

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1031

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 93512). Claimant filed a timely request for hearing. On September 27, 2018, ALJ Monroe conducted a hearing, and on October 5, 2018, issued Order No. 18-UI-117815, concluding the employer discharged claimant, but not for misconduct. On October 24, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument, to the extent it was based thereon, when reaching this decision. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Family Solutions employed claimant as an on-call residential treatment counselor from January 22, 2018 to July 17, 2018. Claimant's job involved counseling female residents between 11 and 17 years of age at an employer group home.

(2) As a condition of claimant's occupation and employment as a residential treatment counselor for minor children, she was required to pass an Oregon Department of Human Services (DHS) background check at hire and maintain that status during her employment. The DHS background check involved checking criminal records, court records, driving records and abuse records.¹ Claimant passed the DHS background check when hired by the employer in January of 2018.

(3) On June 7, 2018, claimant self-reported to the employer that she had received notice from the Office of Training and Investigative Services (OTIS), which was affiliated with DHS, that allegations of abuse/neglect had been made against her concerning her prior employment and that an investigation would be conducted in connection therewith. The employer learned that claimant could continue to work in her job while the investigation was conducted as long as she was supervised. The employer allowed

¹ See OAR 407-007-0460.

claimant to continue to work under that condition. The employer also requested a new DHS background check on claimant.

(4) On or about July 15, 2018, claimant informed her group home supervisor that she had received letter notice from OTIS that it had completed its investigation and had substantiated three neglect/abuse allegations. The first allegation was that claimant had driven recklessly with children in a motor vehicle, the second was that she had left children unattended in a motor vehicle, and the third was that she had played profane music while children were in a motor vehicle. Claimant disputed all three allegations and appealed the findings and decision of OTIS. Nonetheless, the letter notice advised claimant that her eligibility to work with children and adults with behavioral and developmental disabilities was revoked for a period of five years or until the neglect/abuse findings were set aside. The letter notice from OTIS was forwarded to the employer's human resources office.

(5) On July 17, 2018, the employer concluded that it was unlikely that claimant would be able to work for it any longer as a residential treatment counselor, had no other work available and told claimant that based upon the letter, "that was it." Transcript at 41. It then removed her entirely from the employer's work schedule. Transcript at 41.

(6) After July 17, 2018, claimant attempted to contact the employer about the results of the background check it had requested on June 7, without success. On August 10, 2018, the employer received the results of the DHS background check it had requested on June 7, 2018 and learned that claimant had failed the background check. The employer never notified claimant of the results.

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

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 separation is a discharge. OAR 471-030-0038(2) (January 11, 2018). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). For a continuing employment relationship to exist there must be some future opportunity for the employee to perform services for the employer. *See, Appeals Board Decision 97-AB-873*, June 5, 1997. No continuing relationship exists if the employer does not have an expectation that a service will be performed. *See, Appeals Board Decision 02-AB-2040*, October 15, 2002.

The parties disagreed on the nature of the work separation with the employer asserting that claimant quit when she notified her group home supervisor on July 15 about the results of the OTIS investigation and indicated she understood that she would no longer be able to work at the group home unless the findings were overturned. Transcript at 35-36. However, claimant attempted to contact the employer after July 17 to verify her employment status without receiving a response. The employer's failure to contact claimant thereafter demonstrated that the employer was not willing to allow claimant to perform any additional service for the employer. Under the above cited rules, the work separation was discharge, and occurred on July 17, 2018.

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) (January 11, 2018) 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. OAR 471-030-0038(3)(c) provides that the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-117815, the ALJ concluded that the employer discharged claimant, but not for misconduct, because the employer failed to show that claimant violated a known expectation willfully or with wanton negligence during her employment with the employer. Order No. 18-UI-117815 at 4. While we agree with the ALJ's conclusion, we do so for a different reason.

OAR 471-030-0038(3)(c) provides, in relevant part, that the *willful or wantonly negligent* failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct. While there is no dispute that claimant was discharged because she failed to maintain a certification of similar authority with DHS that permitted her to work as residential treatment counselor for children, the record fails to show that she lost that certification or similar authority due to a willful or wantonly negligent failure on her part. Although there is hearsay evidence that claimant lost her eligibility to work in her chosen field for the employer because certain neglect/abuse allegations against her were apparently substantiated by OTIS, claimant denied, and the employer did not dispute, that she ever drove recklessly with children in the car or that she left children in a car unattended. Transcript at 23-26.

And while claimant admitted that certain music from her phone that contained some profanity was played in a car when children were present, she explained that the playing of that music was no more than accidental, and she changed it as soon as she heard it. *Id.* Although claimant may have been careless, even negligent, the record fails to show she consciously played profane music when children were present, or consciously engaged in other conduct that she knew or should have known would probably result in her doing so. Nor does the record show that claimant was indifferent to the consequences of her actions. The employer therefore failed to meet its burden to show that the conduct for which claimant lost her DHS certification was either willful or wantonly negligent, or therefore disqualifying misconduct under OAR 471-030-0038(3)(c).

The employer discharged claimant but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation from the employer.

DECISION: Order No. 18-UI-117815 is affirmed.

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

DATE of Service: November 30, 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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية محكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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