

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0727**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #120830). Claimant filed a timely request for hearing. On April 22, 2014, ALJ Lewis conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-16004, concluding the employer discharged claimant, but not for misconduct. On April 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Firehouse Diabetes Center employed claimant as a medical assistant from November 28, 2011 to January 16, 2014. The employer gave claimant additional laboratory assistant duties after hire.

(2) The employer expected claimant to review the doctor's orders, and implement them in a timely manner, including requesting prior authorizations for medications and procedures, and scheduling surgical procedures. The employer also expected claimant to be respectful and courteous to patients. Claimant understood the employer's expectations.

(3) The employer's office regularly received requests from pharmacies for prior authorization for prescriptions from patients' insurance providers. When a patient requested a refill, and the insurance company denied payment for the prescription, the pharmacy sent a request for a prior authorization to the employer's office. The employer then submitted the prior authorization request to the insurance provider. The insurance company re-determined whether to pay for the medication based on the medical information provided by the employer's office in the prior authorization request. Most of the time, for an existing prescription, the employer waited until the insurance company denied payment before

requesting prior authorization. The employer responded to pharmacy requests for prior authorization within 24 hours to ensure the patient received the medication in a timely manner. Occasionally, the employer submitted a request for prior authorization before the patient requested a refill.

(4) Claimant received one training session about how to complete a prior authorization request. He did not complete the request correctly during the training, and often failed to complete prior authorization requests correctly. The employer did not have written procedures about when and how to complete prior authorization requests.

(5) On January 6, 2014, claimant spoke with a patient who had new medical insurance and wanted the employer's office to request prior authorization for her prescription from her new insurance before she requested a refill. Claimant asked three other staff members if there was a way to handle the patient's inquiry other than waiting for the insurance to deny payment. The other staff members did not tell claimant to do anything other than to wait to see if the insurance company denied payment. Claimant told the patient to bring her new insurance card into the office so the employer could update her information, as was the customary practice in the office. On January 13, 2014, the patient called the employer and complained because she was unable to refill her prescription before she used all her medication.

(6) On approximately January 15, 2014, the doctor ordered that a patient be scheduled to have her intravenous access surgically replaced so she could receive treatment at home rather than in the hospital. The procedure was not scheduled for the patient, and, as a result, the patient had to go to the emergency room for treatment.

(7) On approximately January 15, 2014, a patient complained to the employer that claimant was "demeaning" toward her, and that she would not permit claimant to check her vital signs when she went to the employer's office. Transcript at 22.

(8) On January 16, 2014, the employer discharged claimant for allegedly endangering the welfare of its patients by failing to request prior authorization for medications and a medical procedure, delaying patients' receipt of medication and treatment.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that 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. 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 to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's doctor testified that the employer discharged claimant for a series of alleged deficiencies throughout his employment. However, the employer did not discharge claimant until after the incidents that occurred in mid-January 2014, presumably because the employer determined that the prior incidents did not merit discharge. Therefore, the incidents which occurred on January 13 and January 15, 2014 were the proximate cause of the work separation, and the initial focus of the misconduct analysis.<sup>1</sup> Only if claimant's behavior on January 13 and 15, 2014 was willful or wantonly negligent will his prior incidents be at issue in determining whether the employer discharged claimant for misconduct, and not an isolated instance of poor judgment.

The employer discharged claimant, in part, because he failed to request prior authorization from an insurance company for a patient's medication, delaying the patient's ability to refill the prescription. However, the record does not establish that claimant's conduct was a willful or wantonly negligent violation of the employer's expectations. A patient notified claimant that the patient was changing insurance carriers, and that a prior authorization request would be necessary. Claimant told the patient to bring the new insurance information to the patient's next visit. Unsure about how to handle the matter, claimant asked other staff members, who confirmed that claimant should follow the employer's normal practice of waiting to submit a prior authorization request until the insurance company denied the patient's refill request. The employer did not show by a preponderance of the evidence that claimant knew or should have known through prior training, experience or warnings that he was required to request prior authorization for the patient's medication when the patient called, rather than waiting until the pharmacy requested the prior authorization. Thus, the employer has not shown that claimant knew or should have known that his failure to request prior authorization for the medication when the patient called would probably violate the employer's expectations. As such, claimant's conduct was not a willful or wantonly negligent violation of the employer's expectations, and was not misconduct.

The employer also discharged claimant, in part, because he allegedly failed to schedule and request prior authorization for an intravenous access procedure for a patient. Claimant testified that he did not receive the doctor's orders to schedule and request prior authorization for that patient's procedure. Transcript at 51. There was no evidence the employer reprimanded claimant for that incident when the oversight occurred, or at the time of discharge, which tends to support claimant's testimony. Absent a basis for concluding claimant was not a credible witness, we find the evidence that claimant received and failed to follow the doctor's orders equally balanced between the parties. The employer therefore failed to show by a preponderance of the evidence that claimant received the doctor's orders. Absent such a showing, the employer failed to establish that it discharged claimant for misconduct on that basis.

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<sup>1</sup> In unemployment insurance benefit cases, the initial determination regarding misconduct is confined to the proximate cause of the discharge, which is usually the final instance of alleged misconduct before the discharge when the record shows the discharge would not likely have occurred but for that final incident. See *Cicely J. Crapsler* (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).

The employer also discharged claimant, in part, because a patient complained that he treated her in a “demeaning” manner, and he made her “feel uncomfortable.” Transcript at 20. Claimant testified that patients might have thought he was inattentive because he did not discuss nonmedical matters with them while he was “busy trying to take care of the medical things quickly.” Transcript at 55. Claimant provided the only first-hand testimony of what occurred between him and the patients he treated. The employer’s hearsay statement from a patient, lacking detail about the alleged incident that prompted the statement, is insufficient to establish that claimant violated the employer’s expectation that he treat patients in a respectful and courteous manner.

In sum, we conclude that the employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-16004 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating

**DATE of Service:** June 4, 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.