

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0541

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73193). Claimant filed a timely request for hearing. On April 27, 2015, ALJ Vincent conducted a hearing, and on May 5, 2015 issued Hearing Decision 15-UI-37956, reversing the Department's decision. On May 11, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Presbyterian Community Care Center employed claimant as a registered nurse (RN) and a nursing supervisor from June 3, 2014 until February 9, 2015.

(2) The employer expected claimant to follow generally accepted nursing standards when caring for patients receiving intravenous infusions (IVs), which required inspections of the infusion site at least every two hours. The employer also expected claimant to document in the patient's medical chart each time she inspected the condition of the infusion site. Claimant understood the nursing standard for checking infusion sites, but did not understand that the employer required her to document each check in the patient's chart.

(3) On the night of February 7, 2015, claimant was assigned to care for a patient who was receiving an IV infusion. Claimant checked the condition of the infusion site at 3:30 a.m. Claimant did not record this inspection in the patient's chart. Claimant again checked the infusion site at 5:00 a.m. Claimant did not record this inspection in the patient's chart. Shift change occurred at 6:00 a.m. and claimant's nursing relief took over care for the patient receiving the IV infusion. When that nurse checked the condition of the patient who was receiving the infusion, he discovered that the IV was infiltrated, or leaking the infused fluids into the patient's arm tissues surrounding the infusion site. The relief nurse observed that the patient's arm was swollen with fluids. The patient's identification wristband was embedded in his wrist due to swelling and had to be removed by cutting it off. As a result of the infiltration, the patients sustained bruising and some skin breakdown on the back of his arm.

(4) On February 9, 2015, the employer discharged claimant for not inspecting the patient's infusion site every two hours through the early morning hours on February 7, 2015, and for not documenting any infusion site inspections in the patient's medical chart.

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 preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant agreed that she was aware of the nursing standard that required her to check the site at which a patient was receiving an infusion at least every two hours, but denied that she was aware of any nursing standard or employer expectation that she record the results of each physical inspection of the infusion site in the patient's medical chart. Transcript at 22, 23, 26. Aside from asserting that such recording of every infusion site inspection in a patient's medical chart was a nursing standard, the employer did not offer any evidence about how claimant was aware of that standard or how the employer's expectation of charting every infusion site inspection was communicated to claimant. On this record, the employer did not establish that claimant was reasonably aware that she needed to document every inspection, but only that claimant was required to inspect the infusion site every two hours.

Claimant contended that she checked the patient's IV infusion site at 3:30 a.m. and 5:00 a.m., or at least every two hours. Transcript at 11, 24, 25. Claimant further testified that at neither inspection did she observe indications of an infiltrated IV. Transcript at 24, 25, 26. To support its contention that claimant did not check the IV at the times that she contended, the employer relied on claimant's failure to document such inspections in the patient's chart, and the condition of the patient's arm at 7:00 a.m., which the employer's witness believed showed that the infiltration had been ongoing undetected for some time before 7:00 a.m. Transcript at 20, 30. In light of claimant's testimony that she was not aware of any requirement that she needed to document each infusion site inspection, claimant's failure to document inspections at 3:30 a.m. and 5:00 a.m. was not particularly probative on the issue of whether she actually performed inspections at those times. Accepting the testimony of the employer's witness that the IV must have been infiltrated for a longer period than the two hours between claimant's last contended inspection of the infusion site at 5:00 a.m. and when the infiltration was discovered at 7:00 a.m., the employer did not present evidence ruling out that claimant checked the infusion site at 3:30 a.m. and 5:00 a.m. and inadvertently overlooked any observable signs that the IV was infiltrated. In view of the employer's failure to eliminate this possibility, the evidence was insufficient to establish that claimant did not check the infusion site every two hours as expected, but simply missed the signs, if any, of an infiltration. If claimant missed such signs, the employer did not present any evidence showing that claimant's failure to detect those signs was due to willful or wantonly negligent behavior rather than a

simple error or failure to exercise reasonable care.¹ On this record, the employer did not meet its burden to establish claimant's misconduct.

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

DECISION: Hearing Decision 15-UI-37956 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating

DATE of Service: July 2, 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 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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¹ See OAR 471-030-0038(1)(c); OAR 471-030-0038(3)(a); see also *Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making an error when she overlooked a matter, her conduct was not conscious and was not willful or wantonly negligent); *Marina V. Berlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful when she made a mistake, her failure was not willful or wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence claimant was conscious of his failure to take care in performing a task, the failure was not willful or wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to adequately perform a routine task, her failure was not willful or wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010) (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not willful or wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not willful or wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).