2016 and before the owner went out of town on April 4, 2017 – she told claimant about the restrictions on individuals allowed to use her personal vehicle. Audio recording at 9:54 and 10:49. Claimant, however, testified that she was unaware of any age or other restrictions regarding employees who were permitted to use the employer's vehicle. Audio recording at 19:04. On this record, we find no reason to doubt the credibility of either claimant or the employer's owner. The evidence regarding claimant's understanding of the employer's policy is therefore equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has failed to satisfy its evidentiary burden. The employer therefore failed to demonstrate that claimant was aware of the age restriction on employees permitted to use the employer's vehicle. As a result, the employer did not show that claimant knowingly violated the employer's expectations when she allowed a 19-year old employee to use the owner's vehicle on April 14.

The ALJ, however, concluded that the testimony of the employer's owner was more "persuasive" than that of claimant because:

> In an employment situation, it is not logical that an individual entrusted with the care of the personal vehicle of another (let alone the 'boss') would allow a teenager to drive that vehicle in the course of business to transport the young children of the employer's clients. Hearing Decision 17-UI-88120 at 3.

We disagree with the ALJ's determination regarding claimant's credibility. The employer's policy allowed "teenagers," *i.e.*, 19-year old employees, to transport children in large, 15-person vans. Given

these circumstances, we find it far more "logical," that claimant, who was unaware of any age restrictions regarding drivers permitted to use the employer's vehicle, would direct a young employee to transport children in a smaller vehicle, rather than driving a large van that the employee that did not feel "safe" in operating. *See* Finding of Fact 3.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-88120 is set aside, as outlined above.

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

DATE of Service: August 23, 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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