

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1966

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74410). Claimant filed a timely request for hearing. On December 19, 2014, ALJ Shoemake conducted a hearing, and on December 23, 2014 issued Hearing Decision 14-UI-30897, affirming the Department's decision. On December 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her 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) Yavapai Regional Medical Center employed claimant as a registered clinical dietician from May 27 to September 10, 2014.

(2) The employer had a policy prohibiting its dieticians from changing a doctor's order for a patient's therapeutic diet without the doctor's permission. In practice, however, the employer's dieticians often changed the texture of a patient's therapeutic diets without the doctor's permission. Claimant therefore believed she was permitted to do so. Claimant understood she was prohibited from making other changes to a doctor's order for a patient's therapeutic diet without the doctor's permission.

(3) On September 8, 2014, claimant discussed several patients' therapeutics diet with their doctors, who gave claimant permission to change some of the patients' diets. Claimant took notes during her conversations with the doctors, and accessed the employer's computer system to make the permitted changes. Claimant also decided to change the texture of a patient's diet. While doing so, claimant

misread her notes, and mistakenly believed the patient's doctor had given claimant permission to make other changes to the patient's diet. Claimant therefore made the other changes to the patient's diet.

(4) The employer discharged claimant for changing the doctor's order for the patient's therapeutic diet without the doctor's permission.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for changing a doctor's order for a patient's therapeutic diet without the doctor's permission on September 8, 2014. In Hearing Decision 14-UI-30897, the ALJ found that claimant was aware of the doctor's order but "felt that the patient needed something else," and therefore changed the order.¹ Based on that finding, the ALJ summarily concluded that claimant willfully violated the employer's expectation that she follow doctor orders and not change them.² At hearing, however, claimant testified that although she deliberately changed the texture of the patient's diet, she made other changes to the patient's diet because she misread her notes, and mistakenly believed the patient's doctor had given claimant permission to make the other changes. Audio Record at 35:00. The employer failed to show claimant consciously made the other changes without the doctor's permission, or consciously engaged in other conduct she knew or should have known would probably result in her doing so. In misreading her notes, claimant was careless, arguably negligent, but her conduct was not willful, and did not rise to the level of *wanton* negligence as defined under OAR 471-030-0038(1)(c).

As for claimant changing the texture of the patient's diet without the doctor's permission, claimant testified that the employer's dietitians often did so, and that she therefore believed she was permitted to do so. Audio Record at 28:00. Absent evidence to the contrary, the record fails to show claimant's conduct violated the employer's expectations, let alone that it was a willful or wantonly negligent violation, and not the result of a good faith error in claimant's understanding of the employer's expectations.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

¹ Hearing Decision 14-UI-30897 at 2.

² *Id.* at 3.

DECISION: Hearing Decision 14-UI-30897 is set aside, as outlined above.

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

DATE of Service: February 11, 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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