

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0387

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100045). Claimant filed a timely request for hearing. On April 10, 2018, ALJ Griffin conducted a hearing, and on April 12, 2018, issued Order No. 18-UI-107203, affirming the Department's decision. On April 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Veterans Care Centers of Oregon employed claimant from August 17, 2018 until February 28, 2018 as a restorative nurse's aide (RA). The employer provides housing and health-related services to its residents.

(2) The employer expected each restorative aide to chart only what that restorative aide did herself (or himself) and what actually occurred with the residents.

(3) There were three RAs and each RA, including claimant, was the primary RA responsible for one of three wings on the floor where claimant worked in the employer's facility. For the two and a half years claimant had worked in the restorative care department, each shift, she and the other two RAs had printed a list of residents whose medical plans included restorative care. Sometimes nurses or the RAs from the other wings brought residents from claimant's wing to restorative care. The RAs' practice before claimant began her leave of absence had been for each RA to mark on the list when they knew a resident from any of the wings completed restorative care, and to mark if the resident refused care or completed less time or different activities than ordered in their care plan. At the end of the shift, claimant entered the information from the list in the charts for the residents in her wing, including whether the residents completed restorative care that day, even if claimant had not herself brought the residents to restorative care or witnessed them receiving restorative care.

(4) On February 22, 2018, claimant returned to work from an extended personal leave of absence. During her absence, the employer had implemented a new "point of care" (POC) system for RAs to use

to chart all their interactions with the residents. The employer was dissatisfied with the RAs using the list to track residents' restorative care and intended to change that practice by implementing the new POC system. On February 22, the employer conducted a meeting with claimant and the other RAs to review how to use the new POC system, including that each RA should chart only what he or she did with the residents. Claimant did not understand from the meeting that the employer expected her to chart restorative care only when claimant herself assisted the resident with receiving the care. Claimant had never received a warning for charting patient information that she had not personally witnessed.

(5) On February 26, 2018, claimant used information that the other RAs marked on a list of residents whose plans included restorative care to complete the charts for the residents in her wing at the end of her shift. The nurse on duty reported to claimant's supervisor that claimant charted three residents as having received restorative care that day, but that those residents had not left their units that day. The supervisor reviewed surveillance video from the hallway between the residents' unit and the restorative care area, and did not see the residents pass through the hallway from their unit to restorative care. The employer concluded that the three residents had not received restorative care on February 26 although claimant charted that they received restorative care.

(6) On February 26, 2018, claimant's supervisor met with claimant and claimant told her she had not personally witnessed the three residents receive restorative care, but had relied on the notes written on the list for the information she charted.

(7) On February 28, 2018, the employer discharged claimant for allegedly falsifying medical records on February 26, 2018 by charting that three patients received restorative care that day when the patients allegedly did not receive restorative care.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was for misconduct. The ALJ concluded that claimant was wantonly negligent in putting restorative care information in residents' charts when she did not personally witness the residents completing the restorative care, reasoning that claimant knew the employer expected her to chart accurate information in the residents' charts, and that claimant could not be sure the list was accurate when she did not see the activity or verify it. The ALJ concluded that

claimant “was indifferent to the considerable risks for inaccurate charting that [the list system] presented, yet chose to do it anyway.”¹ The ALJ reasoned further that claimant’s charting practices on February 26 were not isolated and thus not an isolated instance of poor judgment because she had engaged in the same practice “for years” and her conduct resulted in three separate instances of inaccurate charting on February 26.² The ALJ also concluded that claimant’s conduct was not a good faith error because “there is no evidence that had the employer known of the practice, it would have approved of it.”³ We disagree that the record supports the ALJ’s conclusions.

The employer established that claimant violated its expectations regarding charting residents’ activities because claimant did not interact with three of the residents for whom she charted restorative care on February 26, and because the information she charted for the three residents was probably inaccurate. However, the preponderance of the evidence shows that claimant sincerely believed that the employer condoned her charting practices. Because the resident aides had been using the same system that claimant used on February 26 for more than two years, and because there is no evidence that the employer warned claimant before she returned from leave that the practice of using other RAs notations on the list violated its expectations, it is more likely than not that claimant’s belief that she was permitted to complete the residents’ charts using information written on a list by the other resident aides was sincere and based upon her plausible understanding of the employer’s rules. Moreover, it is plausible, and claimant’s testimony was credible, that she did not understand from the February 22 meeting that the new POC charting system required her to change her long-term practice of charting from the information all the RAs compiled on one list. The system was new to claimant because she had just returned to work from an extended leave of absence. Therefore, although claimant’s charting method on February 26 violated the employer’s expectations, the violations occurred due to claimant’s sincere but mistaken belief that her conduct did not violate the expectations, making her conduct the result of a good faith error. Because good faith errors are not misconduct, claimant’s discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of her discharge.

DECISION: Order No. 18-UI-107203 is set aside, as outlined above.⁴

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

DATE of Service: May 24, 2018

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,

¹ Order No. 18-UI-107203 at 4.

² *Id.*

³ *Id.*

⁴ This decision reverses a hearing order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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