

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1378

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85155). Claimant filed a timely request for hearing. On November 28, 2016, ALJ Seideman conducted a hearing, and on November 30, 2016 issued Hearing Decision 16-UI-71926, affirming the Department's decision. On December 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Riverview Terrace employed claimant as a med tech from March 18, 2016 to September 8, 2016.

(2) Claimant's job was to distribute medication to patients according to the schedule and dosage prescribed to each patient. When claimant distributed medication from a blister pack, the employer expected her to initial and date the blister pack to indicate that she had done so. The employer prohibited employees from falsifying any documentation pertaining to the distribution of medication, including writing false information on a blister pack.

(3) During claimant's NOC shift, ending on the morning of September 1, 2016, claimant did not distribute two blister pack medications to a patient. A trainee distributing medications the following morning found the blister packs with the medication still in place, and noted the blister packs had not been initialed or dated. The trainee asked her trainer how to handle the matter. The trainer also observed that the medication had not been distributed and the blister packs were not initialed or dated.

(4) The trainer and trainee documented the medication error and notified the employer of it. The employer's documentation of claimant's September 1st medication error included a "MAR Audit" form indicating that the error occurred and that claimant needed to initial or circle something to document that the medications had not been given. Claimant worked a NOC shift that ended the morning of September 5, 2016, and, on that date, "initialed that she made the corrections." Exhibit 1.

(5) On September 6, 2016, the employer held a staff meeting and one-on-one meetings with med techs, including claimant, to discuss recent medication errors. During her one-on-one meeting claimant denied having failed to distribute medication to the patient on September 1st, and told the employer to “prove it.” Exhibit 1. The employer then attempted to gather evidence of the September 1st error. The trainer from the September 1st morning shift retrieved the medication blister packs. She found at that time that the medication doses she had observed on the morning of September 1st had since been removed from the blister packs, and that claimant had initialed and dated the blister packs to indicate that she had in fact distributed the medication to the patient as scheduled on September 1st.

(6) On September 8, 2016, the employer discharged claimant for falsification of the blister packs.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ 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 connected with work. 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 had the right to expect claimant to refrain from falsifying its medication records, and there is no dispute that claimant understood she was not permitted to falsify the documentation. Claimant alleged, rather, that she did not falsify any documentation as the employer alleged. Claimant argued that the case came down to the employer's word against hers, and that the trainer involved in the September 1st medication error report and who discovered the falsification did not like her. *See* Audio recording at ~ 36:50, 41:55. Notably, however, the individual who discovered the September 1st medication error, initially reported it, and documented the incident was not the trainer claimant suspected was biased against her, it was the trainee, and the record fails to show any motivation the trainee might have had to lie about her observations the morning of September 1st. The trainer's testimony and written statement are corroborated by the trainee's, and, therefore, despite claimant's suspicion that the trainer did not like her or was hostile toward her, we conclude those reports and the trainer's testimony is, more likely than not, reliable.

Based on the consistent evidence provided by the trainer and trainee about their observations, it is more likely true than not that the two medications were in their blister packs, without claimant's initials or a date, on the morning of September 1st. The only reasonable inference that can be drawn from that evidence is that claimant failed to distribute those two medications on September 1st as scheduled. Claimant did not deny that she placed her initials and dated both blister packs. Since the blister packs contained medication and were not initialed or dated after claimant's shift on the morning of September 1st, but the medication was gone and the packs were initialed and dated on September 6th, that must have occurred sometime thereafter, making the initials and dates a falsification of the employer's records

since they did not accurately reflect what occurred during claimant's September 1st shift. We further conclude that the falsification was most likely attributable to claimant because she was informed of the error on September 4th, worked a NOC shift from September 4th to September 5th and had the opportunity during that shift to remove the medication and initial and date the blister packs, and because, although she disputed *when* she initialed and dated the packs, she did not deny that she was the one responsible for the initials and dates. It is therefore more likely than not that claimant falsified documentation related to the two medications, and given her understanding of the employer's expectation that she not do so and the conscious judgments she had to have made to remove the medications and initial and date the blister packs after discovering her medication error, we conclude that her violation of the employer's expectation was willful.

OAR 471-030-0038(3)(b) provides that good faith errors and isolated instances of poor judgment are not misconduct, but neither of those exceptions applies. There is no evidence that, after making the medication error, claimant removed doses of medication from two blister packs and initialed and dated the packs to hide evidence of her error out of a sincere belief that doing so would be considered acceptable conduct. Her conduct was therefore not excusable as a good faith error. Although claimant's conduct appears to consist only of a single exercise of poor judgment within the context of her employment relationship, isolated acts that exceed poor judgment, for example, when they amount to an irreparable breach of trust that make a continued employment relationship impossible, may not be excused. OAR 471-030-0038(1)(d)(D). Claimant caused a breach of trust in the employment relationship when she falsified the information on the two blister packs after making a medication error. The employer had reliable evidence that the medication error occurred on September 1st and was attributable to claimant. As a result of claimant's subsequent denial of the error and attempt to cover the fact that she made it by removing the medication and initialing and dating the blister packs to make it appear she had distributed the medications, the employer could no longer trust claimant to maintain accurate and truthful records. Given the nature of claimant's work – distributing medications to patients and accurately documenting her activities – no reasonable employer would have continued to trust claimant to perform her duties after the falsification occurred. As such, we conclude claimant's conduct created an irreparable breach of trust in the employment relationship, and, therefore, exceeded mere poor judgment.

For the reasons explained, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-71926 is affirmed.

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

DATE of Service: January 11, 2017

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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