

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0788**

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On April 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105310). Claimant filed a timely request for hearing. On April 30, 2014, ALJ Sime conducted a hearing, and on May 1, 2014 issued Hearing Decision 14-UI-16610, concluding the employer discharged claimant, but not for misconduct. On May 7, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Tuality Healthcare employed claimant as a receptionist from February 7, 2011 to March 13, 2014.

(2) The employer expected claimant to maintain confidentiality of patient records by avoiding disclosure of the records to third parties. Claimant understood the employer's expectation.

(3) On March 6, 2014 and March 12, 2014, a third party received in error faxed medical records intended for an insurance company. The employer concluded that claimant must have sent the faxes because she was primarily responsible for sending faxes, and that the reason the third party had received the medical records was that claimant had transposed the last two digits of the insurance company's fax number.

(4) Claimant was not the only person who sent faxes from the employer's fax machine. She did not send any faxes on March 12, 2014.

(5) On March 13, 2014, the employer discharged claimant for failing to maintain the confidentiality of the patient records involved in the March 6 and March 12 faxing incidents.

**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. 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.

The employer alleged that claimant was responsible for misdirecting two faxes to a third party by transposing the last two digits of an insurance company's fax number. However, the evidence of claimant's responsibility was based on the supervisor's belief that claimant was the only employee who sent those types of faxes, and not because she witnessed claimant sending the faxes or because claimant was somehow identified as the person who sent both faxes. Claimant testified that, at the time the March 12, 2014 misdirected fax was identified, she had not yet sent any faxes that day. Given that testimony, and the lack of direct evidence tending to show otherwise, the preponderance of the evidence in the record fails to show that claimant was responsible for misdirecting the faxes.

Moreover, even if she had been, the record would still fail to show that misconduct occurred. The reason the faxes were misdirected was that two numbers in the intended fax recipient's fax number were transposed. Transposing two digits of a fax number might be considered negligent conduct; however, to be considered disqualifying misconduct for purposes of unemployment insurance benefits, the conduct must be wantonly negligent, which requires that the individual be conscious of her conduct at the time it occurred. Absent evidence showing otherwise, transposing two digits of a fax number is not the kind of conduct resulting from *conscious* indifference to the employer's expectations, but would, more likely than not, occur as the result an inadvertent mistake, which is not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 14-UI-16610 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** June 17, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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