

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0011

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114854). Claimant filed a timely request for hearing. On December 18, 2017, ALJ Scott conducted a hearing, and on December 20, 2017, issued Hearing Decision 17-UI-99428, concluding the employer discharged claimant, but not for misconduct. On January 2, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On September 5, 2017, Bird House Beginnings and Ladybugs LLC employed claimant with the intention of making her the licensed provider and lead teacher of an in-home day care facility in Clackamas County, Oregon.

(2) When claimant was hired, the employer's majority owner (DG) was in the process of setting up an in-home child care facility in a home owned by DG; it was not yet an ongoing business. Claimant was expected to assist in setting up the facility by performing various tasks, including applying for the facility license in her name, which she did. On October 3, 2017, the state licensing representative (DL) came to the home and informed DG and claimant that due to local zoning restrictions the facility's license would not be approved and the facility would not be allowed to open, unless claimant, the designated licensee, lived in the home.

(3) Over the next two days, DG both negotiated with claimant about rental terms if she were to live in the facility and attempted to obtain a zoning waiver from Clackamas County that would allow claimant to be the facility licensee without living in the home. While engaged in that process, DG arranged for claimant to work as a teacher in a similar West Linn facility, owned by DG's minority member (KB), until the problem was solved. DL earlier had informed claimant that until some pending proceedings against KB were resolved, KB was not allowed to be present in a child care facility.

(4) Over October 4 and 5, 2017, claimant thought over DG's rental proposal but ultimately concluded that living at the facility and renting from DG was not feasible because the rental terms were

substantially more expensive than she could afford and she was over eight months pregnant, making a move at that time inadvisable.

(5) On October 5, 2017, claimant was scheduled to work at the West Linn facility owned by KB from 8:00 a.m. to 1:00 p.m. At around 10:30 a.m., after claimant had nearly finished her assigned tasks, the lead teacher at that facility told claimant that there was not a lot left for her to do so she was free to leave. However, before claimant left, KB showed up at the facility, which caused claimant concern given the warning she had received from DL about KB being present at a child care facility. Claimant immediately emailed DL about KB's presence because she believed she was required to do so as a "mandatory reporter" under Oregon law. DL responded that it was correct to make the report, but there had been no violation as KB had not been alone with the children. Shortly thereafter, claimant left the facility. Later that day, after claimant and DG exchanged text messages concerning the events of the day, DG requested that claimant return her key to the employer's Clackamas County facility.

(6) On October 6, 2017, DG sent claimant a letter that stated in relevant part,

Your employment...will be officially terminated on October 6, 2017. You have been terminated for the following reason:

Certified daycare requirement by the State of Oregon and the County of Clackamas is requiring the provider of day care live in the residence of the daycare facility. [Claimant] has communicated this was not an option that she could commit to. We will have to release her of her job as the daycare needs/requirements can't be met... Exhibit 1.

CONCLUSIONS AND REASONS: We agree with ALJ. The employer discharged claimant, but not for misconduct.

At hearing, the employer asserted that claimant quit while claimant asserted she was discharged. *Cf.* Transcript at 5, 30. Under Department rules, if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so, the work separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

The employer asserted that claimant expressed her intent to leave the job by leaving the West Linn facility before the end of her shift on October 5, 2017. Transcript at 31. However, DG asked claimant about that by text message on October 6 and in response claimant clarified that quitting was never her intent and explained why she left the West Linn facility early that day. Exhibit 1 at 29. Moreover, DG had directed claimant to return her facility key, and the employer's December 6 letter to claimant was clear that her employment had been "terminated"... "as the daycare needs/requirements [of the position] can't be met [due to claimant's finances and pregnancy]." Because claimant was willing to continue to work for the employer for an additional period of time under the original terms of the position but was not allowed to do so, the work separation was a discharge.

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) 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 has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because an unanticipated regulatory requirement made it impossible for claimant to fulfill the needs of the position for which she was hired and had attempted to fulfill for approximately 30 days. Although DG and KB were probably aware that living in the home day care facility was a requirement for the licensee, the employer's past experience was that a waiver of that requirement was routinely obtained. Transcript at 10. However, after the zoning officials of the relevant jurisdiction refused to grant the necessary waiver, it became impossible for the employer to continue to employ claimant under the terms they had previously agreed upon. Although the employer's decision to discharge claimant was understandable, it failed to demonstrate that it discharged her because she willfully, or with wanton negligence, violated a reasonable employer expectation under the circumstances presented.

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

DECISION: Hearing Decision 17-UI-99428 is affirmed.

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

DATE of Service: February 7, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.