

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1004

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110318). Claimant filed a timely request for hearing. On May 28, 2014, ALJ M. Davis conducted a hearing, and on May 29, 2014 issued Hearing Decision 14-UI-18576, affirming the Department's decision. On June 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. We considered the entire hearing record and claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Bethesda Lutheran Communities, Inc. employed claimant from February 10, 2003 to April 4, 2014 as an on-call direct support staff person.

(2) The employer expected support staff to administer the proper dosages of medication to patients. The employer expected staff to compare the patient's medication to their medication administration record (MAR) before administering it to the patient. Claimant understood the employer's expectations.

(3) On February 27, 2014, claimant prepared to give a patient her medication. Claimant saw that the bubble pack containing the patient's medication for February 27 had already been opened. Claimant assumed an error had occurred, opened the patient's medication dosage for February 28, 2014, and administered it to the patient. Claimant went to sign the patient's MAR, and saw the other staff person on duty had already dispensed the patient's February 27 medication and signed the patient's MAR.

(4) Claimant had not violated the employer's medication administration policy before February 27, 2014.

(5) On April 4, 2014, the employer discharged claimant for violating the employer's medication administration policy.

CONCLUSIONS AND REASONS: We disagree with 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 that an employer has the right to expect of an employee. 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 Hearing Decision 14-UI-18576, the ALJ concluded claimant's conduct was a wantonly negligent violation of the employer's medication administration policy and exceeded mere poor judgment, reasoning that claimant's failure to check the MAR or confirm with a coworker that the medication had not been administered created an irreparable breach of trust with the employer and was too serious to be an isolated instance of poor judgment.¹

The record is not disputed about what occurred on February 27, 2014. Claimant knew the employer expected her to check the patient's MAR before administering medication to the patient. Claimant also should have known as a matter of common sense to check with the other staff when she saw the medication bubble for February 27 was already open. Claimant consciously engaged in conduct that she knew or should have known would probably violate the employer's medication administration policy. Claimant's conduct was wantonly negligent.

However, we disagree with the ALJ's conclusion that claimant's actions on February 27 were not excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is defined as a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct that does not exceed mere poor judgment. OAR 471-030-0038(1)(d)(A and D). The record does not show that claimant had violated the employer's medication administration policy before the final incident, or that claimant engaged in a pattern of other willful or wantonly negligent conduct. The record does not support the ALJ's conclusion that claimant's conduct exceeded mere poor judgment because it created an irreparable breach of trust. The record does not show that claimant intentionally administered a second dose of medication to the patient, and the employer did not allege it could no longer trust claimant. The employer's human resources representative testified that the employer

¹ Hearing Decision 14-UI-18576 at 3.

discharged claimant rather than taking other disciplinary action because “there [were] performance issues” and because claimant’s conduct was a direct violation of the employer’s medication administration policy. Audio Record ~ at 19:32 to 19:59. Nor does the record show that, viewed objectively, claimant’s one medication error in eleven years of employment with this employer caused an irreparable breach of trust in the employment relationship. Thus, we conclude claimant’s conduct was a single occurrence of wantonly negligent conduct that did not exceed poor judgment.

The employer therefore discharged claimant for an isolated instance of poor judgment, and not misconduct. Accordingly, the discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 14-UI-18576 is set aside, as outlined above.

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

DATE of Service: July 16, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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