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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0983

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110453). Claimant filed a timely request for hearing. On September 19, 2018, ALJ Janzen conducted a hearing, and on September 20, 2018 issued Order No. 18-UI-116917, concluding the employer discharged claimant, but not for misconduct. On October 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's application for review included a written argument. However, the employer's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered the employer's argument only to the extent it was based on information received into evidence at the hearing.

FINDINGS OF FACT: (1) DVA Renal Healthcare, Inc. employed claimant as a patient care technician from October 19, 2017 to June 27, 2018.

(2) The employer expected its employees to report for work and work as scheduled. The employer also expected employees who administered medications to patients to immediately document the medications administered and time they were administered in the patient's electronic medical record, unless a circumstance prevented the employee from immediately doing so.

(3) On February 24, 2018, claimant left work for her 30 minute lunch break and did not return as scheduled. During her break, she learned that her child care provider had a family emergency that required claimant to return home and then transport her children to a relative for care. Shortly after her break ended, claimant reported her circumstances to the employer, then returned to work.

(4) On March 2, 2018, claimant left work for her 30 minute lunch break and again did not return as scheduled because her vehicle "wouldn't start" after she exited a store. Transcript at 24. In a panic, she found a stranger with jumper cables and eventually restarted her car. Although the employer had called her telephone after she failed to return to work as scheduled, claimant had not heard the call because her telephone had been in the car while she was outside of it interacting with the stranger. She returned to work about 30 minutes after the end of her break and explained her circumstances to the employer. On March 13, 2018, the employer gave her an initial written warning for her February and March attendance violations. Exhibit 2.

(5) In April and May, 2018, claimant experienced severe stomach pain and related illness. She eventually sought medical care and after being tested was advised that she had contracted highly contagious stomach bacteria that would prevent her from attending to patients for at least two weeks. In April, before her condition was diagnosed, claimant missed work or left work early on April 11, 18, 19, 24 and May 1, 3 and 4, 2018. After she learned of her diagnosis, she brought in to the employer a doctor's note explaining her condition. She then missed work on May 11, 15 and 16, 2018 because she was still contagious. On May 23, 2018, the employer gave claimant a final written warning for attendance violations based on absences from work since her initial warning on March 13.

(6) On June 5, 2018, the employer determined that claimant had failed to immediately document the administration of a medication after administering it to a patient and coached her regarding her violation of the employer's medication documentation policy. Prior to that day, claimant had been trained that she was expected to document a medication administration immediately, if able, but if that was not possible due to emergency or other circumstances, by the end of her shift. Because the employer was short-staffed on June 5 and claimant had to tend to numerous patients in succession or simultaneously, she did not immediately record the administration of the medication to the patient and was not aware that she was violating the employer's expectation. However, later that day, the employer clarified that going forward, she was expected to immediately document any medication administration to a patient.

(7) On June 13, 2018, the employer discovered that claimant had again failed to immediately document the administration of a potentially dangerous medication to a patient before moving on to another patient, which put the first patient at risk for a double dose of the medication claimant had administered. It was the same medication claimant failed to immediately document on June 5, 2018. Claimant explained that she had failed to do so because she "forgot." Transcript at 7, 19.

(8) On June 23, 2018, claimant was scheduled to work a morning shift but slept through her alarm, causing her to arrive 1 hour and 30 minutes late. Claimant had been exhausted by extra 13-hour shifts she had been assigned since her return to work from her illness. Although she had requested that she not be scheduled for extra shifts, the employer declined her request due to staffing concerns.

(9) On June 27, 2018, the employer discharged claimant for claimant's failure to immediately document the administration of a medication in the patient's record on June 13, 2018, and for being 90 minutes late for her shift on June 23, 2018.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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. 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. Isolated instances of poor judgment and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, claimant's testimony concerning her training regarding recordkeeping prior to June 5, 2018 and the reasons for at least some of her missed work in March, April and May of 2018 differed from the employer's evidence and testimony concerning those matters. *See* Transcript at 19-21; Exhibit 2. Viewed objectively, there is no reason in the record to find that one party was more credible than the other as to those matters in dispute. In a discharge case, when the evidence on a disputed issue or issues is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer has the burden of proof. Accordingly, where the evidence was in dispute, we based our findings on claimant's evidence.

The employer discharged claimant, in part, for being 90 minutes late for her shift on June 23, 2018. Barring illness or exigent circumstances, the employer had the right to expect claimant to report to work and work as scheduled. Claimant violated that expectation on June 23 when she failed to report for work at the start of her scheduled shift. Claimant had taken the reasonable step of setting an alarm to ensure she would awake in time for her to arrive for work as scheduled, but due to some combination of her health and exhaustion, claimant slept through her alarm. By setting an alarm and then reporting for work after realizing she was late, claimant demonstrated that she was not indifferent to the employer's expectations or interests, but, rather, wanted to meet them. Accordingly, claimant's failure to report for work on time on June 23, 2018 was not a willful or wantonly negligent violation of the employer's expectation that she report for work as scheduled.

The employer also discharged claimant, in part, for failing to immediately document the administration of a medication in a patient's record on June 13, 2018. The employer had the right to expect claimant to fulfill her documentation responsibilities on that date having just coached her on June 5, 2018 regarding the importance of immediately recording the administration of any medications in a patient's electronic record. Claimant violated that expectation on June 13 when she failed to immediately document the administration of a medication to a patient. Although claimant asserted that she "forgot" to immediately update the patient's record, there is no evidence that she took any precautions to help her remember to update the patient's record before leaving the patient in question despite knowing that she was expected to update the patient's record immediately, that it was important for the patient's well-being, that she had been forgetting to do it, and there likely would be consequences if she forgot again. Under the circumstances, her failure to take any steps to ensure that she remembered to perform that job duty, demonstrated indifference to the potential consequences of her failure to act in that way when claimant

knew she was administering a potentially dangerous medication and knew or should have known that her failing to document her conduct would probably result in a violation of the standards the employer had the right to expect of her. Claimant's failure to immediately update the patient's record was at least a wantonly negligent violation of the employer's reasonable expectation that she do so.

The next issue is whether claimant's conduct in failing to record the medication on June 13 was an isolated incident of poor judgment under OAR 471-030-0038(1)(d) and thus excusable under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Under OAR 471-030-0038(1)(d)(D), certain acts, even if isolated, that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Neither the Department's initial decision nor the ALJ's order addressed the issue of an isolated instance of poor judgment. Here, the record fails to show that claimant had been disciplined previously for other *willful or wantonly negligent behavior*. Although claimant had been coached on June 5 for her documentation failure on that day, the record shows she was not fully aware of the employer's expectation that it be done immediately regardless of how busy she was at the time. Moreover, although claimant had been warned previously for attendance violations, the record shows that those violations were, more likely than not, due to illness or exigent circumstances and were not misconduct. Therefore, her conduct on June 13 was no more than a single or infrequent occurrence under OAR 471-030-0038(1)(d)(A). The employer failed to show that the conduct in question was unlawful or tantamount to unlawful conduct, and absent any evidence showing that, for example claimant willfully ignored her responsibility to document the medication she dispensed because she did not care about it or had decided it was not important, her conduct was not so egregious that the employment relationship could not have been rehabilitated and claimant trusted after additional protocols to prevent future similar conduct were established. While claimant's failure to take steps to ensure she would not forget her duties showed poor judgment, it did not exceed mere poor judgment by creating an irreparable breach of trust that made a continued employment relationship impossible. Therefore, her failure to document the administration of the medication on June 13 was no more than an isolated instance of poor judgment and thus excusable under OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct under ORS 657.176, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 18-UI-116917 is affirmed.

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

DATE of Service: <u>November 15, 2018</u>

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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