

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0361

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On December 13, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104617). Claimant filed a timely request for hearing. On February 11, 2014, ALJ Menegat conducted a hearing, and on February 14, 2014 issued Hearing Decision 14-UI-10481, reversing the Department's decision. On March 4, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Providence Health employed claimant as an office clerk from August 11, 2008 until November 18, 2013. The employer provided health insurance to members and often communicated with members by mail.

(2) As part of her job, claimant received and processed mail that was returned to the employer as undeliverable. After she reviewed the returned mail, claimant notified the appropriate team that the recipient's address needed to be changed in the employer's database.

(3) The employer expected claimant to refrain from removing any documents from the workplace that contained confidential patient information as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Claimant did not understand HIPAA to prohibit her from removing documents that only disclosed members' names and residential addresses.

(4) In early November 2013, claimant noticed a large amount of returned mail was accumulating in her department that had not been processed. On approximately November 15, 2013, after her shift was over, claimant took home some postcards that contained only members' names and their old and new addresses. Claimant intended to alphabetize the postcards at home so she could remove any duplicate cards, which would speed up the processing of changes to the members' addresses. Claimant placed the postcards in a bag before leaving the workplace with them. Claimant did not ask her supervisor for permission to take the postcards home because she thought he would refuse to allow her to work at home.

(5) Shortly after November 15, 2013, the employer learned that claimant had taken some mail home on November 15, 2013. The employer talked with claimant and claimant told the employer she had only taken some postcards with names and addresses and did not think she had violated HIPAA.

(6) On November 18, 2013, the employer discharged claimant for taking from the workplace confidential information in violation of HIPAA on November 15, 2013.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

HIPAA prohibited the employer from disclosing "individually identifiable health information," which HIPAA's implementing regulations refer to as "protected health information." See 42 USC §1320d *et seq.*; 42 CFR §160.103. "Protected health information" is information that relates to medical conditions, the provision of health care or payments for health care that identifies particular individuals or reasonably might be used to identify the individuals to whom the health information relates. 42 CFR §160.03. Identifying information alone, such as a personal name or residential address, is not necessarily designated "protected health information" under HIPAA unless that identifying information is combined with information about health conditions, care or payments or there is some basis to believe it might lead to the discovery of such information. See <http://www.dhs.gov/ocr/privacy/hipaa/understanding/coveredentities/De-identification/guidance.html#protected>.

Whatever information HIPAA actually protects from disclosure, the threshold issue in determining whether claimant is disqualified from benefits is what the employer communicated to claimant about HIPAA's prohibitions before she allegedly violated that law and the employer's standards for confidentiality. Claimant testified that she understood HIPAA to apply to disclosures of health information like medical records. Transcript at 21. Although the employer's witness generally asserted that claimant knew that taking any mail home from the workplace violated HIPAA, he provided no information about how claimant was made aware of HIPAA's requirements and what was actually communicated to her about HIPAA. Transcript at 7, 8. The witness was unable at hearing to summarize

the requirements of HIPAA, or to identify specifically how claimant's taking some mail home might have violated HIPAA. Transcript at 11. The witness also generally contended at hearing that the employer had a specific rule prohibiting removing mail from the workplace, but he presented no specific information about the language of this rule, how claimant was made aware of it and what, if anything, was communicated to claimant to explain this rule. Transcript at 7. On this record, the employer did not demonstrate that it ever communicated its expectations to claimant or explained to her HIPAA's requirements. It reasonably cannot be concluded that claimant violated an employer expectation without some information that the employer made her aware of that expectation, including the provisions of any law with which it expected her to comply. To gauge claimant's actions on November 15, 2013, we are left only with claimant's understanding of HIPAA's requirements.

The employer contended at hearing that claimant took mail from the workplace with members' names and addresses as well as explanations of benefit forms that had been mailed to members. Transcript at 5, 7, 15, 16. Because explanation of benefits forms contained information about medical services provided to members, it would have been a HIPAA violation for claimant to remove those forms from the workplace under claimant's understanding of HIPAA. Transcript at 15, 21. However, claimant denied she took home explanation of benefit forms on November 15, 2013 and testified that she only took postcards with members' names and addresses. Transcript at 19, 27. There is no reason in the record to believe or disbelieve the testimony of either party as to the items that claimant removed from the workplace. Where the evidence on a disputed issue is evenly balanced we are required to resolve that issue against the employer, because it is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, claimant took from the workplace only the postcards. By her understanding of HIPAA, claimant did not violate that law by taking postcards that only contained name and address information. Moreover, based on our review of HIPAA, set out above, the accuracy of any contention that HIPAA prohibits disclosure solely of names and addresses appears quite problematic. The employer failed to present any evidence that the name and address information on the postcards could be linked to any health conditions of, treatment provided to, or payments made by those members. The employer did not meet its burden to establish that, by removing from the workplace information solely relating to members' names and addresses, claimant necessarily violated HIPAA.

The employer also contended that claimant's behavior in not asking her supervisor for permission to take the postcards home and in placing the postcards in her bag suggested claimant knew she was prohibited from taking that mail from the workplace. Transcript at 5, 6. Claimant provided innocent explanations for these actions that appeared plausible, including that she thought her supervisor would not allow her to perform work at home and that she put the postcards in a bag because she thought her coworkers would laugh at her for taking work home. Transcript at 22, 27. Because claimant's rebuttal appeared credible, the employer did not establish that claimant's behavior showed that she knew she was violating the employer's expectations and HIPAA by taking the postcards home.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-10481 is affirmed.

Tony Corcoran and D. E. Larson;

Susan Rossiter, not participating

DATE of Service: March 24, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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