

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1483

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 93406). Claimant filed a timely request for hearing. On November 2 and 10, 2015, ALJ Monroe conducted a hearing, and on November 20, 2015, issued Hearing Decision 15-UI-48138, reversing the administrative decision and concluding that the employer discharged claimant, but not for misconduct. On December 10, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument to the extent it was relevant and based on the hearing record.

FINDINGS OF FACT: (1) Willamette Manor, an assisted living facility, employed claimant as a registered nurse (RN) from March 25, 2013 through August 25, 2015.

(2) The employer expected that claimant would maintain accurate records of treatment given and medication administered to the patients for whom she cared. In addition, the employer expected that claimant would comply with all applicable laws and regulations, including the Health Insurance Portability and Accountability Act (HIPAA). Claimant knew and understood these expectations, as a matter of commonsense and because of her experience and education. In addition, these expectations were listed as job duties and responsibilities in the position description to which claimant agreed when she was hired. Exhibit 1.

(3) On April 30, 2015, the employer reprimanded claimant in writing for making several errors in administering medication to patients, and for improperly disposing of "sharps" (i.e., needles) that were used in administering medication. The reprimand warned claimant that "failure to correct this problem and/or future problems will result in further disciplinary action including discharge." Exhibit 1.

(4) On July 18, 2015, 2015 a medication aide administered the wrong medication to a patient. As an RN, claimant was responsible for ensuring that medication aides properly administered correct medications to patients. Although claimant regularly checked the medication administration records, she failed to notice the error and did not take appropriate action, which would have included regularly monitoring the vital signs of the patient who received the wrong medication. November 2, 2015 hearing, Transcript at 15.

(5) On August 2, 2015, claimant sent a physician a fax, requesting information about a patient. Claimant mistakenly included a request for information about a second patient on this fax transmission. Exhibit 1.

(6) On August 3, 2015, a patient, who had been diagnosed with norovirus in May 2015, told claimant that she thought she might again have norovirus. Norovirus is a serious and life-threatening illness; had the patient tested positive for norovirus, the employer would have had to quarantine the patient and notify the appropriate health department. Claimant examined the patient and determined that the patient did not have norovirus. When claimant made a note in the patient's chart, she intended to explain that the patient had been diagnosed with norovirus in May 2015, but did not currently have the disease. Claimant became distracted while making the chart note, however, and mistakenly entered the following sentences in the note: "QNA review: [Patient] was tested for Noro virus and was positive. Our facility was on quarantine in May, related to multi resident having signs and symptoms of noro virus." Exhibit 1.

(7) From August 4 through 17, 2015, claimant was on vacation and did not work for the employer. On August 4, the employer's executive director reviewed claimant's chart notes and discovered the note that stated that a patient had been diagnosed with norovirus. The executive director placed the patient in quarantine until she was able to contact the patient's doctor and determine the patient did not have norovirus. The executive director also discovered the July 18 medication error, and the August 2 fax transmission that included a request for information about a second patient.

(8) When claimant returned from vacation, the executive director placed her on leave until August 25, 2015. On that date the executive director discharged claimant for failing to properly care for the patient who was given the wrong medication on July 18, for violating HIPAA by including information about a second patient in her August 2 fax transmission to the physician, and for failing to accurately document patient information on August 3.

CONCLUSION AND REASONS: We agree with the ALJ, and conclude that 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).

The employer discharged claimant for the errors she made in her work as an RN. The employer alleged that claimant failed to provide appropriate treatment to a patient who was given the wrong medication on July 18, failed to comply with HIPAA regulations in an August 2 fax she sent to a physician, and failed to accurately document a patient's condition in a chart note she made on August 3. At the hearing, claimant readily admitted that she made these mistakes. To demonstrate that these mistakes constituted misconduct, however, the employer must show that claimant's conduct was the result of willful or wantonly negligent behavior. OAR 471-030-0038(3)(a). We must focus our inquiry on the claimant's mental state at the time she made the mistakes for which the employer discharged her.

In regard to care she allegedly failed to provide to the patient who received the wrong medication on July 18, claimant testified that she was unaware that the medication aide had not given the patient the correct medication. November 2, 2015 hearing, Transcript at 15. Concerning the August 2 fax transmission to the physician, claimant could recall no details about the fax and could not explain why she included requests for information about two patients on the fax. November 2, 2015 hearing, Transcript at 44. In regard to the inaccurate chart note she made on August 3, claimant testified that she was extremely busy during her work shift on that date, and was probably interrupted while writing the note; as a result, she did not fully explain the patient's situation – that the patient had been diagnosed with norovirus in May 2015 but did not currently have the disease. November 2, 2015 hearing, Transcript at 46-47. The evidence thus shows that claimant was unaware of her mistakes at the time she made them. Absent evidence that a health care provider was conscious of an error at the time it occurred, the error cannot be considered wantonly negligent. *See, e.g.*, 2015- EAB-0098 (March 20, 2015) (claimant's "near miss" in withdrawing insulin for a patient was not misconduct, since the record was devoid of evidence that she was conscious of her error); and *Edna Rittenberry* (Employment Appeals Board, 13-AB-0153, March 1, 2013) (claimant's mistake in dispensing incorrect medications to two patients was not misconduct, because the record contained no evidence that claimant was conscious of her mistake).

The employer did not contend that the errors that resulted in claimant's discharge resulted from claimant's willful or intentional conduct, asserting only that she was "neglectful." November 10, 2015 hearing, Transcript at 11. The evidence in the record supports claimant's contention that she was unaware of the mistakes she made at the time they occurred. We therefore conclude that the employer failed to meet its burden to show that the conduct for which claimant was discharged was willful or wantonly negligent.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-48138 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 8, 2016

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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