EO: 200
BYE: 201539

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
2015-EAB-0098

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 170621). Claimant filed a timely request for hearing. On January 7, 2015, ALJ Wipperman conducted a hearing, and on January 15, 2015 issued Hearing Decision 15-UI-31918, reversing the Department's decision. On February 4, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as a registered nurse in its emergency department from August 18, 2014 until September 23, 2014.

(2) The employer expected claimant to dispense medicine to patients accurately and in accordance with physicians' instructions. In particular, when claimant intended to administer insulin to a patient, the employer expected her to have another nurse check the accuracy of the dose she had measured before she administered it. Claimant was aware of the employer's expectations.

(3) On August 27, 2014, when claimant was still in orientation and working with another nurse overseeing her activities, claimant drew a dose of the anesthetic Propofol before the overseeing nurse had completed the calculations required to determine the volume of the Propofol solution that would correspond with the dose ordered. The overseeing nurse told claimant that the volume of Propofol she had withdrawn was not the correct amount. The Propofol dose was corrected and the correct amount

was administered to the patient. The employer considered this event to have been a "near medication error" by claimant.

(4) On September 11, 2014, claimant withdrew a dose of the antibiotic Vancomycin for a patient based on the dosage amount set out in the patient's medication record, which was 1000 milligrams. The patient's physician had changed the amount of the dose to 750 milligrams, but that change had not been entered in the medication record at the time claimant was preparing to administer the Vancomycin to the patient. Before claimant administered the 1000 milligrams of Vancomycin, the charge nurse told her that the physician had orally changed the order and the correct amount of the dose was now 750 milligrams. Although the correct dose was administered to the patient, the employer considered the initial withdrawal of 1000 milligrams to have been a "near medication error" by claimant.

(5) During the night of September 18, 2014, claimant had physical altercation with her former husband. Claimant slept only about three hours that night. On September 19, 2014, while claimant was at work, her former husband communicated with her several times about their ongoing dispute. These contacts "rattled" claimant. Transcript at 27. The emergency department was "very hectic" and understaffed that day. Transcript at 26. As a result of claimant's fatigue, upset and the frenzied work pace, claimant made an error and withdrew six units of insulin to administer to a patient, as had been previously ordered for that patient, rather than the four units that the order had been changed to reflect. A nurse who was working with claimant told her that the correct dose was four units for that patient. Claimant adjusted the patient's insulin dose to four units and administered the correct dose of insulin. However, because claimant initially withdrew six units of insulin for the patient, the employer considered that to have been a "near medication error" by claimant.

(6) On September 23, 2014, the employer discharged claimant for three "near medication errors" during the approximately four weeks that she had been employed.

CONCLUSIONS AND REASONS: 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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer's witness contended at hearing that the employer discharged claimant for the three "near medication errors" occurring on August 27, 2014, September 11, 2014 and September 19, 2014, it was not disputed that the employer was aware of the two earlier alleged errors when they initially occurred. By not discharging claimant for the earlier errors, the employer necessarily determined that a discharge was not warranted for either or both of them. In a discharge case, the

misconduct analysis focuses on the proximate cause of the discharge or the behavior without which a discharge would not have occurred. *See David B. Elling* (Employment Appeals Board, 13-AB-0295, March 18, 2013) (discharge analysis focuses on the proximate case of the discharge or the behavior without which a discharge would not have occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (same). The proximate cause of claimant's discharge was the "near miss" on September 19, 2014, and not the "near misses" on August 27, 2014 and September 11, 2014, and that incident is the focus of the misconduct analysis.

At hearing the employer's witnesses and claimant disagreed on the facts surrounding the medication "near misses" on August 27, 2014 and September 11, 2014. Although those "near misses" are not particularly relevant to this decision, we have included them in our findings of fact for purposes of a complete history. None of the employer's witnesses observed these "near misses," or had first-hand information about them. Transcript at 7, 15. Since claimant was present for the "near misses," and her first-hand testimony is entitled to greater weight than the employer's hearsay evidence, we have accepted claimant's evidence about them in making our findings of fact.

Claimant did not dispute that she was aware that the employer expected her to refrain from medication errors and, presumably, the types of behaviors that would likely lead to medication errors. Transcript at 18. Claimant also did not dispute that she withdrew an incorrect dose of insulin on September 19, 2014 and that the wrong dose would have been administered to the patient but for the intervention of another nurse on duty. Transcript at 18, 26. While claimant's "near miss" on September 19, 2014 might have resulted from her negligent behavior, to disqualify her from unemployment benefits, the employer must show more than carelessness or mere negligence. The employer must show that claimant's "near miss" on September 19, 2014 was the result of willful or wantonly negligent behavior. OAR 471-030-0038(3)(a). Since the appropriate inquiry focuses on claimant's mental state at the time of her mistakes, the employer's argument that a high level of potential harm to patients was caused by claimant's medication error is irrelevant to our decision on whether grounds exist to disqualify claimant from unemployment insurance benefits. A willful or wantonly negligent mental state cannot be inferred from the scope of the potential harm that resulted from claimant's behavior.

The employer did not contend that claimant willfully withdrew an incorrect dose of insulin on September 19, 2014, and there is no evidence in the record to support such an inference. With respect to whether claimant's error on September 19, 2014 was wantonly negligent, EAB had consistently held that, absent evidence that claimant was conscious of her error at the time it occurred, the error cannot be considered wantonly negligent. *See Edna Rittenberry* (Employment Appeals Board, 13-AB-0153, March 1, 2013) (absent evidence that claimant was conscious that she had dispensed incorrect amounts of medication to two patients, this error cannot be considered a conscious error); *Christine Y. Duarte* (Employment Appeals Board, 12-AB-1470, June 5, 2012) (absent evidence that claimant was aware that she had administered and documented a medication incorrectly at the time she did so, her errors were not wantonly negligent); *Debra L. Ruschman* (Employment Appeals Board, 10-AB-1155, May 14, 2012) (absent evidence that claimant was conscious that she was making a medication error at the time she made it, her mistake was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2010) (absent evidence that claimant's failure to document a medical test was conscious, her failure to do so was not wantonly negligent).

The employer did not dispute claimant's explanation of the circumstances under which she erroneously withdrew the wrong amount of insulin on September 19, 2014. Claimant testified that she was fatigued after having an serious altercation with her former husband on September 18, 2014 and getting very little sleep that night, that her husband bombarded her with text messages throughout the day of September 19, 2014 which left her upset and "scattered" and that the "hectic" pace of the emergency department on September 19, 2014 left her even more unfocused. Transcript at 19, 27. On these facts, it appears that claimant very likely was not aware that she was making a mistake when she measured the amount of insulin to administer to the patient on September 19, 2014. There is no evidence in the record tending to show that claimant was conscious of her behavior when she withdrew the insulin. The employer did not meet its burden to show that the conduct underlying claimant's error on September 19, 2014 was willful or wantonly negligent.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-31918 is affirmed.

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

DATE of Service:

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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