

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0757

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 115712). Claimant filed a timely request for hearing. On July 17 and 19, 2018, ALJ Schmidt conducted a hearing, and on July 23, 2018 issued Order No. 18-UI-113606, concluding the employer discharged claimant for misconduct. On August 2, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information not offered during the hearing. Claimant did not explain why she did not present this new information at hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to present by way of her written argument when reaching this decision.

Although the ALJ admitted Exhibit 2 into evidence at the hearing, he failed to mark it. *See* Order No. 18-UI-113606 at 1. Since Exhibit 2 was readily identifiable from the record, EAB has corrected this clerical oversight and marked the exhibit.

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as a staff nurse in a hospital from sometime in 2004 until June 1, 2018.

(2) The employer expected claimant to administer narcotic medications to patients after using Pyxis, its automated medication dispensing system pursuant to physicians' orders. Pyxis tracked medications and amounts dispensed, the date and time dispensed, the nurse to whom the narcotics were dispensed and the patient for whom the narcotics were prescribed and dispensed. Because Pyxis can only dispense narcotic medications in available amounts, sometimes narcotics must be dispensed in amounts exceeding those ordered for the patient. In this circumstance, based on federal requirements regulating controlled

substances, the employer expected claimant to accurately document the excess that was dispensed, the date and time the excess amount was discarded or wasted and the identity of the nurse in addition to claimant who witnessed the wasting. The employer expected claimant to dispense narcotic medications from Pyxis only for patient administration. Based on several trainings over the years, claimant understood how to use Pyxis and the employer's expectations in connection with its use. Claimant also understood the importance of accurately dispensing narcotics using Pyxis and accurately documenting the wasting of narcotic medications.

(3) In a system separate from Pyxis, the electronic medication administration record (MAR), the employer expected claimant to accurately record all narcotic medication administered to particular patients, the dose administered, the date and time of the administration, the patient's pain level immediately before administration and other information relevant to the administration of the medication. The employer's expectations were based on federal requirements regulating controlled substances and narcotic medications. Based on several trainings over the years, claimant understood the employer's expectations in connection with recording information in the MAR and the importance of accurately documenting how narcotic medications were used.

(4) On March 16, 2015, the employer issued a final written warning to claimant for having dispensed certain narcotic medications from Pyxis and failing to document in the patient's MAR that the dispensed narcotics were actually administered to patients. The warning advised claimant that these discrepancies violated the employer's standards and the employer developed a medication management plan for claimant to follow.

(5) On March 24, 2018, claimant dispensed 0.5 mg of hydromorphone from Pyxis at 3:55 a.m. for a patient who was prescribed 4 mg of hydromorphone every four hours as needed. Claimant recorded in the patient's MAR that 0.5 mg of hydromorphone was administered to the patient at 4:00 a.m. Less than one hour later, at 4:51 a.m., claimant dispensed 1 mg of hydromorphone for the same patient from Pyxis and documented that she wasted 0.5 mg of the hydromorphone at 4:52 a.m. and that she administered 1 mg at 5:00 a.m., totaling 1.5 mg and not the 1 mg dispensed from Pyxis.

(6) On April 6, 2018, claimant dispensed 25 mg of Tramadol from Pyxis at 9:14 p.m. for a patient who was prescribed 25 mg Tramadol as needed. Claimant recorded in the patient's MAR that, although the patient had a pain level of 0, she administered 25 mg Tramadol at 9:18 p.m.

(7) On April 8, 2018, claimant dispensed 4 mg morphine from Pyxis at 5:24 a.m. and wasted 2 mg at 5:25 a.m. Claimant did not record in MAR that the remaining 2 mg of morphine was administered to any patient, leaving 2 mg of morphine unaccounted for.

(8) On April 13, 2018, claimant dispensed a 5 mg tablet of oxycodone from Pyxis at 11:04 p.m. for a patient who was prescribed one 5 mg tablet as needed. Claimant then dispensed a second 5 mg tablet of oxycodone for the patient at 11:06 p.m. Claimant recorded in the patient's MAR that one 5 mg oxycodone tablet was administered at 11:08 p.m., leaving one 5 mg tablet of oxycodone unaccounted for.

(9) On April 22, 2018, claimant dispensed one 5 mg tablet of hydrocodone from Pyxis for a particular patient, but did not document in the patient's MAR if it was administered, leaving it unaccounted for.

(10) On April 25, 2018, claimant dispensed 4 syringes of 0.5 mg hydromorphone for a total of 2 mg hydromorphone from Pyxis at 5:29 a.m., wasted 0.5 mg hydromorphone at 5:30 a.m. and recorded in the patient's MAR that she administered 5 mg hydromorphone at 5:37 a.m., leaving 1 mg hydromorphone unaccounted for.

(11) On April 25, 2018 at 9:22 p.m., claimant dispensed 15 mg of oxycodone from Pyxis for a patient and recorded in the MAR that she administered it at 11:59 p.m., with no explanation for not administering the medication for 2 hours and 37 minutes after dispensing it. Claimant failed to record the patient's pain scale in the MAR.

(12) On April 26, 2018 at 8:17 p.m., claimant dispensed two tablets of 5 mg oxycodone for a patient and, almost immediately, at 8:18 p.m., dispensed 4 mg of morphine for the same patient. The patient had received 2 mg of morphine only one hour earlier, at 7:13 p.m., and the patient was to receive the morphine only every 3 hours as needed. Claimant recorded that she wasted 1 mg of the morphine and failed record in the patient's MAR that the remaining 3 mg of morphine and the 10 mg of oxycodone were ever administered to the patient, leaving 3 mg of morphine and 10 mg of oxycodone unaccounted for.

(13) On April 27, 2018, claimant dispensed one 5 mg tablet of oxycodone for a patient at 12:11 a.m., and recorded in the patient's MAR that she administered 10 mg of oxycodone at 12:17 a.m., which exceeded the amount dispensed.

(14) On April 27, 2018, claimant dispensed from Pyxis a total of 2 mg of hydromorphone for a patient, failed to record the patient's pain scale and failed to record if it was ever administered, leaving 2 mg of hydromorphone unaccounted for.

(15) On May 9, 2018 at 10:12 p.m., claimant dispensed 1 mg of oxycodone and 4 mg morphine for the same patient. The patient was prescribed the oxycodone as needed for moderate pain and the morphine as needed for mild pain. Claimant recorded that she wasted 3 mg of the morphine and further recorded that she administered the remaining morphine at 10:12 p.m. and the oxycodone at 10:15 p.m., with no explanation for why she had administered both within a three minute interval.

(16) On May 18, 2018, claimant dispensed 4 mg morphine for a patient at 2:38 a.m. and an additional 4 mg morphine for the same patient at 2:39 a.m. Of these amounts, claimant recorded that she wasted 2 mg at 2:40 a.m., 4:06 a.m. and 4:33 a.m. and that she administered 2 mg at 2:42 a.m. and 2 mg 4:36 a.m., which accounts for 2 mg morphine more that claimant dispensed.

(17) On May 20, 2018, claimant dispensed 10 mg oxycodone for a patient at 5:02 a.m., but failed to record if it was administered to the patient, leaving 10 mg oxycodone unaccounted for.

(18) Sometime around or before May 20, 2018, the employer's director of pharmacy received a routine report auditing the use of the Pyxis system for the previous month. The report showed that the amount of narcotics that claimant dispensed from Pyxis was three standard deviations above the mean amount that nurses generally dispensed, which was a very significant variation. The pharmacy director arranged to have other employees review Pyxis records and patient MARs to investigate claimant's medication management practices. Several discrepancies were found to exist in claimant's practices, including those

detailed above. The director reviewed the Pyxis records and MARs that the employees had relied on in reaching their conclusions and found the conclusions to be well-founded.

(19) On June 1, 2018, the director of pharmacy, the employer's nurse manager and the employer's human resources manager met with claimant and two union representatives to discuss what the employer had learned about claimant's practices. At the meeting, the employer showed claimant certain documents it had prepared to show that she was not complying with the employer's standards for documenting narcotic medications that she dispensed and administered to patients. The employer representatives told claimant that she was going to be discharged for how she dispensed and documented her administration of narcotic medications. After consulting with the union representatives, claimant tendered her resignation to the employer.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

The first issue this case presents is the nature of claimant's work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (January 11, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Although claimant technically submitted a resignation to the employer, both parties agreed that had claimant not done so she would have been discharged as she was told on June 1, 2018. Transcript of July 17, 2018 Hearing (Transcript 1) at 7, 21-22, 37-38, 40-41; Transcript of July 19, 2018 Hearing (Transcript 2) at 28. The circumstances show that claimant's resignation was not voluntary and that, while claimant was willing to continue working for the employer, the employer was not willing to allow claimant to continue working for it. Claimant's work separation was a discharge on June 1, 2018.

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) (January 11, 2018) 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. 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).

The employer's witnesses testified about federal requirements governing the employer's use of narcotic medications, the seriousness with which the employer took its responsibilities to control their use and the procedures it had implemented to do so. Transcript 1 at 8, 11-13. Claimant did not suggest that she was unaware of the employer's standards or the imperatives underlying its procedures controlling narcotic medications. The employer's witnesses also testified at length about how the employer investigated claimant's dispensing, administering and documenting narcotic medications during the period of March 24 through May 20, 2018, including reviewing records from Pyxis, comparing them with claimant's entries in the employer's electronic MARs for patients and then verifying the accuracy of those records. Transcript 1 at 24-29; Transcript 2 at 40-41, 58-60, 61-62; Exhibit 2. The manner in which the employer conducted its investigation appeared careful and thorough.

Claimant contended at hearing that the evidence which the employer presented or the conclusions drawn from it was not accurate for many reasons. Claimant did not contend that she made mistakes either in dispensing narcotic medications from Pyxis or that she forgot to enter information in the MAR to document the administration of those medications. Transcript 1 at 41; Transcript 2 at 23. Rather, claimant speculated that at least six of the times she neglected to enter information in the MAR to document that she actually administered narcotics dispensed from Pyxis to a patient or failed to document the patient's pain level, it was due to an emergency in the hospital and someone else having actually administered the narcotics to the patient. Transcript 1 at 42-43; Transcript 2 at 11, 15, 16, 17, 20. However, claimant did not describe and apparently could not recall any specific emergencies that actually occurred during the approximately two months at issue. The employer's witness testified that he did not recall any emergencies occurring during that time on the floor on which claimant worked and none were noted in claimant's documentation, as would have been expected if emergent circumstances had arisen in connection the resulted in the administration of medication to a patient. Transcript 2 at 41-42. Claimant also suggested that the information presented by the employer in which she appeared to have administered repeated doses of medication to particular patients in close succession was inaccurate because there was no evidence that she had entered overrides of a physicians' orders into Pyxis. Transcript 1 at 42, Transcript 2 at 8, 10, 16. However, the employer's witnesses testified that all of the occurrences at issue were under prescriptions that allowed the narcotic to be administered as needed, and Pyxis did not require an override before dispensing such narcotics. Transcript 2 at 48-50, 62-63. The lack of evidence as to overrides is not relevant.

Claimant further suggested that sometimes she needed to administer a particular narcotic, Tramadol, when a patient had no documented pain because the medication was actually prescribed for purposes of sleeping rather than treating pain. Transcript 1 at 41; Transcript 2 at 10. However, the employer's witness testified that the narcotic at issue was for pain and was not routinely given for sleeping as claimant contended. Transcript 2 at 50. Claimant also contended that she might have on occasion have administered two pain medications in close succession due to the patient experiencing breakthrough pain. Transcript 2 at 17, 19. However, the employer's witness testified that if such an occurrence resulted in the administration of an additional dose of a pain medication, it would be expected that claimant would have documented that need and sought a doctor's order authorizing the additional medication, which claimant did not do. Transcript 2 at 43. In addition, one of the occurrences claimant tried to explain as resulting from a patient's breakthrough pain involved the ostensible administration of two pain medications one minute apart on May 9, 2018. Transcript 2 at 19; Exhibit 2 at 62. Under this circumstance, it does not make sense that sufficient time had elapsed after the first medication was given to determine that pain was breaking through. None of the explanations that claimant provided were persuasive.

Claimant's testimony showed that she understood that the employer required careful dispensing and documentation of the administration of narcotic medications. Given the seriousness with which the employer approached narcotics, claimant's training, the apparent accuracy of the employer's records and the absence of a plausible explanation to the contrary, it is unlikely that claimant was not aware that she was failing to dispense and document the narcotics she was giving in compliance with the employer's standards during the period of March 24, 2018 through May 20, 2018 and probably was violating the employer's standards. Claimant's behavior with respect to the occurrences detailed in Exhibit 2 could only have been at least a wantonly negligent violation of the employer's standards.

While claimant's behavior might have been wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior may be considered an "isolated instance of poor judgment" if it was, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant violated the employer's standards with wanton negligence on several occasions from March 24, 2018 through May 20, 2018. Because claimant's behavior was neither single nor infrequent it may not be excused as an isolated instance of poor judgment.

Nor may claimant's wantonly negligent behavior be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not plausibly contend that she dispensed and failed to document narcotic medications during the period at issue based on a misunderstanding of the employer's expectations or because she sincerely believed the employer would condone her practices. Claimant did not make a threshold showing that her behavior is excusable as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-113606 is affirmed.

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

DATE of Service: September 7, 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, 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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