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BYE: 201442

State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION

**2014-EAB-0232**

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On November 12, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 100746). The employer filed a timely request for hearing. On January 14, 2014, ALJ Wipperman conducted a hearing, and on January 16, 2014 issued Hearing Decision 14-UI-08675, reversing the Department's decision. On February 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a written argument of eighty four pages to "prove that the employer misrepresented the situation that led to my termination." Written Argument at 3. The argument offered much new information that was not presented during the hearing. That claimant might dispute the evidence that the employer presented at hearing was a circumstance that she should reasonably have anticipated before the hearing and therefore was not a circumstance beyond her reasonable control. Aside from this circumstance, claimant did not allude to other factors or circumstances that prevented her from offering the new information during the hearing. Because claimant did not show that any factors or circumstances beyond her reasonable control prevented her from offering this information at hearing, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.272(2) and OAR 471-041-0090 (October 29, 2006).

**FINDINGS OF FACT:** (1) Veterans Care Centers of Oregon employed claimant as a registered nurse at a care facility from November 9, 2011 until October 18, 2013.

(2) The employer expected claimant to follow physicians' orders when providing care to a patient. Claimant was aware of the employer's expectations.

(3) Claimant was responsible for providing skilled medical care to approximately 22 residents of the employer's facility. Claimant was allowed to, and did, delegate much of the hands-on care to meet the

physical needs of the residents to certified nursing assistants (CNAs). CNAs routinely served beverages and food to the residents and were expected to know the residents' dietary restrictions. Claimant rarely served beverages or food to residents, and usually assigned this task to CNAs. Claimant was expected to oversee the CNAs when they provided services to the residents to whom claimant was assigned.

(4) At the employer's facility, several residents had experienced strokes and other medical events that made it difficult for them to swallow. The physicians' orders for these residents often prohibited the consumption of water-thin liquids and limited their liquid intake to beverages that were of "nectar-thick" or "honey-thick" consistencies. These designations for the thicknesses of the beverages allowed to residents were generally recognized terms in the field of medical care. CNAs were trained in recognizing these thicknesses and qualified to evaluate whether a particular beverage was of the appropriate thickness to comply with physicians' orders. CNAs were expected to confirm that a beverage was of an appropriate thickness before serving it to a resident.

(5) On October 10, 2013, one of the residents assigned to claimant asked claimant if he could have some ice cream. The physician's orders for this patient restricted him to "honey thick" beverages. Claimant told the patient he could not have ice cream because, at room temperature, the ice cream would melt and become less thick than "honey-thick." Claimant thought that the employer's health shake, of a consistency similar to a milkshake, was "honey-thick" and instructed the CNA assigned to this resident to give him a health shake in place of the ice cream he had requested. Claimant assumed that the CNA would not serve the resident the health shake if, after preparation, it was not of "honey-thick" consistency, but would use thickening agents to make the health shake of the required consistency. The CNA prepared the health shake and served it to the patient. As served, the health shake was not of "honey-thick" consistency but was of "nectar-thick" consistency. The CNA later told the employer's resident care director that he had thought the health shake was "honey-thick" when he served it to the patient.

(6) On each unit in the employer's facility, the employer posted a list of approved beverages that complied with each level of thickness designation. Health shakes were not on the list as an approved "honey-thick" beverage. Claimant had never examined this list because CNAs and not nurses generally served beverages to residents.

(7) On October 18, 2013, the employer discharged claimant for allowing a resident to be served a beverage on October 10, 2013 that was not "honey-thick" and did not comply with the physician's orders for that resident.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not 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)(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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries 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).

In Hearing Decision 14-UI-08675, the ALJ concluded claimant engaged in wantonly negligent misconduct when she told the CNA to serve the resident a health shake on October 10, 2013. The ALJ reasoned that "[w]hen claimant instructed a CNA to provide a resident restricted to honey-thick liquids with a thickened milkshake [sic], she created the possibility that the CNA would prepare [and serve] the milkshake [sic] too thin for the resident" and "[c]laimant knew or should have known that instructing a CNA to provide a thickened shake violated the medical orders of the resident's doctor." Hearing Decision 14-UI-08675 at 4. We disagree.

At the outset, we address the initial contention of the employer's witness that the employer discharged claimant both for the incident on October 10, 2013 as well as for prior incidents of alleged misconduct about which the employer had issued warnings to claimant. Transcript at 5, 6. When an employer was aware of prior incidents of alleged misconduct at or around the time they occurred, EAB customarily limits its evaluation to the final incident preceding the discharge to determine whether claimant engaged in misconduct. EAB takes this approach because, when an employer knew of the prior incidents and restricted its disciplinary actions to warnings, it must necessarily have concluded the past incidents were not of sufficient gravity to merit discharge. *See Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred). Because the employer was well aware of the prior incidents and did not discharge claimant for them, the proximate cause of claimant's discharge on October 18, 2013 was the incident occurring on October 10, 2013. In line with established EAB precedent, the proper focus of the misconduct analysis is that final incident.

It is necessary to place the fact of this case into perspective to understand claimant's behavior. Although the employer's witness testified that claimant "admitted to overriding a physician's orders," the witness did not present any evidence suggesting that claimant admitted to knowingly directing the CNA serve a beverage that violated the physician's orders for the particular resident. Transcript at 5, 19. Claimant's testimony that she thought the health shake she had ordered for the resident would be of a "honey-thick" consistency before it was served was not rebutted. Transcript at 19, 20, 21. Nor did the employer even attempt to rebut claimant's testimony that CNAs were trained and experienced in evaluating the thickness of the beverages served to patients, and were expected to thicken beverages that, after preparation, were too thin to be served in compliance with the physician's orders for the particular resident. Transcript at 19, 21. The employer also failed to provide any rebuttal to claimant's testimony that CNAs, and not nurses, were generally responsible for serving beverages to residents and it was customary and acceptable for nurses to delegate such a task to CNAs. Transcript at 20. The employer's witnesses presented no evidence that a nurse ordering a beverage for a resident and allowing it to be prepared and served by a CNA without the nurse first inspecting the beverage to confirm it was of the proper thickness was anything other than a routine and acceptable occurrence in the employer's facility. To the extent that the employer expected claimant to inspect every beverage before a CNA served it to a patient, the employer's witnesses presented no evidence that this expectation was ever communicated to claimant. Because claimant had the responsibility to provide medical care for 22 residents, it appears

unlikely she would have had the time to perform such inspections during her work day and unlikely that the employer would have required it in practice. Transcript at 27. Based on the division of work responsibilities between nurses and CNAs and common practice in the employer's facility, claimant's assumption that the CNA would not serve a beverage that was not appropriately thickened was understandable. Claimant's testimony at hearing that she believed this was sincere, credible and compelling. Transcript at 19, 20, 21, 31, 32. Even if the employer had presented evidence that it communicated to claimant that it expected claimant to inspect all beverages before they were served to residents to confirm that a CNA had prepared it to the proper thickness, claimant's behavior on October 10, 2013 in relying on the CNA to properly perform the CNA's job duties was at worst a good faith error. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 14-UI-08675 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

**DATE of Service: <u>March 12, 2014</u>**

**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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.