EO: 200
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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-1818

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 125234). Claimant filed a timely request for hearing. On October 31, 2014, ALJ R. Davis conducted a hearing, continued on November 5, 2014, and on November 7, 2014, issued Hearing Decision 14-UI-28433, concluding the employer discharged claimant, but not for misconduct. On November 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as a staff nurse from January 3, 2012 to August 5, 2014.

(2) Staff nurses obtained patient narcotic medications from a computerized medication bin known as "the Pyxis." Transcript at 9-10. After withdrawing medication from the Pyxis, nurses were expected to bar scan the medication and the patient's wristband, and then promptly administer or "waste", i.e. dispose of in front of a witness, unused narcotic medication unless hindered by an uncooperative patient or emergent circumstances. Claimant was aware of the employer's expectations.

(3) On July 7 and July 8, 2014, claimant obtained a narcotic medication from the Pyxis to administer to a patient experiencing severe alcohol withdrawal. Although she administered the medication to the patient on both days and manually documented it in patient records, she did not bar scan the

administration of the medication to the patient on July 7 because he was uncooperative. Exhibit 2; Transcript at 39-40. Based on the Pyxis record, the employer considered the July 7 medication unaccounted for.

(4) On July 10, 2014, claimant obtained a narcotic pill from the Pyxis to administer to a patient who refused the medication because he felt nauseous. Claimant placed the pill in applesauce to make it more palatable but the patient again refused. Claimant asked a coworker to witness the disposal of the medication and applesauce claimant had placed in a paper cup, but the coworker refused because she did not see the medication wrapper. Claimant was required to attend to another patient and crushed the medication with the applesauce in the paper cup and threw the cup in the trash, where the employer allowed liquid, rather than solid, narcotics to be disposed. Transcript at 42-44, 73. Claimant did not document her disposal of the medication in the trash and the employer considered the medication unaccounted for.

(5) On July 16, 2014, at 11:21 p.m., claimant obtained a narcotic pill from the Pyxis, administered it to a patient at 11:33 p.m. and bar scanned the information as required. The employer mistakenly viewed the Pyxis record and concluded the medication was administered approximately five hours later which it considered an inappropriate delay.

(6) On July 16, 2014, at 10:37 p.m., claimant obtained an IV narcotic medication from the Pyxis for a patient suffering from alcohol withdrawal, dropped the container holding the medication to the floor, causing it to crack and spill the medication. At 10:38 p.m., claimant obtained a second container of the same IV medication to administer to the patient. At approximately 10:44 p.m., she found her charge nurse at another wing on the floor, explained what had happened and the charge nurse then "witnessed" the waste of the first dose and the portion of the second dose that claimant did not administer to the patient. Exhibit 1. The employer later concluded the first container of narcotic medication unaccounted for.

(7) On July 17, 2014, claimant obtained an IV narcotic medication from the Pyxis, administered it to a patient suffering from alcohol withdrawal 12 minutes later and documented her actions in the Pyxis record. The employer considered the administration of the medication inappropriately delayed.

(8) On July 23, 2014, claimant obtained an IV narcotic medication from the Pyxis, administered it to an uncooperative patient suffering from alcohol withdrawal 19 minutes later and documented the administration time in the Pyxis record. The employer considered the administration of the medication inappropriately delayed.

(9) On July 24, 2014, claimant obtained an IV narcotic medication from the Pyxis and administered it to a combative patient suffering from alcohol withdrawal 46 minutes later after security personnel calmed the patient down. Claimant documented her actions on the Pyxis record. The employer considered the administration of the medication inappropriately delayed.

(10) On July 26, 2014, the employer reviewed the Pyxis record for claimant's patients for the month of July, observed missing and other entries regarding claimant's administration and waste of narcotic medications between July 7 and 24 and concluded claimant violated its policies regarding administration and waste of narcotic medications. The employer suspended claimant pending an investigation.

(11) On July 31, 2014, the employer met with claimant, provided her with the Pyxis record for the nine incidents between July 7 and July 24 and asked her to explain the reasons for missing and other entries demonstrating delay in administration of, or failure to waste, medications. The employer concluded claimant's explanations were unsatisfactory.

(12) On August 5, 2014, the employer discharged claimant for the unaccounted for medications and the delays in the administration of medications between July 7 and July 24 based on the Pyxis record. Claimant had not previously been disciplined by the employer.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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.

As a preliminary matter, claimant's first-hand testimony about the incidents that led to her discharge substantially differed from the testimony and documentary evidence presented by the employer which was substantially based on hearsay evidence. In the absence of persuasive evidence demonstrating claimant was not a credible witness, her first hand testimony was at least as credible as the employer' s hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer -- has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

The employer discharged claimant for what it considered unaccounted for medications and mishandling and delays in the administration of medications between July 7 and July 24 based on the Pyxis record. Claimant's supervisor testified as follows:

> …it wasn't so much the fact that she was below the ninety percent [the employer's target percentage for the frequency of using the bar scanner]. It was just that we had, you know, within the last thirty days…a period of time where we suddenly had all these…unaccounted for medications. She was trying to get other nurses to witness, and they didn't actually see the meds…the controlled released substance [on July 10] was crushed…there were long delays of when she was giving the meds…I mean…it had more to do with those issues.

Transcript at 71-72.

The employer concluded, based on the Pyxis record and hearsay statements from nurses who did not testify at hearing, that medication claimant withdrew on July 7, July 10 and July 16 was unaccounted

for. However, the employer did not dispute claimants assertion that the IV medication claimant withdrew on July 7 was fully administered to the patient and that the administration was documented in a separate form she completed for the patient in question. It did not dispute claimant's assertions that she asked a coworker to witness the waste of the medication in the applesauce on July 10 and that the reason the coworker would not witness the waste was because the coworker did not see the medication wrapper, which claimant disposed of because that patient had never before refused medication, rather than the pill in question. Transcript at 41-42; Exhibit 2. Her additional assertion that she had to attend to another patient rather than seek out another witness also was plausible. Transcript at 43. Finally, the employer did not dispute claimant's assertion that on July 16 she explained to the nurse manager what had happened to the first dose and invited the manager to check the disposal container to verify her account, which the manager declined to do. Transcript at 46.

The employer also concluded, again based on the Pyxis record, that medication claimant withdrew on July 16, July 17, July 23 and July 24 was administered with an inappropriate delay. However, the employer did not dispute claimant's evidence that on July 16 and July 17 the medication was actually administered within 12 minutes of withdrawal which claimant believed was acceptable to the employer under Institute for Safe Medication Practices (ISMP) guidelines and that on July 23 and July 24 the medication administration delays were caused by an uncooperative and combative patient suffering from alcohol withdrawal, i.e, emergent circumstances. Transcript at 35; Exhibit 2.

Where misconduct is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or 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 her conduct* and knew or should have known her conduct would probably result in violation of standards of behavior the employer had the right to expect of her.[1] Willful or wantonly negligent conduct may not be inferred from results alone. On this record, even if during one or more incidents claimant technically violated the employer expectations in question, her actions did not demonstrate conscious indifference to the employer's interests. Accordingly, the employer failed to meet its burden to show that claimant's conduct was at least wantonly negligent.

The employer discharged claimant, but for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

[1] *See* OAR 471-030-0038(1)(c); *see also Sathanuman Khalsa* (Employment Appeals Board, 12-AB-0737, April 9, 2012) (absent evidence that claimant was conscious he was not paying close enough attention, his failure to pay attention was not wantonly negligent); *Guadalupe Vallasenor* (Employment Appeals Board, 12-AB-0229, February 23, 2012) (absent evidence that claimant was conscious she was making a mistake at the time she made it, her mistake was not wantonly negligent); *Marina V. Burlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence that claimant was conscious that she was failing to be careful, the failure was not wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence that claimant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-0949, May 14, 2010 (absent evidence claimant's failure to read restricted delivery label was conscious, failure was not wantonly negligent).

DECISION: Hearing Decision 14-UI-28433 is affirmed.

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

DATE of Service: January 27, 2015

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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