

## EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0081

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 112336). Claimant filed a timely request for hearing. On November 21, 2014, ALJ Vincent conducted a hearing, and on January 13, 2015, issued Hearing Decision 15-UI-31717, affirming the administrative decision. On January 29, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Kaiser Foundation employed claimant as a patient access specialist from June 21, 1999 to October 2, 2014. Claimant's job duties consisted of answering telephone calls from members of the employer's health care system, taking messages from the patients to submit to doctors, and scheduling patient appointments.

(2) The Health Insurance Portability and Accountability Act (HIPAA) and the employer's policies prohibited claimant from accessing or transmitting protected health information about a patient for any purpose other than the direct administration of healthcare to that patient. Information is considered protected health information if it meets the following conditions: (1) the information must be created, received or maintained by a health provider or health plan; (2) the information must be related to past, present, or future health care or payment for that health care; and (3) the information must identify the health plan member or patient, or contain enough information to identify the individual. Exhibit 2, p. 60. The employer considered any violation of HIPAA or its policy concerning patient confidentiality to be an act of gross misconduct that would result in the employee's discharge or a last chance agreement. Claimant knew and understood the requirements of HIPAA and the employer's policies regarding

confidentiality and gross misconduct; she also knew and understood the definition of protected health information.

(3) In February 2014, claimant's supervisor concluded that claimant had problems with her job performance and on February 18, 2014, placed claimant on a "Level 1" corrective action plan. In this plan, claimant's supervisor directed claimant to "treat all members and co-workers with respect," and told claimant that she "was to work on improving these areas ASAP." Exhibit 1, p. 67. Based on the advice of her union representative, claimant began to keep notes to defend against the employer's charge that her work performance was inadequate. Claimant's note-keeping consisted of copying and retaining emails regarding patient calls she had received and handled. At some point, claimant's supervisor told her that she could not copy these emails; claimant then began forwarding the emails to her personal email address. Claimant deleted the name of the patient and the patient's health record number (a unique identifying number the employer assigned to each patient's health record) from each email she forwarded to her personal email address.

(4) On July 26, 21 and 28 2014, claimant forwarded emails to her personal email address in which she mistakenly included the patients' health record numbers.

(5) Sometime in early August 2014, a staff member complained to claimant's supervisor that claimant was accessing or transmitting confidential patient information in violation of HIPAA and the employer's policies. The employer began an investigation into this matter.

(6) On August 29, 2014, claimant's supervisor placed claimant on a "Level 2" corrective action plan because the supervisor had discovered "new problems" with claimant's work performance. In this plan, claimant's supervisor told claimant that she needed "to have professional interactions with members and co-workers not treating them rudely or disrespectful [sic] or in an unprofessional manner." The "Level 2" corrective action plan included no reference to any violations of HIPAA or the employer's confidentiality policy by claimant. Exhibit 2, p. 68.

(7) On September 12, 2014, claimant forwarded an email to her personal address that she received on August 7, 2014 from one of the employer's managers. The email included the name of a patient and contained the following message:

Congratulations Yvette! This member was so happy with your outstanding service that she took the time to call and tell us about it. We're starting to see more compliments come our way for our Agents and you should all be proud of that! Great job Yvette. We appreciate the wonderful work. Exhibit 1, p. 30.

(7) On October 2, 2014, the employer discharged claimant for engaging in gross misconduct by transmitting personal health information to her personal email account in violation its policies and HIPAA.

**CONCLUSION AND REASONS:** We disagree with the ALJ, and conclude that the employer discharged claimant, but not for misconduct.

In Hearing Decision 15-UI-31717, the ALJ found that that claimant “admitted mailing private patient documents to herself because she was concerned that a supervisor was scrutinizing her performance.” The ALJ concluded that claimant knew these actions violated HIPAA, and that “[m]ore likely than not, claimant knew that her actions would probably violate her employer’s expectations. Her conduct was at least wantonly negligent.” We disagree.

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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer’s decision to discharge claimant was based on alleged violations of HIPAA and the employer’s confidentiality policies that occurred when claimant forwarded emails to her personal account that contained a patient name or health record number on July 16, 21, and 28, August 5, and September 12, 2014. Claimant knew that she was not permitted by law or the employer’s policy to reveal or transmit patient information for any purpose other than direct administration of healthcare to a patient, and understood that forwarding sending emails to her personal email address that included patient names and health record numbers violated the law and the employer’s policies. Transcript at 33. In regard to the August 5 emails, however, the employer failed to demonstrate that they were actually transmitted to claimant’s personal email address. Transcript at 53. Concerning other emails forwarded to her personal account, claimant asserted that her regular practice was to delete patient names and health record numbers from these emails and that her failure to do so on July 26, 21, and 28 was unintentional. Transcript at 31. In regard to the email she forwarded to her personal account on September 12 that contained a compliment from a manager, claimant testified that she “didn’t see the – the patient’s name on there” until the employer began its August 2014 investigation into her alleged breach of HIPAA and violation of its policies. Transcript at 33. The record contains no evidence to rebut claimant’s assertion that her inclusion of identifying patient information in some of the emails she forwarded to her personal account was an unintentional mistake. We therefore conclude that the employer failed to meet its burden to demonstrate that claimant was conscious of her conduct and knew, or should have known, that it violated the employer’s expectations. As a result, the employer did not prove that claimant’s actions in forwarding emails that contained confidential patient information to her personal account were at least wantonly negligent.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 15-UI-31717 is set aside, as outlined above.

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

**DATE of Service: March 6, 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.

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