

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0579

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #72608). Claimant filed a timely request for hearing. On March 26, 2014, ALJ Triana conducted a hearing, and on March 31, 2014 issued Hearing Decision 14-UI-13852, affirming the Department's decision. On April 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The People Group, Inc. employed claimant from April 11, 2011 to December 5, 2013 as a licensed dental hygienist for its client, Bravo Smile.

(2) The employer required dental hygienists to use only sterilized instruments to treat patients. Claimant understood that requirement based on her experience and training.

(3) On December 2, 2013, claimant picked up four cassettes (packages containing dental instruments) from the area where the employer kept sterilized cassettes after being removed from the employer's autoclave (machine used to sterilize medical instruments). The cassettes were hot and stacked so that the tape used to seal the cassettes was not visible. Claimant put the cassettes in the cabinet where she stored them for use in treating patients. The employer's office was behind schedule that day, so claimant was rushing to prepare her station for her next patient. Claimant did not notice that the tape sealing the cassette had not changed to a darker, striped color to indicate the cassette had been properly sterilized.

(4) Claimant returned from her lunch break and provided dental treatment to a patient using the instruments from the cassette that had not been properly sterilized.

(5) On December 5, 2013, the employer discharged claimant for using unsterilized instruments to treat a patient.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude the employer discharged claimant, 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. 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. The employer has the burden of persuasion in a discharge case, and must establish by a preponderance of the evidence that claimant violated a reasonable expectation willfully or with wanton negligence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ determined the employer discharged claimant for misconduct. The ALJ reasoned that although claimant did not notice the tape had not changed color, “given the potential severe consequences of using non-sterilized equipment, claimant should have checked the tape to ensure the package was properly sterilized.”¹ The ALJ concluded claimant’s failure to check the tape was wantonly negligent because claimant “should have known failing to check the tape to ensure the cassette was properly sterilized could lead to a violation of the standards of behavior which the [employer] had a right to expect of her.”²

There was no evidence claimant willfully failed to use sterilized instruments to treat a patient. To show claimant’s conduct was wantonly negligent, and not merely negligent, the employer must show more than evidence of a mistake or failure to exercise due care. The record must contain evidence that claimant was indifferent to the consequences of conscious conduct, where she consciously engaged in conduct she knew or should have would probably result in a violation of the employer’s reasonable expectations. Although the consequences of using unsterilized instruments may be dire, we may not infer claimant consciously disregarded a known or apparent risk from the potential consequences alone.

The employer did not show that claimant consciously failed to look at or notice the tape indicating the cassette had not been properly sterilized. Rather, the record shows the clinic was behind schedule that day, and claimant was rushing to complete her duties in a timely manner. More likely than not, claimant’s haste in preparing her station for the next patient caused her failure to notice the tape on the cassette indicating it had not been properly sterilized. Because claimant took the cassette from the area where sterilized cassettes were stored, and the cassettes were hot, claimant did not otherwise have reason to suspect the cassette had not been properly sterilized. Thus, absent evidence that claimant knew or should have known that rushing to prepare the office for her next patient would probably result in a violation of the employer’s reasonable expectation that she use only sterilized instruments to treat patients, the employer has not shown her conduct was the result of wanton negligence. Accordingly, claimant is not subject to disqualification from the receipt of unemployment insurance benefits.

¹ Hearing Decision 14-UI-13852 at 3.

² *Id.*

DECISION: Hearing Decision 14-UI-13852 is set aside, as outlined above.

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

DATE of Service: April 30, 2014

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.