

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1018

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154112). Claimant filed a timely request for hearing. On October 11, 2018, ALJ Snyder conducted a hearing, and on October 19, 2018 issued Order No. 18-UI-118426, affirming the Department's decision. On October 24, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered the employer's written argument in reaching this decision. With its argument, the employer submitted documents that the ALJ did not admit at hearing because claimant's representative did not believe claimant received the documents before the hearing. *See* Audio Record at 8:07 to 9:59. Due process required that the employer provide the documents to the other parties before the hearing, as stated on the notice of hearing. The employer did so by mailing the documents by first class mail to claimant's address of record as shown on the notice of hearing on October 8, 2018, which afforded claimant reasonable notice of the documents. The employer therefore appropriately provided a copy of the documents to claimant in accordance with the instructions set forth in its notice of hearing, and the ALJ erred in excluding the documents from evidence. The employer's documents included a cover sheet, handwritten corrective actions from the employer, and lab test reports. These documents are hereby admitted into the record as EAB Exhibit 1. A copy of EAB Exhibit 1 is being mailed to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, the documents will remain in the record as EAB Exhibit 1.

FINDINGS OF FACT: (1) Curry Health District employed claimant from March 15, 2017 until July 21, 2018 as a laboratory assistant.

(2) The employer required laboratory assistants to verify a patient's identity before labeling a specimen for the patient, and to compare labels before putting a new label on a specimen. The employer also

required laboratory assistants to use two patient identifiers to confirm a patient's identity before collecting a laboratory specimen from a patient; laboratory assistants were required to confirm identity by asking a patient's date of birth and full name. Claimant understood the employer's patient identification requirements.

(3) On March 6, 2018, claimant put the wrong patient's label on a specimen. On March 9, 2018, the employer coached claimant to verify a patient's identity before labeling a patient specimen.

(4) On April 12, 2018, claimant put the wrong patient's name on a specimen. The employer gave claimant a verbal warning regarding the importance of identifying a patient before attaching a label to a specimen. EAB Exhibit 1 at 4. The employer offered to retrain claimant regarding patient identification procedures, and claimant declined the training.

(5) On May 22, 2018, claimant mislabeled a laboratory specimen that came from the employer's emergency department. The emergency department put a label on the specimen before it sent the specimen to the laboratory. At the same time, the emergency department sent an order regarding the specimen to the laboratory. When the laboratory received the order, the laboratory printed a new label for the specimen. Claimant failed to compare the label that was already on the specimen with the label printed at the laboratory before affixing the laboratory label to the specimen. As a result, claimant put the laboratory's label on the wrong patient's specimen. On May 30, 2018, the employer gave claimant a written warning for her error on May 22, stating that "future instances of failing to follow [the employer's] policy . . . will result in further disciplinary action, up to and including termination." EAB Exhibit 1 at 21.

(6) On July 20, 2018, there were two patients with the same first name waiting in the employer's waiting area near its laboratory services and imaging departments. Claimant arrived at the waiting area and called out the patients' first name. One of the two patients responded to claimant, and claimant failed to ask the patient his last name and date of birth to confirm the patient was the correct patient to call. Claimant had the patient give a specimen and sent it to the employer's laboratory. Another laboratory assistant realized that an error had occurred and stopped processing the specimen from the wrong patient.

(7) On July 21, 2018, the employer discharged claimant for failing to follow its guidelines regarding identifying patients for laboratory testing.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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) (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 good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to identify patients accurately to avoid erroneous laboratory results and tests being performed on the wrong patients. The final incident that caused the employer to discharge claimant was when she failed to use two identifiers verify a patient's identity before taking a specimen from him on July 20, 2018. The record does not show, and claimant did not assert that claimant was unaware of the employer's identification requirements. Moreover, claimant should have known as a matter of common sense that identifying a patient for a laboratory test based merely on his first name was inadequate. It is more likely than not, under the circumstances, that claimant knew or should have known that her failure to identify the patient with two identifiers would probably violate the employer's expectations, and acted with indifference to the consequences of her conduct. Claimant's conduct was, therefore, a wantonly negligent violation of the standards of behavior the employer had the right to expect of her.

OAR 471-030-0038(3)(b) provides that good faith errors are not misconduct. There is no evidence that claimant sincerely believed, or had a plausible factual basis for believing, that taking a laboratory specimen from a patient without confirming his last name was consistent with the employer's expectations. Claimant had also recently received verbal and written warnings for failing to follow the employer's identification procedures when labeling specimens, and knew the employer expected her to rectify her patient identification practices. Her conduct was therefore not excusable as a good faith error.

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, there is no evidence to show claimant took measures to improve her identification practices after the coaching she received on March 6, and the preponderance of the evidence shows claimant violated the employer's standards with wanton negligence on April 12 and May 22, 2018. Because claimant's behavior was neither single nor infrequent, it may not be excused as an isolated instance of poor judgment.

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

DECISION: Order No. 18-UI-118426 is affirmed.

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

DATE of Service: November 27, 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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