

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1455

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143424). Claimant filed a timely request for hearing. On November 28, 2017, ALJ R. Frank conducted a hearing, and on November 30, 2017 issued Hearing Decision 17-UI-97948, affirming the Department's decision. On December 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Beaverton School District # 48J employed claimant as a bus driver from September 1, 2014 to September 25, 2017. Claimant was an experienced bus driver who had 12 years of experience with the employer and another company.

(2) In August 2014, claimant took and passed a training called "Experienced Driver Training Checklist" and the "Special Education Training" that included training on installing car seats, seatbelt locks and safety vests. In February 2017, claimant attended a defensive driving course called "Key Concepts of Safe Driving." During that course, claimant was taught that she was expected to check her mirrors every five to seven seconds.

(3) Claimant regularly worked as a bus driver but accepted a 16-day assignment to transport special needs children for the employer's summer program. In June 2017, the employer trained claimant to work with the special needs children, including the use of harnesses as seat restraints for the children and that each child had a bus plan that she needed to follow. Claimant understood that although parents and aids would be allowed to fasten children into their restraints, she was responsible for verifying that the children were securely seated on her bus. She also understood that she could view the children in

her mirrors, and should do so to make sure they were seated and restrained when she checked her mirrors every five to seven seconds.

(4) Beginning July 10, 2017, claimant drove the special needs children's bus. One of the children, J, had a bus plan that said, "Backpack must stay up front with driver in the AM only. Otherwise he eats everything that's in his lunch. Must sit in back of bus away from others." Exhibit 1. Claimant read and understood J's bus plan, and understood that he was supposed to remain seated in the back of the bus and in a restraint harness while he was on the bus.

(5) Between July 10, 2017 and August 3, 2017, claimant did not check that the children were properly and securely restrained in their safety vests. She did not frequently check her mirrors. Claimant also did not follow J's bus plan. She did not check that he was seated. On three occasions, she allowed J to be seated in front of other children instead of at the back of the bus. J regularly released himself from his seat restraints, walked around the bus and sat next to other children. Claimant did not regularly check her mirrors and sometimes did not see J moving around the bus. When claimant saw J moving around she sometimes chose not to redirect him to sit back down or check that he was properly restrained. On July 10, 17, 18, 19, and 24, 2017, while unrestrained and unsupervised, J engaged in sexual misconduct with two other children.

(6) On July 25, 2017, claimant witnessed J sitting with his penis partially exposed next to another child. Claimant directed J to return to his seat.

(7) On approximately July 25, 2017, claimant reported the incident to the employee in charge of such things. The other employee told claimant she did not need to report anything, pull the bus surveillance footage or have J sit in the front of the bus. The employee acknowledged that J was an "escape artist" with his restraints. Claimant asked for a bus aide to assist with J, and the employee came up with an alternative plan since there were only four days remaining in the summer program.

(8) On July 26 and 27, two other instances of sexual misconduct involving J occurred on claimant's bus. On August 3, 2017, the summer program ended.

(9) On September 5, 2017, the employer first learned of the sexual misconduct that had occurred on claimant's bus during the summer program. The employer investigated by watching the bus surveillance footage and discovered that claimant had not checked the children's restraints, monitored them frequently enough using the mirrors, and had not ensured that J was properly restrained.

(10) On September 6, 2017, the employer interviewed claimant. During the interview, claimant acknowledged that she was responsible for checking the harnesses to ensure the children were safely restrained. With regard to the July 25th incident during which J partially exposed his penis, claimant remarked, "There was a reason why he was isolated in the back." Exhibit 1. Claimant also remarked that after discussing that incident with the other employee she knew "[w]e definitely needed to make certain he was staying in his seat" and said "[t]here were no further incidents." *Id.*

(11) Between September 6, 2017 and September 13, 2017, the employer viewed the surveillance footage again. The employer noted that claimant did not ensure that J's restraints were properly buckled, and did not check any of the children's safety harnesses between July 10th and July 25th. The footage also

showed that claimant rarely checked the mirrors, and therefore was not observing the children as expected. The footage showed that on July 26th J wandered the bus unrestrained and opened the back door of claimant's bus while claimant was on the bus; claimant did not notice that he had done so until she started the bus and buzzers sounded and the driver of the bus behind her radioed her to tell her the door was open. On July 26th and July 27th, J had again engaged in sexual misconduct.

(12) On September 13, 2017, the employer interviewed claimant again. During the interview, claimant indicated that she had parents deal with the children's safety harnesses and only checked them visually, and not every time. Claimant told the employer that she did not follow J's bus plan when they were stopped at the school and did not always ensure that J was seated at the back of the bus. Claimant admitted to the employer that she knew J was not restrained on July 26th and did not get up and secure his restraints.

(13) On September 25, 2017, the employer discharged claimant for failing to ensure that the children in her bus were properly restrained and failing to follow J's bus plan.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. Isolated instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is defined, in pertinent part, as a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d).

The employer had the right to expect claimant, an experienced and trained bus driver, to ensure that the children on her bus were properly restrained, and to monitor the children on the bus to ensure they were seated at all times. However, she did not check children's restraints and did not use her mirrors to monitor the children while she was operating the bus. On at least eleven occasions, she failed to monitor J while he was moving about the bus instead of being seated in accordance with his bus plan.

Claimant argued that she did not understand the employer's expectations with regard to J's bus plan because when she spoke about it with the other employee "I saw she changed the instructions on the bus route. And included some words like that he needed to be isolated in the back and completely away from other children. I don't recall all the words, but it grew from two sentences into a short paragraph." Transcript at 26. However, the only plan in evidence, and the only plan claimant was expected to implement, was less than two lines long and said J could not be seated with his backpack in the morning because he would eat his lunch, and that he "Must sit in back of bus away from others." Exhibit 1. The

employer refuted claimant's allegation that J's plan changed during the summer program, testifying that it "was not ever changed or modified." Transcript at 29. Claimant's testimony implicitly suggests that she was familiar with the two-sentence version of J's plan, which included instructions about J begin sitting in the back of the bus. The record therefore fails to show that claimant did not understand the plan or did not know she was expected to abide by it.

Claimant further argued that she did not understand the employer's expectations regarding the need to restrain children or check on them in the mirrors. On this record, it is unlikely that argument is true. Claimant was an experienced bus driver of 12 years, and had attended training sessions that included mirror use, seat restraint and special needs training in 2014, February 2017 and June 2017. The record demonstrates that she knew J and the other children were to be restrained in safety harnesses while on the bus. Claimant knew by July 25, 2017 that J had partially exposed his penis while with another child when he was unrestrained on the bus and spoke to an employee about it, stating to the employer that after that had occurred, "We definitely needed to make certain he was staying in his seat." Nevertheless, on July 26th and July 27th J again left his restraints, moved about the bus, came into contact with one or two other children, and opened the back door of the bus; it appears that claimant was, at a minimum, aware that J was moving about at least on July 26th and despite her heightened understanding of the need to keep him seated did not reseat or re-restrain J into his seat.

Claimant argued that the employer should have better informed her about why J needed to be seated at the back of the bus away from other children. Claimant argued that the employer had explained in J's bus plan why she needed to keep his backpack away from him in the morning, and that if the employer had explained that J posed a threat to the other children on her bus she would have been more careful. Claimant's argument is beside the point. It is not material that claimant did not understand *why* J needed to be seated in accordance with his bus plan because she knew or should have known *that* J needed to be seated in accordance with that plan, and still failed to take sufficient adequate to ensure that he did. We also note that, after the July 25th incident and her discussion with the employee about it, claimant had to have better understood why claimant's plan involved isolating him from other children at the back of the bus, but still failed on two occasions to sufficiently monitor J or ensure that he was remaining seated and safely harnessed at the back of the bus.

Finally, claimant argued that she did not engage in misconduct because when she first learned of J's behavior on July 25th she told the employee in charge of such things, suggested she take action, and the employee decided not to do so. Even if the employee's perceived indifference to J's sexual behavior or disinclination to take any action based upon claimant's report about J's behavior somehow justified claimant's failure to monitor J and the other children, check her mirrors, and verify that they were properly restrained between July 26th and August 3rd, claimant had no such assurances prior to July 26th when she regularly failed to verify the children were safely harnessed, did not check her mirrors every five to seven seconds, and allowed J to wander the bus and engage with other children even though J's bus plan required that he "Must sit in back of bus away from others."

The preponderance of the evidence shows that on every occasion upon which she operated the bus between July 10, 2017 and July 27, 2017, claimant failed to perform her required duties – including ensuring the children were safely harnessed, checking her mirrors every five to seven seconds, and ensuring that J adhered to his bus plan – under circumstances where she knew or should have known the expectation and demonstrated her indifference to it. Claimant's conduct was wantonly negligent.

Claimant's conduct was not excusable as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not sincerely believe or have a factual basis for believing that her conduct was in compliance with the employer's expectations or that the employer would excuse or condone her violation of those expectations. Claimant's conduct was not "isolated" because, for reasons already explained, her conduct consisted of repeated acts or a pattern of wantonly negligent failures to safely harness and monitor the children on her bus, or adhere to J's bus plan.

For the reasons explained herein, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-97948 is affirmed.

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

DATE of Service: January 25, 2018

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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