

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0386

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2019, the Oregon Employment Department (the Department) issued notice of a decision concluding the employer discharged claimant for misconduct (decision # 160519). On March 26, 2019, claimant filed a timely request for hearing. On April 11, 2019, ALJ Janzen conducted a hearing, and on April 15, 2019 issued Order No. 19-UI-128226 affirming the Department's decision. On April 18, 2019, claimant filed a timely application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based upon the record.

FINDINGS OF FACT: (1) Montessori in the Pines LLC employed claimant as an assistant teacher from 2016 until February 27, 2019.

(2) The employer's policy stated:

Employees are expected to adhere to standard business principles in matters of personal and business conduct, to accept responsibility for the appropriateness of their own conduct, and to exhibit a high degree of personal integrity at all times. All employees shall observe professionalism wherever business is conducted, including parents, students, and other staff. Gossip in the form of sharing personal information about children and their families to other families at the school is not allowed. All employees are expected to maintain positive relationships with the parents, students and staff at our school.

Exhibit 3. On July 9, 2018, claimant signed an affirmation that she read and understood that policy.

(3) The employer had ongoing concerns about claimant's attitude at work. On October 11, 2018, the employer met with claimant and asked her to "please show a willingness to change her attitude while at work and have a more positive working relationship with staff." Exhibit 3. During the discussion about the particulars of the employer's concerns, claimant denied some of the instances the employer brought

to her attention, but “apologized and said she would make efforts to change her behavior, not criticize, show willingness to teach according to the Montessori method and agreed to be less defensive and more willing to support.” Transcript at 19; Exhibit 3. The employer noticed an improvement in claimant’s attitude after the conversation.

(4) From the last week of January through February 12, 2019, the employer developed additional concerns about claimant’s attitude and supervision of the children. The employer considered claimant’s responses to correction for those instances insubordinate, unresponsive, or resistant.

(5) On February 14, 2019, a student under claimant’s supervision drew on his own face and another student’s face with a marker. Claimant was responsible for supervising the children and cleaning at the same time, and at the time of the incident was “listening to them and going back and forth, emptying the garbage and cleaning the kitchen.” Transcript at 26. The employer felt claimant had been poorly supervising the children and allowed them to draw all over themselves.

(6) The employer approached claimant about the incident. Claimant responded that maybe they should not give children, or that child, markers. The employer said, “no, this is poor teacher supervision.” *Id.* The employer would have been satisfied with claimant had she responded by stating, “I totally understand. I get it. No problem, I’ll do a better job next time” and would have felt that claimant was “willing to improve” had she said something like that. Transcript at 11. Instead, the employer felt claimant’s response was “a very dismissive attitude, or [] an argumentative attitude with excuses.” Transcript at 10.

(7) The employer had noticed prior incidents that she attributed to claimant’s poor supervision of the children, and was not satisfied with claimant’s responses when the employer spoke with her about those incidents. The employer felt “very frustrated and unsupported.” Transcript at 10. Claimant’s response to the employer on February 14th was “the last straw.” Transcript at 7.

(8) On February 27, 2019, the employer discharged claimant based upon her February 14th conduct.

CONCLUSIONS AND REASONS: Claimant’s discharge was not for misconduct, and Order No. 19-UI-128226 is reversed.

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) (December 23, 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.

Order No. 19-UI-128226 concluded that the employer discharged claimant for misconduct. The order stated, “The final incident leading to claimant’s discharge occurred on February 14, 2019, after claimant

did not adequately supervise a child who drew in marker on his face and on another student's face. Claimant then dismissed the employer's attempt to counsel her. During claimant's testimony at the hearing, claimant continued to be dismissive [of the employer's] legitimate concerns. Claimant's demeanor at the hearing established, more likely than not, that she was dismissive and disrespectful to the employer during her employment in a manner consistent with [the employer's] testimony. Claimant should have known that her conduct would violate the employer's expectations because the employer spoke to her about its concerns regularly. Claimant violated the employer's policy in this respect with wanton negligence." *See* Order No. 19-UI-128226 at 3.

The record does not support the order's conclusion that claimant was either conscious that she was being dismissive, or that she knew or should have known her response to the employer's February 14th correction would be considered dismissive or indicative of a poor attitude such that it violated the employer's expectations. Although the employer testified that she had concerns over time that claimant was being dismissive of the employer's training and instructions, the employer did not testify at the hearing that she notified claimant that she considered claimant's responses to trainings, instructions, or corrections dismissive. Although Exhibit 3 describes some parent complaints the employer received about claimant's attitude, Exhibit 3 shows that the employer only notified claimant that she was concerned about claimant's attitude on October 11th, after which time the employer testified claimant apologized and showed some improvement. Transcript at 17.

In sum, while there is no dispute on this record that the employer perceived claimant's responses as dismissive, and would have preferred that claimant take ownership of mistakes the employer pointed out to her and indicate a willingness to improve, the record does not show that claimant knew or should have known the responses she chose to make were inadequate to the employer's needs. Nor does the record show that she consciously failed to meet the employer's expectation that she take ownership and indicate a willingness to improve, since the record does not show that the employer made that expectation clear to claimant. Claimant's "dismissive" responses to the employer were not willful or wantonly negligent misconduct.

Order No. 19-UI-128226 denied benefits to claimant based in part upon claimant's demeanor during the hearing, as interpreted by the ALJ conducting the hearing, who indicated that claimant's "demeanor at the hearing established, more likely than not, that she was dismissive and disrespectful to the employer during her employment." *See* Order No. 19-UI-128226 at 3. As noted, there is no dispute that the employer perceived claimant as dismissive, nor do we necessarily disagree with the ALJ that to a third-party observer claimant's responses to the employer's concerns as described at the hearing could appear dismissive or defensive. Claimant's deflections of responsibility for certain incidents in her employment are also susceptible to being perceived as disrespectful. The question on review is not, however, how the employer perceived claimant, or even how an adjudicating or reviewing body perceived claimant. It is whether the employer's expectation was made reasonably clear to claimant, whether claimant was conscious of the conduct and knew or should have known the conduct would probably violate the employer's expectations, and whether she was indifferent to the consequences of her conduct. For the reasons already explained, the record fails to show claimant was.

Finally, the employer discharged claimant, in part, for failing to supervise children on February 14th while one child drew on his own face and that of another child. There is no reasonable dispute that claimant left children visually unsupervised for a long enough period of time that a child was able to

draw on his own face and another student's face. However, claimant's unrefuted testimony is that she was at all times within hearing distance of the children while performing assigned duties that necessitated she not be within viewing of the children at all times. She did not intend to leave the children unsupervised, nor, under the circumstances, does it appear she was conscious that she was not adequately supervising the children at the time of the incident. As such, her failure to supervise the children while the drawing incident occurred was not the result of willful or wantonly negligent behavior attributable to her as misconduct.

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

DECISION: Order No. 19-UI-128226 is set aside, as outlined above.

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

DATE of Service: May 22, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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 بمحكمة 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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