

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1172

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123403). Claimant filed a timely request for hearing. On September 22, 2017, ALJ Amesbury conducted a hearing, and on September 28, 2017 issued Hearing Decision 17-UI-93415, concluding the employer discharged claimant, but not for misconduct. On October 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Precious Cargo Preschool & Childcare employed claimant from April 10, 2017 until June 21, 2017 as an assistant childcare provider at a daycare.

(2) The employer's owner expected claimant to sign written warnings presented to her by the owner, but did not have a rule or policy about signing warning forms.

(3) On June 12, 2017, it was claimant's job to change the daycare children's diapers during the morning shift. Claimant did not change the diapers that morning because she decided to remove the children from the daycare room before changing their diapers when one child became physically aggressive toward a teacher.

(4) On June 20, 2017, the owner gave claimant a written performance warning because she did not change the children's diapers during the morning shift on June 12, 2017. Claimant disagreed with the warning. The owner did not ask claimant to sign the warning at that time. The warning form contained a signature line, but did not state anything about the signature, including the significance of signing the warning. Claimant took the warning home.

(5) While claimant was at home, the owner sent claimant a text message asking her to sign the warning and bring it back to work. The owner did not tell claimant that she would be disciplined if she did not sign the form. Claimant sent a text message to the owner stating that she would bring the warning back but would not sign it. The owner did not ask claimant why she would not sign the form or discuss the warning further with claimant.

(6) On June 21, 2017, claimant reported to work, turned in the warning, and began to work. One hour later, the owner called claimant to her office and discharged her for refusing to sign the written warning. The owner did not give claimant the opportunity to sign the warning during the discharge meeting.

CONCLUSIONS AND REASONS: We agree 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. The employer must prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she refused to sign a written warning given to her on June 20, 2017. There is no dispute that claimant refused to sign the employer's warning on June 20, nor is there any dispute that claimant's denial violated the owner's expectations. However, for such violation to be considered misconduct and disqualify claimant from receiving unemployment insurance benefits, it must have been done with the intent to violate the expectation or with conscious indifference to it, and the owner did not establish that those conditions existed.

Claimant testified that she disagreed with the June 20 warning because she was following a competing employer policy that resulted in her not changing the daycare children's diapers the morning of June 12, and did not know that refusing to sign the warning would result in discipline, let alone discharge. Transcript at 23-24. The employer did not have a rule or policy about signing warning forms, and the owner did not rebut claimant's assertion that she did not know she would be disciplined for failing to sign the warning. The warning form did not state anything near the signature line, thus did not indicate that claimant was required to sign the warning, that her signature was no more than an acknowledgment that she had received the warning, or that her signature was or was not an admission that she agreed with the content of the warning. We infer that claimant's misunderstanding of the owner's expectation was reinforced by the owner's failure to ask claimant for her signature when she initially gave claimant the warning.

In the absence of a showing that claimant knew or should have known from the employer, the written warning itself, or common sense that the employer would discipline her for failing to sign the warning, we conclude that claimant's conduct was due to a good faith error in her understanding of the employer's expectations, and not to a willful or wantonly negligent disregard of those expectations. We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not subject to disqualification from receiving benefits because of this work separation.

DECISION: Hearing Decision 17-UI-93415 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: November 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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