

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1034

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 130620). The employer filed a timely request for hearing. On May 27, 2014, ALJ Shoemake conducted a hearing, and on May 30, 2014 issued Hearing Decision 14-UI-18679, concluding the employer discharged claimant for misconduct. On June 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bi-Mart Corporation employed claimant from June 22, 2009 to April 8, 2014 as a pharmacy assistant.

(2) The employer expected pharmacy assistants to refrain from disclosing patients' protected health information without proper permission. The employer expected claimant to ask each patient for two pieces of personal information, such as name and date of birth, and to verify that the two pieces of identifying information matched the information on the prescription vial and accompanying paperwork. The employer's policy provided that two prescription errors would result in discharge. Claimant understood the employer's policy and expectations.

(3) On March 10, 2014, claimant gave the wrong prescription to a patient. On March 11, 2014, the employer told claimant she had given a patient the wrong prescription.

(4) After learning of the error she had made on March 10, 2014, claimant tried to the best of her ability to refrain from making errors and to follow the procedure required by the employer.

(5) On March 22, 2014, claimant gave a patient the wrong prescription.

(6) On April 8, 2014, the employer discharged claimant for improperly handling the prescription on March 22.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded claimant's discharge was for misconduct. The ALJ found that claimant's conduct in giving the wrong medication to the wrong individual was a wantonly negligent violation of the employer's expectations, reasoning that, "if claimant had followed the employer's identification procedure, matching individual's identification to the vial and paperwork, she likely would not have [given the wrong medication]."¹

However, the record fails to show that claimant's medication error was the result of wanton negligence, as defined under OAR 471-030-0038(1)(c), and not mere carelessness or ordinary negligence, which is not misconduct. Claimant understood the employer's procedures, and believed she had followed them when she mistakenly gave a patient the wrong prescription on March 22. Claimant testified that she always followed the employer's procedures, and tried to be "extremely precise with everything" and "thought [she] was doing absolutely everything right" and "was trying to be so careful" after her first error on March 10, 2014. Audio Record ~ at 25:34 to 26:16. The employer failed to show claimant consciously dispensed prescription medication to the wrong patient, or that she consciously neglected to follow the employer's procedures to ensure accuracy in dispensing prescriptions. Nor did the employer show that claimant was indifferent to the consequences of her actions. Absent such showings, the employer failed to establish that claimant violated the employer's expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-18679 is set aside, as outlined above.

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

DATE of Service: July 18, 2014

¹ Hearing Decision 14-UI-18679 at 3.

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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