EO: 200
BYE: 201731

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

725
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0165

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101400). Claimant filed a timely request for hearing. On February 1, 2017, ALJ S. Lee conducted a hearing, and on February 3, 2017 issued Hearing Decision 17-UI-76261, affirming the Department's decision. On February 7, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Golden Sands at Klipsan Beach employed claimant as a caregiver and bath aid from August 18, 2016 to November 26, 2016.

(2) The employer and Washington state law prohibited employees from giving medications to residents unless a nurse delegated them the authority to do so. Claimant had been a CNA since 1991, attended ongoing trainings offered by the employer and acknowledged receipt of the employer's handbook, all of which included reference to that prohibition.

(3) One of the employer's residents kept a bottle of Pepto-Bismol in her room. In October or November, that resident said she felt unwell and asked claimant for the medication. Claimant did so, but when she noticed the resident was going to drink from the bottle was concerned that she would drink too much. Claimant took the bottle from the resident, poured a dose into the lid, and, when the resident was finished, rinsed the residue from the lid and put the medicine away in the resident's room. Claimant subsequently told another employee that she had helped the resident take some Pepto-Bismol, and the employer issued a medication error report warning claimant for helping the resident take medication.

(4) The employer generally considered a medication error such as claimant's a terminable offense, but the employer's management decided not to pursue termination if claimant underwent additional training. The employer enrolled claimant in training scheduled for mid-November 2016 and paid for claimant to attend it. Claimant was unaware of the training and did not attend it. Because claimant had not attended the training, effective November 26, 2016, the employer discharged claimant.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ found as fact that the employer discharged claimant for giving over-the-counter medication to a resident and for failing to attend training, but, in concluding claimant's discharge was for misconduct, focused her analysis entirely on the medication issue. *Compare* Hearing Decision 17-UI-76261 at 1, 3-4. We disagree with the ALJ in both respects. The preponderance of the evidence shows that claimant violated an employer policy by giving a resident some over-the-counter medication, but it is more likely than not that the employer would not have discharged her had she attended the training. Specifically, the employer's witness testified that while "it's possible" claimant would have been discharged even if she had taken the training, the ultimate decision about claimant's employment status was up to the regional nurse and the employer's recommendation – which, had claimant attended the training, would have been to "advocate for" keeping claimant employed – would have "weighed heavily" with the regional nurse. Audio recording ~ 42:00. On this record, it therefore appears more likely than not that, had claimant attended the training, the regional nurse would have accepted the employer's witness's recommendation to keep claimant employed and the employer would not have discharged claimant. Although the medication issue was the reason the employer required claimant to undergo additional training, it was claimant's failure to attend the training, and not the medication issue, that actually triggered the employer's discharge decision. Claimant's failure to attend training was, therefore, the proximate cause of her discharge and the proper focus of the misconduct analysis.[1]

[1] Even if we had concluded that the medication error was a proximate cause of the discharge, this decision would remain the same. Although the medication error was a violation of the employer's expectation it was likely not a conscious violation and did not exceed a mere good faith error. Had claimant been aware that giving the resident medication violated the employer's expectations, we find it unlikely that she would have disclosed having done so. Even if she was aware of the expectation, the fact that the medication was in the resident's room and the resident asked for the medication likely gave claimant reason to sincerely believe it was acceptable to give the medication to the resident, again, as shown by the fact that claimant notified the employer of her conduct. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer expected claimant to attend training and claimant did not attend it, thereby violating the employer's expectation. In order for claimant's violation to be considered misconduct, however, it must have been willful or conscious, and the employer did not meet its burden to prove that it was. Although the employer's witness did not know the date of the training, she alleged that claimant's attendance at the training was posted since a couple of days prior to the training; claimant testified that she did not see the posting. *Compare* Audio recording at 16:05; 24:40. The employer's witness provided hearsay evidence that the office manager orally told claimant about the training, based on the witness asking the manager if claimant knew she was supposed to be at training and the manager responding "yes she does," but the employer did not provide any additional details about when or how the manager notified claimant about the training. Audio recording at 36:20. Claimant testified that she was not orally notified in advance about the training. Audio recording at 24:50. Although the employer's witness left claimant a message the day of the training asking claimant where she was, claimant testified that she did not receive the message until it was too late to attend. *Compare* Audio recording at ~ 17:00; 25:15. The evidence about whether or not claimant knew or should have known she was supposed to attend the training is, at best, equally balanced. Absent a basis for believing one party over the other, we must conclude that the party with the burden of persuasion, here the employer, has failed to meet its burden to show that claimant was aware she was supposed to attend a particular training, much less that she willfully or consciously violated the employer's expectation that she attend that training.

We therefore conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-76261 is set aside, as outlined above.[2]

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

DATE of Service: <u>February 24, 2017</u>

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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[2] **NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.