

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1269

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 90201). The employer filed a timely request for hearing. On October 18, 2017, ALJ Seideman conducted a hearing, and on October 23, 2017 issued Hearing Decision 17-UI-95175, affirming the Department’s decision. On November 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Salem Health employed claimant as a registered nurse at its hospital from September 21, 2017 until June 7, 2017.

(2) The employer expected claimant to accurately document in Omnicell, its electronic medication dispensing system, the types and amounts of all narcotic medications she dispensed for patients, to accurately enter in patient medical records the types and amounts of narcotic medication she administered to that patient and, if all the narcotic medications she had dispensed were not administered to patients, to record the types and amounts that had been “wasted.” Audio at ~6:39. Claimant understood the employer’s expectations.

(3) Beginning sometime around November 2016, claimant became depressed and sought treatment from a nurse practitioner and a therapist. Claimant was prescribed various types of anti-depressant medicines to alleviate her symptoms. As of late May 2017, claimant’s depression was not yet well controlled. Either from depression or the antidepressant medicine claimant was taking, claimant sometimes was “spacey,” “overwhelmed” and forgetful at work. Audio at ~16:47, ~16:58.

(4) On May 26, 2015, Omnicell records showed that claimant dispensed two vials of 0.5 mg. and one vial of 1.0 mg. Dilaudid, a narcotic, for patient A. Patient A’s medical records showed only one vial of 0.5 mg Dilaudid was administered that day by claimant and records were created showing that only one vial of 0.5 mg. Dilaudid was wasted. When the employer asked claimant on June 5, 2017 what had

happened to the 1.0 mg of Dilaudid that was not accounted for on May 26, 2017, claimant stated, “I must have lost it or threw it away.” Audio at ~7:26; Exhibit 1 at 1.

(5) On May 27, 2017, Omnicell records showed that claimant dispensed 2 mg. Dilaudid for patient A and 2 mg. Dilaudid for patient B. Patient A’s medical records for May 27, 2017 showed only that 1 mg Dilaudid was administered and patient B’s records showed only that 1 mg of Dilaudid was also administered. No record was created showing that 1 mg. of the Dilaudid dispensed for patient A and 1 mg. of the Dilaudid dispensed for patient B was wasted on May 27, 2017. When the employer asked claimant on June 5, 2017 what had happened to the 2 mgs. of Dilaudid that were not accounted for on May 27, 2017, claimant stated, “Well, I get busy at night and maybe I didn’t record the waste. I’m not sure.” Audio at ~8:12; Exhibit 1 at 1.

(6) On May 30, 2017, Omnicell records showed that claimant dispensed 1 mg. Dilaudid for patient C. Patient C’s medical records did not show that 1 mg. or any Dilaudid was administered to patient C on May 30, 2017. When the employer asked claimant on June 5, 2017 what had happened to the 1 mg Dilaudid dispensed for patient C on May 31, 2017, claimant stated, “Wow, I don’t remember that. That’s weird.” Audio at ~8:41; Exhibit 1 at 1. On May 31, 2017, the employer interviewed patient C and patient C stated that claimant had not administered any Dilaudid to him on May 30, 2017.

(7) In early June 2017, the employer performed a routine audit of its recent use of narcotic medicines and discovered claimant’s failures to document and account for Dilaudid she had dispensed on May 26, 27 and 30, 2017. The employer suspected claimant was diverting Dilaudid from patients to herself and, at the employer’ request, claimant submitted to a drug test, the results of which were negative.

(8) On June 7, 2017, the employer discharged claimant for failing to account for Dilaudid she dispensed on May 26, 27 and 30, 2017.

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 the employer did not challenge claimant’s explanation that she did not mean to fail to properly account for Dilaudid on May 26, 27 and 30, 2017 and that, although she could not state with certainty what happened during those shift, she must have made some sort of “mistake.” Audio at ~16:23, ~19:27. Violations of employer standards that are the result of a claimant’s inadvertent lapses or oversights, accidents, distractions, forgetfulness or other unplanned errors generally are not

accompanied by the consciously aware mental state needed to establish the willful or wantonly negligent mental state that is a prerequisite for finding misconduct. *See* OAR 471-030-0038(1)(c). This is so because, by definition, an individual is not aware or conscious, at the time he or she is acting or failing to act due to these reasons, that he or she is engaging in behavior that may violate the employer's standards or that he or she is overlooking anything or making a mistake. Absent evidence that claimant's behavior at issue on May 26, 27, 30, 2017 was accompanied by a willful or wantonly negligent mental state, of which there is none in this record, the employer did not meet its burden to show that claimant engaged in misconduct that resulted in her discharge.

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

DECISION: Hearing Decision 17-UI-95175 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: December 6, 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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