

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1929

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 90131). Claimant filed a timely request for hearing. On November 14, 2014, ALJ Wyatt conducted a hearing, continued on December 3, 2014, and on December 3, 2014, issued Hearing Decision 14-UI-30160, affirming the Department's decision. On December 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing, as required by OAR 471-041-0090. Accordingly, we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Bay Clinic LLP, a physicians group, employed claimant as a phlebotomist from December 7, 1992 to August 21, 2014.

(2) As a phlebotomist for the employer, claimant had access to the electronic medical records of the employer's patients. To access that information, claimant had to open the employer's software program, CERNER, type in her personal password and the patient's name. A face screen that included the patient's picture, date of birth and other identifying information opened and displayed an index to access specific medical information concerning the patient.

(3) The employer expected its employees to adhere to its “confidentiality” policy,<sup>1</sup> and the privacy protections of the Health Insurance Portability and Accountability Act (HIPAA).<sup>2</sup> Under the policy, employees were prohibited from discussing patient information with coworkers and others without prior authorization. Under HIPAA, access to protected health information (PHI), including information that could be used to identify a patient, was restricted to only those employees who had the “need to know” to perform their jobs.<sup>3</sup> Claimant received training on the employer’s confidentiality policy and HIPAA privacy and security regulations and was aware of the employer’s expectations.

(4) On August 1, 2014, the employer’s laboratory manager (Gravelle) who also was claimant’s supervisor notified claimant that the laboratory procedures for drawing a patient’s blood were going to be changed in response to a patient, seen that day, that had developed an infection following a recent blood draw. Claimant immediately became concerned that she might be blamed for the infection and asked for the patient’s name so she could investigate. Gravelle refused to provide the patient’s name, and after claimant persisted in asking for the name, explained to claimant that the employer’s concern was preventing future complications rather than blaming anyone and stated, "You don't need to know." Transcript at 58. By that statement, claimant understood that Gravelle did not want her to investigate any facts surrounding the patient infection. After Gravelle left the room, claimant checked the schedule of patients seen at the clinic that day, and using CERNER, went to the face screen of the patient with the infection and discussed it with a coworker. Gravelle returned, observed claimant examining the patient’s picture on the face screen associated with the patient, told her it was “horribly inappropriate” and directed her to get out of the patient’s medical record. Transcript at 16, 47. At the end of the day, claimant left for vacation and Gravelle reported the incident to the office manager.

(5) Claimant returned from vacation on August 21, 2014. On that day, the employer discharged claimant for accessing protected health information of the patient with the infection on August 1 without a need to know in violation of HIPAA.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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. An isolated instance of poor judgment or a good faith error is not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to refrain from investigating the name of and facts regarding the blood draw of the patient with the infection on August 1. Claimant admitted at hearing

---

<sup>1</sup> Exhibit 2.

<sup>2</sup> 42 U.S.C. 1301 et seq. HIPAA requires health care providers to establish procedures that clearly identify employees or classes of employees who have access to protected health information (PHI), including medical diagnoses and anything that can be used to identify a patient. It also requires health care providers to establish procedures to address and respond to identified security breaches. <http://www.hhs.gov/ocr/privacy/index.html>.

<sup>3</sup> The Privacy Rule is located at 45 CFR [Part 160](#) and Subparts A and E of [Part 164](#). See, <http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/index.html>

that she understood that expectation after Gravelle refused her request for the identity of the patient and told her, "You don't need to know." Transcript at 58-59. By her own admission, claimant acknowledged that her subsequent conduct in accessing password protected health information of a patient, the identity of the patient with the infection, constituted a willful violation of the employer's HIPAA expectation.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Some conduct, even if isolated, such as acts that violate the law or are tantamount to unlawful conduct, exceeds mere poor judgment and cannot be excused. OAR 471-030-0038(1)(d)(D). Although claimant did not deny she had been trained regarding the substance of HIPAA and its related regulations, she asserted that she thought it meant "You don't take anything outside of the clinic." Transcript at 59. However, claimant consciously accessed protected health information of one of the employer's patients, the identity of the patient with the infection, knowing she did not "need to know" that information to perform her job. Under those circumstances, her conduct in accessing that information violated the protections of HIPAA and was at least tantamount to unlawful conduct.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show that she sincerely believed, or had a factual basis for believing, the employer would tolerate her conduct in accessing protected patient information only minutes after being explicitly told she did not "need to know" the information to perform her job.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 14-UI-30160 is affirmed.

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

**DATE of Service:** February 23, 2015

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.