

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0708

Hearing Decision 17-UI-84617 Reversed - No Disqualification
Hearing Decision 17-UI-84616 Affirmed - Ineligible

PROCEDURAL HISTORY: On March 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101745). On April 27, 2017, the Department served notice of a second administrative decision concluding that claimant failed to file a timely claim for benefits for the week of March 19 through March 25, 2017 (decision # 75547). Claimant filed timely requests for hearing. On May 31, 2017, ALJ Seideman conducted hearings, and on June 1, 2017 issued Hearing Decision 17-UI-84617, affirming decision # 101745 and Hearing Decision # 17-UI-84616, affirming decision # 66149. On June 7, 2017, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-84617 and 17-UI-84616. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0707 and 2017-EAB-0708).

FINDINGS OF FACT: (1) ColumbiaCare Services, Inc. employed claimant from May 7, 2013 to March 1, 2017 as a residential associate at one of its care facilities.

(2) On November 13 and 14, 2016, claimant made medication errors. On November 22, 2016, the employer gave claimant a final warning due in part to the medication errors.

(3) Claimant was assigned to care for one residential client. One of claimant's duties was to pass medication to the client she was assigned to assist. After removing ("popping") a medication from the bubble pack containing the client's medication, the employer required claimant to sign the space on the bubble pack where the medication was removed, administer the medication to the client, and make an entry in the medical record log that she had passed the medication to the resident.

(4) Since January 2017, claimant worked 12 hours on Sundays, 14 hours on Mondays, and 14 hours on Tuesdays. The employer did not normally have a residential associate work alone, however, claimant

worked alone during her Sunday shifts. When claimant worked alone, it was difficult for her to administer medication to her client, since claimant could not safely leave her client alone and the medications were prepared in a different room.

(5) On February 27, 2017, the employer discovered that the nighttime medications for claimant's client had been popped from the bubble pack, and the bubble pack contained claimant's signature where the medications had been removed. There was no information in the medical record book showing whether claimant had popped the medications or administered them to her client. When claimant's supervisor asked claimant whether she had administered the medications to her client, claimant responded that she did not recall popping the medications or administering them to the client.

(6) On March 1, 2017, the employer discharged claimant for making a medication error.

(7) On March 7, 2017, claimant filed an initial claim for unemployment insurance benefits. That claim was determined to be valid. Claimant claimed benefits for the weeks from March 5 through March 18, 2017. Claimant attempted to claim benefits for the week of March 19 through March 25, 2017 (week 12-17), but the computer screen "timed out" before claimant submitted her claim because she had the screen open longer than permitted without activity on the screen. Claimant did not realize that, as a result, the claim was not completed. Week 12-17 is the only week at issue.

(8) Just before April 12, 2017, claimant learned that she had not successfully claimed week 12-17. On April 12, 2017, claimant claimed benefits by telephone for the period of March 19 through 25, 2017 (week 12-17). The Department denied claimant benefits for week 12-17.

CONCLUSIONS AND REASONS: We conclude that the employer discharged claimant not for misconduct, and that claimant is not eligible for benefits for week 12-17 because she did not file a timely claim for benefits for that week.

Discharge. 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 employer discharged claimant for a medication error on February 27, 2017, when claimant failed to log whether she administered medication to her client. The ALJ concluded that claimant was discharged for misconduct, and referring in part to prior medication errors, reasoned that "claimant's continuance of errors was a wantonly negligent disregard" of the employer's expectations that she properly dispense

medication.¹ We focus our analysis first on the final incident on February 27, 2017, and conclude that claimant's conduct was not misconduct.

The record is not disputed that medication had been popped but not recorded in the medical log for claimant's client during claimant's shift on February 27, 2017. We presume that claimant understood the employer's procedures for popping and administering medication, and documenting medication passes. We also presume claimant knew that she must use extra care to avoid medication errors, having received a warning for making medication errors in November 2016. However, the record fails to show that claimant's medication error during the final incident was the result of wanton negligence, as defined under OAR 471-030-0038(1)(c), and not ordinary negligence, which is not misconduct. The employer failed to show that claimant consciously failed to dispense the medication or that she consciously neglected to record having dispensed the medication. Based on this record, claimant's failure to properly dispense medication or record the medication pass is more likely than not attributable to mere carelessness or fatigue from working a 12-hour shift alone and a subsequent 14-hour shift. It is not clear from the record if the final incident occurred while claimant was working alone. Regardless of whether claimant was working alone at the time, however, the record does not show that claimant consciously engaged in conduct that she knew or should have known would result in a medication error. Nor did the employer show that claimant was indifferent to the consequences of her actions. Absent such showings, the employer failed to establish that claimant violated the employer's expectations willfully or with wanton negligence.

Untimely Claim for Benefits. ORS 657.260(1) provides that claims for benefits shall be filed in accordance with the Department's regulations. With few exceptions, not of which apply here, OAR 471-030-0045(4) (February 23, 2014) states, among other things, that a continued claim must be filed no later than seven days following the end of the week for which benefits are claimed. The date a claim is considered filed, when done via the internet, is "the initial date of transmission of the on line continued claim." OAR 471-030-0045(3)(d).

Here, to be timely, claimant had to claim week 12-17 no later than April 1, 2017. Claimant did not successfully claim week 12-17 until April 12, 2017. While claimant did attempt to file her claim on time, claimant's claim was not transmitted during that attempt since the system "timed out" before the filing of the claim was completed. OAR 471-030-0045(4) does not provide any exceptions that will extend the time for claimant's filing of the continued claim beyond the seven days allowed, even if claimant attempted in good faith to file on time and was unable to do so through no fault of her own. Because there is no exception to the strict operation of OAR 471-030-0045(4), claimant is ineligible to receive benefits for week 12-17 because she did not timely file her claim for benefits for that week.

DECISION: Hearing Decision 17-UI-84617 is set aside and Hearing Decision 17-UI-84616 is affirmed, as outlined above.

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

DATE of Service: July 5, 2017

¹ Hearing Decision 17-UI-84617 at 3.

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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.