

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1133**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 160145). The employer filed a timely request for hearing. On August 31, 2015, ALJ Shoemake conducted a hearing, and on September 8, 2015 issued Hearing Decision 15-UI-44046, affirming the Department's decision. On September 28, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

**FINDINGS OF FACT:** (1) Catholic Community Services employed claimant as a vocational services specialist from July 8, 2009 to June 11, 2015.

(2) The employer was a social services agency. On June 9, 2015, claimant drove a resident of one of the employer's homes on an outing to purchase new shoes. The resident had intellectual disabilities, was non-verbal, and confined to a wheelchair. The employer expected claimant to follow the protocols set forth in the resident's individual support plan (ISP). The resident's protocols included offering him fluids when temperatures were above 70 degrees Fahrenheit, and calling for emergency assistance (9-1-1) if he was unresponsive or unable to arouse. Claimant understood the employer's expectations and was aware of the resident's protocols.

(3) After leaving the home with the resident, claimant stopped at a gas station a few miles away to refuel the employer's van. After refueling, claimant was unable to restart the van. Claimant telephoned seven different employees, requesting assistance. In between calls, claimant attempted to start the van and checked on the resident. The temperature was approximately 90 degrees. However, the van was shaded

from the sun, and claimant lowered the van's windows, opened the side doors and turned on the fan. Claimant did not believe she was required to offer the resident fluids under the circumstances, and therefore did not do so.

(4) After approximately 20 minutes, claimant was able to restart the van, and returned to the home approximately 5 minutes later. When she arrived, a coworker there to assist her noticed that the resident was unresponsive and unable to arouse. Claimant left to find the registered nurse on duty, and they returned less than one minute later. The nurse had claimant and the coworker take the resident inside, where he quickly woke up after cold washcloths were applied to the back of his neck. The nurse did not instruct claimant to call 9-1-1, and claimant did not believe she was required to do so under the circumstances. Claimant therefore did not call 9-1-1.

(5) The employer discharged claimant for violating the resident's ISP protocols on June 9, 2015.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating a resident's ISP protocols on June 9, 2015. At hearing, the employer's house manager testified that claimant admitted she did offer the resident fluids because, although claimant knew he had a sippy cup in his backpack, she was "busy making phone calls, trying to find someone to come to the gas station to help her." Transcript at 9, 11. The house manager further testified that claimant admitted first noticing the resident was unresponsive when she restarted the van at the gas station, but decided to return to the home instead of calling 9-1-1. Transcript at 8-9. However, claimant testified that she did not offer the resident fluids because she knew he had something to drink before leaving the home, the water bottle in his backpack was not the "sippy cup" he needed to consume beverages, and he did not appear dehydrated. Transcript at 31, 34-35. Claimant further testified that she did not know the resident had become unresponsive until they returned to the home, which is consistent with her coworker's testimony that claimant seemed "surprised" when he told her the resident was unresponsive. Transcript at 23, 25, 31-32. According to claimant, she did not call 9-1-1 because the nurse instructed her to take the patient inside, where he quickly woke up; the nurse did not instruct claimant to call 9-1-1. Transcript at 33, 35.

We find the evidence on the above factual issues, at best equally balanced. Absent a preponderance of evidence supporting the employer's version of events, the record fails to show claimant knew or should have known that failing to offer the resident fluids or call 9-1-1 probably violated the employer's expectations, or that claimant's conduct was the result of indifference to the consequences of her actions. The record instead shows claimant sincerely believed, and had a rational basis for believing, that taking other precautions to ensure the resident was not dehydrated and deferring to a registered nurse's apparent decision not to call 9-1-1, complied with the employer's expectations. Claimant's conduct therefore was, at worst, good faith errors, and not misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-44046 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service: October 20, 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](http://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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