

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0373**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 92010). The employ filed a timely request for hearing. On March 22, 2016, ALJ Menegat conducted a hearing, and on March 24, 2016 issued Hearing Decision 16-UI-55687, affirming the Department's decision. On April 1, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) St. Charles Health System, Inc. employed claimant as a medical assistant at a clinic it operated in Sisters, Oregon. One of claimant's duties was to order pharmaceuticals from a company that distributed medications.

(2) Although the employer did not have protocols for how claimant ordered and processed medications, the employer reasonably expected that claimant would not order medications without the clinic's or a provider's authorization and that she would not divert medications she ordered for her own personal use. Claimant understood the employer's expectations as a matter of common sense.

(3) On December 1, 2015, a third-party courier delivered several medications from a pharmaceutical distributor to the clinic in a tote bag. Claimant signed the courier's electronic pad to accept the delivered medications. On the pad that claimant signed, the internal numbers that the distributor assigned to the delivered medications were listed, without indicating the generic or brand names associated with those medications and the employer did not expect claimant to know what medications those numbers signified. After claimant received the tote containing the medications, it was her practice to take the tote back to the store room, open it and compare the contents of the tote with individual invoices she received from the courier that named each medication delivered, showed its quantity and the price billed. It was then claimant's practice to sign the individual invoices and store the medications, as appropriate, in the store room. Claimant kept copies of the individual invoices for her own records and took the originals of the invoices and placed them on the clinic supervisor's desk for further processing and payment.

(4) Sometime later, in December 2015, the pharmaceutical distributor sent an invoice to the clinic for \$206 representing the price for the medication Belviq, a controlled substance for weight loss, which was supposedly delivered to the clinic on December 1, 2015. The clinic supervisor was notified of the receipt of this invoice, but could not locate an individual invoice for Belviq that was placed on her desk around December 1, 2015. The supervisor spoke with claimant about the Belviq. Claimant did not recall having ever received any Belviq, and was unable to locate a copy of an individual invoice for Belviq in the records she maintained for delivered medications. Claimant told the supervisor she had never ordered Belviq from the distributor and could not find an individual invoice for it in her records, which indicated to her that Belviq had never been delivered to the clinic. The employer was unable to find any Belviq on the clinic's premises.

(5) Sometime in very late December 2015 or early January 2016, the employer contacted the pharmaceutical distributor about the ordering and supposed delivery of the Belviq. The distributor told the employer that the Belviq had been ordered sometime before December 1, 2015 by someone who had logged onto its website using claimant's log-in identification. While the employer had given claimant an identification for logging into the distributor's online ordering site, that same log-in identification had been previously assigned to the employee who performed the medication ordering duties before claimant. The distributor's records showed that the Belviq was transferred to a courier as part of a larger delivery of several different medications to the clinic on December 1, 2015, and claimant had signed the courier's electronic pad showing that the delivery had been made.

(6) On January 6, 2015, the employer discharged claimant because she was unable to account for the missing Belviq, which according to the distributor's records had been delivered to the clinic on December 1, 2015, and which claimant had signed for as having received.

**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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witnesses never identified the specific manner in which claimant supposedly violated its standards. The employer appeared to contend that because claimant signed for a medication that the distributor said had been delivered to the clinic and, afterward, the medication supposedly delivered went missing, claimant was somehow at fault. Transcript at 6. However, the employer did not present evidence that ruled out claimant's alternative explanation, which was that the distributor's records were mixed up or in error, she never ordered the Belviq, the Belviq as never delivered to the clinic as part of the larger delivery on December 1, 2015 and she did not take an individual invoice for Belviq to the supervisor's desk because she never received one since the Belviq was never delivered. Transcript at 29, 30, 31, 35, 36. For example, the employer did not demonstrate that it was unlikely the distributor's or the courier's records were in error, did not review claimant's computer activities to tie the Belviq

order to a time when claimant, and not someone else, was using her work computer and did not show any verification by the courier that Belviq was, in fact, part of the order it delivered to the clinic on December 1, 2015, and which claimant signed for. Absent evidence ruling out the plausibility of an error in the distributor's records as well as claimant's alternative explanation for the missing Belviq, the employer did not show that Belviq was ever delivered to the clinic, let alone that it went missing due to some act or omission on claimant's part. Accordingly, the employer did not meet its burden to show that claimant willfully or with wanton negligence violated the employer's standards, or that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-55687 is affirmed.

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

**DATE of Service:** May 2, 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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