

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0686

Reversed
Disqualification

PROCEDURAL HISTORY: On April 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision #142110). Claimant filed a timely request for hearing. On May 29, 2015, ALJ R. Davis conducted a hearing, and on June 2, 2015, issued Hearing Decision 15-UI-39443, concluding that the employer discharged claimant, but not for misconduct. On June 8, 2015, 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). We therefore did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Life Care Centers of America employed claimant as a registered nurse from April 17, 2014 through January 26, 2015.

(2) The employer's procedure for administering medication to a patient required that a nurse obtain the medication to be administered, initial the medication administration record (MAR) to show that the medication had been obtained, and then give the medication to the patient. If the patient refused to take the medication or the nurse did not actually give the medication to the patient, the policy required that the nurse indicate in the MAR that the medication had been refused or not given. Patients' MARs were kept on the cart which contained which contains the medication to be administered to patients. Claimant knew and understood the employer's procedure for administering medication.

(3) On January 20, 2015, a patient with severe chronic obstructive pulmonary disease (COPD) was admitted to the employer's facility. The patient was prescribed Advair and a nebulizer treatment, which claimant was responsible for administering. Advair is administered from a diskette; each diskette contains approximately 100 doses. A nebulizer is a machine that produces a medicated vapor designed to ease a person's breathing difficulties. Claimant initialed the MAR to indicate that she had obtained

the medications. Claimant did not administer the Advair to the patient, and never placed the nebulizer in the patient's room or administered it. Claimant also did not correct the MAR to indicate that the medications had not been given to the patient.

(4) On January 22, 2015, claimant's supervisor interviewed claimant about her conduct on January 20, 2015 and asked if she had given the COPD patient Advair and administered the nebulizer treatment. Claimant asserted that she had administered both medications.

(4) On January 26, 2015, the employer discharged patient for failing to give a patient prescribed medication and for failing to accurately enter information in the COPD patient's MAR on January 20, 2015.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant 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 her conduct would probably result in a violation of the standards of behavior that an employer has the right to expect of an employee. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because on January 20, 2015 she failed to give a patient prescribed medication, and because she did not record her failure to do so in the patient's MAR. The employer expected that claimant would give the patients under her care necessary medication, and would accurately record information about medication that was given, not given or refused in the patients' MARs. In addition, the employer expected that claimant would provide her supervisors with accurate information about the care she provided to her patients. Claimant knew and understood these expectations, as a matter of common sense and because she had been trained in the employer's medication administration policy.

At the hearing, claimant testified that she attempted to place a nebulizer in the patient's room on January 20, but the patient told her she just wanted to sleep. Claimant interpreted this remark as a refusal of the treatment, and did not put the nebulizer in the patient's room. Transcript at 17. Claimant asserted that she simply forgot to record the patient's refusal of treatment in the MAR because she was busy and distracted by the need to assist other staff and patients. Transcript at 14. Claimant also testified that she administered Advair to the patient. *Id.* We do not find claimant's assertions that the patient refused the nebulizer treatment or that she gave the patient Advair to be plausible, however.

When claimant's supervisor interviewed her two days after the January 20 incident, claimant initially asserted that she placed the nebulizer in the patient's room and never mentioned that the patient had refused the nebulizer treatment. Transcript at 24-25. Claimant's assertion that the patient refused treatment and that she simply forgot to note the patient's refusal in the MAR is implausible. Claimant testified that she twice attempted to obtain a nebulizer to put in the patient's room, but was prevented from doing so because a staff member, patient and patient's family needed her assistance. *Id.* Claimant testified that after assisting these individuals, she went to the patient's room; after the patient told claimant she wanted to rest, claimant returned to her medication cart and completed administering medications to her other patients. Transcript at 15. The distractions that supposedly prevented claimant from recording the patient's refusal of treatment occurred *before* the patient allegedly refused the treatment. Because claimant returned to her medication cart, where the patient's MAR was located, immediately after the patient supposedly refused treatment, her assertion that she "forgot" to record the patient's refusal in the MAR because of the interruptions is unlikely.

In regard to the claimant's assertion that she gave the patient Advair, the employer's representative testified that Advair could not have been given to the patient because the box containing the patient's prescribed Advair diskette was found to be unopened. Claimant testified that at times, patients' Advair diskettes became separated from the prescription boxes in which they were stored, apparently resulting in a patient being given a dose from another patient's diskette. Claimant did not, however, assert that she gave the COPD patient a dose of Advair from another patient's diskette. Other than continually asserting that she did administer Advair to the patient, claimant provided no credible explanation why the box containing the COPD patient's Advair diskette was unopened. Given the many implausible elements in claimant's account of her conduct on January 20, we find her explanation of her actions on that date not to be credible. We conclude it more likely than not that she failed to administer Advair to the COPD patient, and that her failure to give this patient the nebulizer treatment was not caused by the patient's refusal of this treatment. Claimant knew that the employer expected her to provide truthful information about the care she provided to patients. Her conscious decision not to do so was, at best, a willfully negligent violation of the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Under OAR 471-030-0038(1)(d)(D), an act of poor judgment that creates "an irreparable breach of trust in the employment relationship" exceeds poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). The standard is an objective one. *Isayeva v. Employment Department*, 266 Or App 806,811 (2014), citing *Callaway v. Employment Department*, 225 Or App 650, 654, 202 P2d 196 (2009). As a result of claimant's dishonesty about her conduct on January 20, 2015, a reasonable employer would no longer be able to trust that she would be able to perform important job duties, such as accurately recording information in patients' MARs. Claimant's actions therefore exceeded poor judgment.

Nor can claimant's conduct be excused as a good faith error under OAR 471-030-0038(3)(b). The record does not show that claimant sincerely believed that the employer would approve of her conduct in failing to provide a truthful account of her conduct on January 20, 2015.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 15-UI-39443 is reversed.

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

DATE of Service: July 30, 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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