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

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0458

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140925). Claimant filed a timely request for hearing. On March 16, 2017 and March 21, 2017, ALJ Monroe conducted a hearing, and on March 31, 2017 issued Hearing Decision 17-UI-80074, reversing the Department's decision. On April 20, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Alberta Kerr Centers, Inc. employed claimant from January 6, 2014 until January 3, 2017, last as a direct support staff person. Claimant provided caring services to adult residents of a facility operated by the employer.

(2) The employer expected claimant to dispense medications as instructed in residents' medical administration records (MAR) and, if a medication was not dispensed as scheduled in the MAR, either to comply with a "missed medication" protocol or, if no such protocol was established for that medication, to contact the prescribing physician for instructions and if the physician ordered the dispensing of medication to the resident at a non-scheduled time, to obtain by fax a signed instruction from the physician authorizing that deviation. Claimant understood the employer's expectations.

(3) On October 21, 2016, the employer and claimant entered into a last chance agreement based on an alleged error made by claimant in dispensing medication. The employer advised claimant at that time that if she again violated the employer's protocols for administering medication she would be subject to discharge.

(4) On December 6, 2016, claimant signed the MAR and the narcotic inventory sheet indicating that had dispensed a narcotic anti-seizure medication to resident. It was customary for staff to sign the MAR and inventory sheet in anticipation of dispensing a medication, before the medication had actually been

removed from its prescription container and before it was given the resident. However, on this day, claimant "forgot" to dispense the narcotic medication to the resident after signing the MAR and the narcotic inventory. Transcript of March 21, 2017 Hearing (Transcript 2) at 7. Failing to administer the anti-seizure medication could have resulted in the resident having a fatal seizure.

(5) On December 15, 2016, when claimant prepared to start her shift at around 8:30 or 9:00 a.m., claimant asked the coworker she was relieving if any medications that were scheduled to be given during the coworker's shift still needed to be dispensed. The coworker told claimant that no medications remained to be distributed, although that staff member had not, in fact, dispensed a bowel medication to a resident that should have been given at 6:00 a.m. Transcript of March 16, 2017 Hearing (Transcript 1) at 46. Claimant checked the MARs for the residents and did not notice that the bowel medication had not been dispensed to the resident during the shift of the coworker she was relieving. Claimant "overlooked" that the bowel medication had not been administered. Transcript 1 at 46. The failure to administer the bowel medication could have resulted in the resident having a fatal bowel obstruction.

(6) On December 19, 2016, claimant was responsible for dispensing several medications to a resident at approximately 6:00 p.m. One of those medications was stored in the refrigerator. Claimant recorded on the patient's MAR that all of the medications were dispensed, gathered together the non-refrigerated medications and gave them to the resident. Claimant "forgot" to retrieve the refrigerated medication and did not dispense it to the resident. After dispensing the medications, the assistant program manager instructed claimant to travel to a pharmacy to pick up some medication for another resident. Transcript 1 at 28; Transcript 2 at 7. At 6:30 p.m., while picking up the medication at the pharmacy, claimant realized she had forgotten to dispense the refrigerated medication to the resident and, since that medication could be given to the resident until 7:00 p.m., tried to contact the assistant program manager by phone to administer it. The assistant program manager did not respond the claimant's voice mail message or text message. When claimant returned from the pharmacy trip, she saw that no one had administered the medication to the resident. It was then after 7:00 p.m. and, following the missed medication protocol, claimant called the office of the prescribing physician to obtain permission to give the medication late or other instructions. The physician's office was in a large medical complex and claimant left a message with an operator. When the physician did not return claimant's call, claimant left two more messages for the physician. The operator took a third message for the physician from claimant and mentioned that claimant might want to speak with the complex's pharmacist. Transcript 2 at 38. Soon after, claimant received a return call about the resident's missed medication. Claimant thought the call was from the physician whom she had been trying to reach, and was told the medication could still be given to the resident. Claimant prepared an instruction for the physician's signature authorizing the late administration of the medication. Because the employer's fax machine had not yet been set up for claimant to send faxes, claimant gave the instruction to the assistant program manager who stated she would send the fax on claimant's behalf to the physician. The "missed medication" fax was never transmitted.

(7) Sometime after December 19, 2016, in later investigating what had happened on December 19, 2016, the employer learned that the person claimant spoke with and had thought was a physician authorizing the late administration of medication on December 19, 2016 was actually the pharmacist for the medical complex. In its later investigation, the employer discovered claimant's medication errors on December 6, 2016 and December 15, 2016.

(8) On January 3, 2017, the employer discharged claimant for failing to comply with the employer's protocols for administering medications on December 6, 15 and 19, 2016.

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 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 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).

At hearing, claimant testified that she "forgot" or "overlooked" dispensing the medications she failed to administer on December 6 and 15, 2016, and on December 19, 2016 she initially failed to notice that she missed giving the required medication. Transcript 1 at 46; Transcript 2 at 7. The employer did not dispute claimant's explanation or present evidence from which it could be inferred that claimant's failure to take precautions against such forgetfulness was wantonly negligent, *i.e,* claimant's failure to abide by the employer's medication protocols led her to overlook or forget to give the medications or that under the circumstances it was foreseeable to claimant that she might overlook administering a medication unless she took precautions in addition to reviewing the MARs. Indeed, in all of these incidents, claimant checked the MARs, as the employer's protocols required, but taking the required steps was insufficient to alert her to the errors she was making or to avoid making the errors. While the consequences of claimant's medication errors were potentially grievous, the magnitude of the harm is not a factor in determining if claimant's behavior constituted misconduct. *See* OAR 471-030-0038(1)(c); OAR 471-030-0038(3)(a). Rather, to establish claimant's misconduct, the employer must show that she was conscious of her behavior when she acted or failed to act *and* knew or should have known she probably was violating the employer's standards at the time she acted. *Id.* Mere carelessness, inadvertent lapses of attention, forgetting or overlooking to perform some act or accidental occurrences or mistakes are generally, by definition, not matters of which one is *consciously aware* when one is acting and, absent additional evidence, are not a sufficient basis from which the willful or wantonly negligent mental state required to establish misconduct can be established or inferred. The employer failed to present the additional evidence or circumstances needed to demonstrate that claimant's medication errors on December 6 and 15, 2016 and her failure to initially administer the medication to the resident on December 19, 2016 were accompanied by a willful or wantonly negligent mental state.

The events that transpired on December 19, 2016 after claimant initially overlooked administering the medication to the resident also were insufficient to show claimant's willful or wantonly negligent behavior. When claimant became aware that she had omitted to dispense the medication, her behavior did not evidence indifference to the resident's needs or to the employer's standards. Claimant promptly,

albeit unsuccessfully, attempted to rectify the error by contacting the assistant program manager to have the medication administered. When claimant returned to the facility, she immediately implemented the "missed medication" protocol and commenced trying to contact the prescribing physician by leaving several messages. That a pharmacist, rather than the physician, would return claimant's calls and authorize her to dispense the late medication was not a circumstance that claimant reasonably should have foreseen and on the facts in the record it cannot be inferred that it was wantonly negligent of claimant to think she had spoken to a physician or that claimant should have specifically inquired into the identity of the person authorizing the administration of the medication. As well, having received what she thought was authorization from the physician, claimant continued to implement the employer's medication protocol by preparing for the physician's signature a written authorization to administer the medication on a non-scheduled to the resident. At hearing, the employer did not dispute that claimant was unable to use the employer's fax machine, that she asked the assistant program manager to transmit the authorization to the physician and that, under the circumstances, she was complying with the employer's standards by arranging for the assistant program manager to transmit the fax. That the assistant program manager neglected to fax the authorization that claimant prepared was not willful or wantonly negligent behavior that reasonably can be imputed to claimant. On the facts as they exist in the record, the employer did not demonstrate that the medication error on December 19, 2016 was attributable to misconduct on the part of claimant.

In the written argument it submitted, the employer argued that the ALJ's decision was "incomplete and denied the employer a fair hearing due to [its] failure to even comment on explicit evidence presented by the employer, thus rendering the decision arbitrary, capricious and contrary to law." However, as discussed above, the employer failed to present evidence showing more likely than not that claimant's behavior on December 6, 15 and 19, 2016 was accompanied by a willful or wantonly negligent mental state. It would serve no purpose to examine the evidence that the employer did present in more detail since it cannot obviate the employer's need to show as a threshold matter that claimant's behavior on December 6, 15 and 19, 2016 was accompanied by willful or wantonly negligent mental state in order to disqualify claimant from benefits. Because the employer did not make such a showing, the employer did not demonstrate that claimant engaged in misconduct and that claimant is disqualified from benefits.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-80074 is affirmed.

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

DATE of Service: May 22, 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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