

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0618

Reversed
Disqualification

PROCEDURAL HISTORY: On April 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73511). Claimant filed a timely request for hearing. On May 22, 2018, ALJ Snyder conducted a hearing, and on May 30, 2018, issued Order No. 18-UI-110340, concluding the employer discharged claimant, but not for misconduct. On June 11, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Star of Hope Activity Center, Inc. employed claimant from June 2011 until March 12, 2018 as a residential support associate for adult clients with intellectual and developmental disabilities.

(2) The employer expected claimant to maintain the legal authority to provide care to the employer's clients, which included passing a background check through the Department of Human Services (DHS) every two years. Claimant understood this expectation.

(3) Claimant's girlfriend had four minor children that lived at his girlfriend's house. One of the children was claimant's biological child and claimant cared for all the children as his own. Claimant spent time at his girlfriend's house and knew his girlfriend "didn't keep that house very clean a lot of the times." Audio Record at 19:31 to 19:41.

(4) On a night in July 2017, claimant went to his girlfriend's house after work and immediately went to bed. Claimant knew "the house wasn't very clean." Audio Record at 20:17 to 20:19. A police officer and DHS worker arrived at the house in the morning to investigate reports of neglect regarding the

children. Based on the condition of the house, DHS determined four counts of abuse (one for each child) regarding claimant were “founded.”¹

(5) In early 2018, claimant submitted to a biannual DHS background check. The background check showed claimant had four substantiated counts of child abuse.

(6) On March 12, 2018, DHS notified the employer that based on the results of the background check claimant was not authorized to work as a residential support associate with developmentally disabled adults. The employer discharged claimant that day because he no longer had the legal authorization to work as a residential support associate for its clients.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(c) (January 11, 2018) states that a claimant’s willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to perform an occupation is misconduct, so long as the failure is reasonably attributable to the individual. In this context, 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 the individual’s failure to maintain the necessary license, certification or other similar authority.

As a preliminary matter in Order No. 18-UI-110340, the ALJ did not decide the case under OAR 471-030-0038(3)(c). The record shows OAR 471-030-0038(3)(c) applies to this case because it involves claimant’s failure to maintain the legal authority necessary to perform his occupation. Claimant’s occupation, and not just his job with the employer, required that claimant pass a biennial background check. OAR 407-007-0210(8)(F) (July 1, 2018) (claimant was a “subject individual” on whom DHS conducts a criminal records check and an abuse check), OAR 407-007-0220 (June 15, 2016). In Order No. 18-UI-110340, the ALJ also concluded that the employer discharged claimant not for misconduct, reasoning that claimant did not know the substantiated child neglect determinations from DHS would affect his background check, and therefore failing to pass the background check was not willful or wantonly negligent.² However, although claimant contended at hearing that he was not aware that the substantiated charges of neglect could result in the loss of his authority to perform his occupation (Audio Record at 17:39 to 19:10), it is reasonable to impute to claimant an awareness that substantiated charges of neglect involving children would result in a failed DHS background check where he cares for at-risk people and he was found to have neglected children, another at-risk population.

Claimant also knew about the conditions that resulted in the substantiated charges. He knew the house was unclean and that children were in the home. Moreover, although claimant referred to the condition of the house as merely being unclean, according to the DHS safety manual appendix 2.4 “Oregon Safety

¹ OAR 413-015-1010 (July 9, 2018) states that a “founded” disposition means there is reasonable cause to believe the alleged abuse occurred. “Abuse” includes neglect. OAR 413-015-0115(1)(a)(B) (June 29, 2018).

² Order No. 18-UI-110340 at 2-3.

Threats Guide” (at https://dhs.state.or.us/caf/safety_model/procedure_manual/appendices/ch2-app/2-4.pdf), DHS intervenes when the conditions in the home are “immediately life threatening or seriously endangering a child’s physical health” and the “threat to a child’s safety and immediate health is obvious” and “vulnerable children who live in such conditions could become deathly sick, experience extreme injury, or acquire life threatening or severe medical conditions.” Based on DHS’ guidelines, the conditions in a home must be unsafe and not merely unclean for DHS to intervene. Given that the severity of the housing conditions necessary to warrant intervention by DHS require an “obvious” “threat to a child’s safety and immediate health,” claimant knew or should have known that the conditions would probably result in substantiated charges of child abuse or neglect.

Claimant’s failure to maintain the legal authority to continue to work as a residential support associate for adult clients with intellectual and developmental disabilities was reasonable attributable to his behavior. Because claimant was conscious of the circumstances that led to the substantiated charges, claimant acted with a conscious indifference to the consequences of his actions. Claimant’s behavior was wantonly negligent.

Claimant’s actions or failure to act in July 2017 that resulted in the founded allegations of abuse cannot be excused from constituting misconduct as an “isolated instance of poor judgment” or a “good faith error” under OAR 471-030-0038(3)(b). Since 2004, the Department has interpreted OAR 471-030-0038(3)(c) to mean that the willful or wantonly loss of the legal authority to perform an occupation is a form of misconduct *per se* that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). *See* December 27, 2004 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling within OAR 471-030-0038(3)(c)). Since the record shows that the behavior for which the employer discharged claimant falls within OAR 471-030-0038(3)(c), it cannot be excused either as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b).

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-110340 is set aside, as outlined above.

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

DATE of Service: July 11, 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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