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



# EMPLOYMENT APPEALS BOARD DECISION
# 2024-EAB-0653

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On June 4, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0004367681). The employer filed a timely request for hearing. On August 19, 2024, ALJ Contreras conducted a hearing, and on August 27, 2024, issued Order No. 24-UI-263939, affirming decision # L0004367681. On September 12, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) Churchill Management, Inc. employed claimant as a licensed practical nurse (LPN) at one of their senior care facilities from July 11, 2023, through April 23, 2024.

(2) LPNs working at the employer's facility were responsible for administering prescribed medication to residents in accordance with the employer's "Medication Administration Policy." Exhibit 5 at 1. In relevant part, the policy stated, "All medications, both prescription and non-prescription, which the facility has responsibility for administering to a Resident, must be prescribed, in writing, by the Resident's physician, physician's assistant or prescribing nurse practitioner, and shall be identified in the Resident's record." Exhibit 5 at 1. The policy did not specify what an LPN should do when a resident's medication is missing or otherwise unavailable for administration to the resident. Claimant received a copy of, and was familiar with, the policy.

(3) When claimant started working for the employer, she was trained by another LPN. The training LPN taught claimant that when a resident's medication is temporarily unavailable, she should place the medication on "hold" in the employer's medical record system. Transcript at 20. This was to avoid scenarios in which the medication technician (med tech) would otherwise have to repeatedly mark "did

not administer" in the employer's system, which the training LPN told claimant would "look bad." Transcript at 38, 41. Claimant had done similarly when she had worked as an LPN at skilled nursing facilities prior to working for the employer, where policies dictated that she should "place an order on hold until the medication… arrived from the pharmacy." Transcript at 42. Claimant followed the training LPN's instruction to place medication on "hold" when circumstances dictated. During claimant's tenure with the employer the training LPN was promoted to Quality Assurance Nurse. Transcript at 39.

(4) On March 1, 2024, a med tech notified claimant that a resident had run out of their blood pressure medication, and that the tech had been trying to obtain more from the pharmacy for five days. Unbeknownst to claimant and her colleagues at the time, the resident's family had given the medication in question to a different med tech who stowed it out of sight in a bag in a back corner of the facility's medication room. As such, because the resident had not actually run out of the medication at that point, their insurance refused to pay for a refill. The resident's family also refused to pay for a refill. As a result, claimant and her colleagues were unable to obtain more of the medication for the resident.

(5) Because claimant and her colleagues were unable to obtain a refill on the resident's medication, claimant placed the medication on "hold" in the employer's system, per her training, while they continued to try to obtain the medication. Claimant also informed her supervisor and the facility's nurse practitioner of the missing medication and "kept her updated" on the medication's status and the fact that the resident's blood pressure had stabilized even without the medication. Transcript at 40. In response to claimant's having told her that the medication was unavailable and that the resident's blood pressure had stabilized without it, the nurse practitioner told claimant, "Okay, we'll figure it out." Transcript at 40. The nurse practitioner did not recommend an alternate medication for the resident, or suggest any other course of action. Claimant failed to document her discussions with the nurse practitioner on this point.

(6) The resident was without their blood pressure medication for 17 days. At that point, after a deep cleaning of the medication room, the resident's medication was found in the corner where the med tech had stowed it.

(7) The employer's management eventually learned that claimant had placed the resident's medication on hold in March 2024 and, on April 17, 2024, suspended claimant while they investigated the matter. During the investigation, the employer found six other instances of claimant having put medications on hold. On April 23, 2024, the employer discharged claimant for "fail[ing] to follow physician orders, policy & procedure regarding medication administration." Exhibit 9 at 1.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "'[W]antonly negligent' means 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." OAR 471-030-0038(1)(c). 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 employer discharged claimant because she placed a resident's medication on hold for multiple days while it was unavailable, and because they found that she had previously engaged in similar behavior while investigating this incident. The employer alleged that this conduct violated their medication administration policy because she did so without following physician's orders, which the policy required her to follow. However, the employer has not met their burden to show that claimant's having placed the medication "on hold" while the medication was unavailable violated the employer's policy or that, even if it did violate the policy, that doing so constituted a willful or wantonly negligent violation of the employer's standards of behavior.

First, the record shows that the policy itself did not state what an LPN was required to do when a medication was missing or unavailable. *See* Exhibit 5. Additionally, the record shows that claimant was trained by one of her fellow LPN's to place medications on hold, as she had done, when the medication was not available. The employer did not rebut claimant's assertion that the medication was unavailable or that she was trained to place the medication "on hold" under such circumstances. The record also shows that claimant had worked in other facilities, prior to working for the employer, where similar practices were followed according to those employers' policies. Moreover, during claimant's tenure with the employer the LPN that trained claimant was promoted to a Quality Assurance nursing position. As a result, claimant reasonably relied on the training she received by the employer. Thus, regardless of whether claimant's actions actually violated the employer's medication administration policy, the employer has not shown that claimant either knew or had reason to know that her conduct violated the policy.

Further, even if claimant's conduct *did* violate the employer's medication administration policy, she did not do so willfully or with wanton negligence. In addition to claimant's beliefs based on her training and prior experience, above, the record shows that claimant apprised the facility's nurse practitioner of the unavailable medication and the resident's stable condition without the medication, who told claimant that they would "figure it out." The employer did not rebut claimant's testimony that she apprised the nurse practitioner and her supervisor of the situation. The employer's witness testified that "there were no orders from [the nurse practitioner] at all and no documentation that she wanted those meds on hold." Transcript at 59. Claimant corroborated this testimony. Transcript at 41. Despite this lack of documentation, the record shows that, more likely than not, the supervisor and nurse practitioner on staff agreed with and assented to claimant's course of action. While it would have been reasonable for claimant to document these interactions, the employer did not show that their policies required her to do so. *See* Exhibit 5. Neither did the employer show that it was claimant's responsibility, as opposed to the nurse practitioner's once informed, to enter or modify orders regarding placing the medication on hold.

Thus, because claimant acted according to what she reasonably, if mistakenly, believed to be the correct course of action, including apprising the staff nurse practitioner and supervisor of her course of action, claimant was not indifferent to the consequences of her actions and did not act with wanton negligence. In sum, claimant acted under the reasonable, if mistaken, belief that she was acting according to the

employer's policy. Because of this, claimant's conduct in relation to the alleged violation of the employer's policy in March 2024 was, at worst, a good faith error, which is not misconduct.

Finally, the employer also took issue with claimant having placed medications on hold on six prior occasions. Because the employer discovered these other violations while investigating claimant for the conduct which began in March 2024, and discharged claimant shortly after discovering them, it can be reasonably inferred from the record that these other violations contributed to the employer's decision to discharge claimant. At hearing the employer presented little evidence as to what happened on these occasions. Employer's witness did not know whether or not the medication was available in the facility at the time the medications were placed on hold or the circumstances surrounding each instance. Transcript at 27. Had the employer established, for instance, that they had become aware of any of those violations earlier in time, and warned or disciplined claimant for having violated their medication administration policy in those instances, such a finding might undercut the conclusion that the March 2024 alleged violation was a willful or wantonly negligent violation of the employer's standard of behavior, as claimant might then have had reason to know that she was not permitted to place a medication on hold as she had done. However, the record does not show that the employer warned or disciplined claimant for any of these prior alleged violations at any point before discharging her. Likewise, the employer offered no meaningful evidence of what transpired in any of these six other instances. As such, the employer did not meet their burden to show that claimant's conduct in those instances was willful or wantonly negligent.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 24-UI-263939 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

**DATE of Service: <u>October 4, 2024</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.

**<u>Please help us improve our service by completing an online customer service survey</u>**. To complete the survey, please go to <u>https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey</u>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

# Understanding Your Employment Appeals Board Decision

**English**

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

**Simplified Chinese**

注意 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

**Traditional Chinese**

注意 – 本判決會影響您的失業救濟金。 如果您不明白本判決， 請立即聯繫就業上訴委員會。 如果您不同意此判決，您可以按照該判決結尾所寫的說明， 向俄勒岡州上訴法院提出司法複審申請。

**Tagalog**

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

**Vietnamese**

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

**Spanish**

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

**Russian**

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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