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BYE: 201609

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0551

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91841). Claimant filed a timely request for hearing. On May 1, 2015, ALJ Shoemake conducted a hearing, and on May 8, 2015 issued Hearing Decision 15-UI-38187, reversing the Department's decision. On May 13, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) PeaceHealth Hospital employed claimant from May 10, 1999 until March 10, 2015, last as a medical social worker and a case manager. To perform her job, claimant had access to the employer's electronic medical records and often wrote explanatory notes in the records of patients to whom she was providing care.

(2) The employer expected claimant to refrain from accessing patient medical records unless access was needed to perform work-related responsibilities or to record information related to those responsibilities. Claimant was understood the employer's expectations.

(3) Sometime in late December 2014 or early January 2015, the employer's risk management gave a presentation to hospital staff about problems and risks in treating hospitalized patients who had mental health issues or cognitive limitations which prevented them from fully understanding or appreciating treatment instructions that they were given. The presentation emphasized that information informally exchanged among staff about patients' special needs or limitations risked being lost as shifts changed. The risk management team advised the entry of such information as notes in the patients' medical records that were accessible to all health providers.

(4) On February 2, 2015, claimant received a call at work from the neighbor of hospitalized patient whose care had been managed by claimant for several years. The neighbor told claimant that the patient

had fallen at home and seemed to be experiencing delirium. Although claimant was not assigned to provide any services to this patient during this hospitalization, she had longstanding experience with him and was aware that he had serious cognitive limitations, was unable to comprehend much of what was communicated to him or was happening to him, and often did not speak. Claimant went to the patient's hospital room when a physician was trying to examine or treat him. The patient was catheterized and pulling at the catheter in an apparent attempt to dislodge it. The physician did not appear to know why the patient was behaving as he was or that the patient might have a limited understanding of his situation. Claimant explained the patient's cognitive limitations and special needs to the physician.

(5) On February 3, 2015, the hospitalized patient's neighbor again called claimant. The neighbor was "hysterical" because the hospital's discharge planner had just told her that the patient would be discharged into her care, and that she was expected to assume responsibility for the patient's catheter care, including keeping the catheter and the patient's intimate body parts clean. Transcript at 25. The neighbor did not think she had the ability or temperament to provide this level of care to the patient. Claimant immediately went to the patient's hospital room. Claimant saw that the patient was fully dressed and staff was lifting him from his bed to facilitate his exit from the room as part of the discharge process. Claimant also observed that the discharge planner was hurriedly trying to instruct the neighbor about proper catheter care and cleanliness after the patient was released. Claimant realized that the discharge planner knew very little, if anything, about the support available to the patient and asked the discharge planner to call the patient's guardian to arrange for his post-discharge home care. The discharge planner did not know that the patient had a guardian, which claimant thought should have been in the patient's medical record. The discharge planner called the guardian and the guardian made arrangements for private in-home caregivers to provide the necessary post-discharge care. After the patient was discharged, claimant dictated a note for his medical record covering information that apparently was not accessible or had been overlooked during the patient's most recent hospitalization. The note stated, among other things, that the patient had cognitive limitations and that he had a guardian through whom any post-discharge care should be arranged. Claimant intended by the note to provide information that was now known during this hospitalization about the patient, who could not communicate for himself, and about his available care and support network, were he hospitalized in the future. When claimant accessed the patient's medical record and dictated the note, she did not consider that she was not, at the time, the case manager or social worker assigned to the patient, did not have a physician's order to consult in the patient's care or that her actions violated the employer's confidentiality policy because her involvement with the patient's care had not technically been within the scope of her assigned job duties.

(6) On February 4, 2015, the employer's security team issued a report that notified claimant's supervisor that claimant had accessed the patient's electronic medical record in violation of the employer's confidentiality policy. On February 9, 2015, claimant's supervisor discussed the report with claimant and told claimant that she had violated the employer's confidentiality policy because she had dictated a note to the patient's medical record when she was not formally involved in providing care to the patient. Sometime after February 9, 2015, claimant accessed the patient's medical chart to determine if there was something about the note that had caused an issue. Since claimant understood that the fact that she had dictated the note was the basis for her alleged violation of the employer's confidentiality policy, she did not think that her accessing the patient's medical record to review the note would be construed as a second violation of the employer's confidentiality policy.

(7) Sometime after the February 4, 2015 report was issued, the security team recommended that the appropriate disciplinary sanction for claimant's violation of the confidentiality policy was to deny her all access to the employer's electronic medical records for a period of one year. Claimant appealed the decision of the security team, but it was upheld.

(8) On March 10, 2015, the employer discharged claimant because, as a result of the decision of the security team to deny her all access to the employer's electronic medical records for one year, she was unable to perform essential requirements of her job.

CONCUSIONS 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer did not dispute any of claimant's testimony, that the attending physician and the discharge planner were not aware of the patient's limitations and that the discharge planner attempted to pressure the patient's neighbor to assume responsibility for his care after he was discharged absent any consultation with his guardian, who was presumably the person legally responsible for the patient's care upon his release from the hospital. While the employer's witnesses did not make clear exactly how this important information slipped by the physician or the discharge planner, it was obvious that it could have led to seriously detrimental impacts on the patient if claimant had not intervened to fill in the gaps in the information contained in the patient's medical record. In this case, there was a fundamental conflict between claimant's reasonable duties under the employer's confidentiality policy and her duties to take reasonable steps to ensure that the employer provided adequate hospital care and to formulate a sensible discharge plans for a patient who was extremely vulnerable and unable to communicate or provide information on his own behalf. We infer claimant's responsibility extended to all patients about whom she had special information, whether or not she was not directly involved in providing care on the employer's behalf during the particular hospitalization at issue. On the undisputed facts in this record, claimant's perception was reasonable that the discharge plan for the patient as it initially existed on February 3, 2015 was misguided and could place the patient in future jeopardy. Claimant's concern that, unless she entered information in the patient's medical record setting out his special needs and that he had a guardian who could arrange for his care, the same problems and risks of harm would recur in future hospitalizations was also reasonable. Claimant's testimony that she did not consider that accessing the patient's medical record for this purpose was contrary to the employer's confidentiality policy appeared sincere and credible, as did her perception that she urgently needed to place that information in the medical record on February 3, 2015 to avoid a similar breakdown in communication

about the patient in the future. In light of the circumstances as claimant reasonably perceived them, her behavior did not evidence a conscious indifference to the employer's standards of confidentiality. Claimant's behavior on February 3, 2015 in accessing the patient's medical record and dictating a note was not a willful or wantonly negligent violation of the employer's standards.

The employer's witness also appeared to contend that claimant's alleged wrongdoing in accessing the patient's medical record for the purpose of dictating a note on February 3, 2015 was compounded by her accessing the patient's medical record later to review the note. Transcript at 31, 32. Claimant's testified that she did so because she understood her supervisor to have told her on February 9, 2015 that her violation of the confidentiality policy had been the result of dictating the chart note on February 3, 2015, and was not the result of her accessing the medical record. Transcript at 35. Claimant's testimony that, since she had already violated the employer's policy by drafting the note, she did not think it was a further violation of the policy to look again at the note was also not utterly implausible. Transcript at 35. The employer offered no explanation why claimant would have accessed the patient's medical record again, when she likely was aware that the employer's security team would discover it, unless she subjectively thought it would not violate the employer's confidentiality policy. Claimant's access of the patient's medical records after February 3, 2015 was not misconduct because it was based on a mistaken understanding of the employer's confidentiality policy. *See* OAR 471-030-0038(3)(b) (good faith errors are not misconduct).

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

DECISION: Hearing Decision 15-UI-38187 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: <u>July 6, 2015</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.

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