

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0369**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On February 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80841). Claimant filed a timely request for hearing. On March 25 2016, ALJ Shoemake conducted a hearing, and on March 25, 2016 issued Hearing Decision 16-UI-55800, affirming the Department's decision. On March 31, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that she provided a copy of it to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant did not show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Or these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) FM Ocean Ridge, LLC employed claimant as a certified medication aide and caregiver from June 12, 2014 until February 10, 2016. The employer operated a residential care facility

(2) The employer expected claimant to comply with state requirements for medication aides. The employer expected and OAR 851-063-0070(9)(d) (January 1, 2015) required claimant to provide care and dispense medications to residents only in accord with the written instructions of a physician or another health care provider authorized by Oregon statutes to diagnose and treat individuals. Claimant was understood the state requirements and the employer's expectations.

(3) On June 23, 2015, claimant gave a resident two narcotic pills rather than the one pill allowed in a physician's instruction. After this incident, the employer counseled claimant and told her she needed to strictly comply with the physician's orders when dispensing medication. On October 9, 2015, claimant mixed up the medications for two residents and gave one resident the medication that was ordered for

the other. After this incident, the employer counseled claimant and told her she was only allowed to give medications that were authorized in a physician's order. On November 23, 2015, claimant gave an over-the-counter antacid pill to resident that had asked for one. There was no physician's order that authorized claimant to give the resident an antacid pill. After this incident, the employer counseled claimant that she was restricted from dispensing any medications, even non-prescription, over-the-counter treatments, if they were not authorized by a physician's order.

(4) Sometime before February 2, 2016, a particular resident readmitted to the employer's facility after a hospitalization. The resident had a large open wound on her back. Accompanying the resident on her admission were specific wound care instructions from Home Health Care and a physician, which provided for the application of a particular topical cream, Desitin, to the wound. On February 2, 2016, the resident informed claimant that the wound was itching and she wanted some relief from it. Claimant searched the resident's apartment and was unable to locate the cream specified in the orders for that resident. However, claimant located a tin of Bag Balm in the apartment. Claimant was aware the instructions for the resident did not authorize the use of Bag Balm on the wound. Without confirming its propriety with a care provider licensed to independently treat individuals, claimant applied the Bag Balm to the resident's wound. Claimant applied the Bag Balm because it was an over-the-counter ointment and she thought applying it to the wound would not harm the resident.

(5) On February 10, 2016, the employer discharged claimant for her behavior on February 2, 2016, when she treated a resident by applying a topical ointment that was not authorized by the physician's orders for that resident.

**CONCLUSIONS AND REASONS:** 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. 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).

Claimant contended at hearing that the employer discharged her because she had made some complaints about coworkers and supervisors, and not because she used an ointment on February 2, 2016 that was not specifically authorized by a physician's orders. Transcript at 30, 31, 41-45. However, claimant did not dispute that the incidents the employer recounted about her dispensing of medications did occur, although claimant attempted to justify her actions. There was insufficient evidence in the record to show that the employer discharged claimant in retaliation for whistleblowing activities, rather than for her alleged non-compliance with the employer's standards on February 2, 2016.

On February 2, 2016, claimant was aware before she applied the Bag Balm to the resident's apparently serious wound that Bag Balm was not an authorized treatment under the physician's instructions. Transcript at 28, 29. At that time, claimant knew that, as a medication aide, she was limited in applying only medications that were authorized in the physician's instructions for the resident. Transcript at 29. Based on the employer's warning to her for her behavior on November 23, 2015, claimant knew or

should have known this restriction applied to prescription medications as well as to over-the-counter treatments. At minimum, it was willful or wantonly negligent for claimant, on her own initiative, to apply Bag Balm to the resident's wound rather than Desitin without seeking authorization from the employer or the physician whose instructions she was required to follow.

Claimant's behavior on February 2, 2016, while willful or wantonly negligent, may be excused from misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as an isolated instance of poor judgment, claimant's behavior, among other things, must not have exceeded "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Here, stated simply, claimant exceeded the scope of the actions permitted under her certification as a medication aide when decided to substitute a medication for the one authorized by the physician's instructions. The wound that claimant decided to treat using an ointment that was not authorized was, as described, serious. Claimant did not have the education or background to evaluate the resident's needs, to determine an appropriate treatment for her wound or to assess whether the use of Bag Balm might interfere with the wound healing. Given that claimant decided to substitute her judgment for that of the treating physician and exceeded the scope of her licensed authority in relation to the resident, a reasonable employer would objectively conclude it could no longer trust claimant to follow the instructions of those licensed to practice medicine and not to act in ways that unreasonably interfered with patients' treatment. Because claimant's behavior on February 2, 2016 constituted an irreparable breach of trust in the employment relationship, it was not excused from constituting misconduct as an isolated instance of poor judgment.

Nor was claimant's behavior on February 2, 2016 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Given the clarity of the warnings the employer issued to claimant before February 2, 2016, and the fact that a warning issued three months prior had involved the dispensing of an over-the-counter medication to a resident, it is implausible that claimant sincerely believed the employer would permit her to apply the over-the-counter ointment to the resident on February 2, 2016, or that she was not restricted to using only the medications authorized in medication and treatment instructions. Claimant's behavior on February 2, 2016 was not excused as a good faith error,

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-55800 is affirmed.

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

**DATE of Service:** April 28, 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](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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