

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0714

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 133431). The employer filed a timely request for hearing. On May 21, 2015, ALJ Seideman conducted a hearing, and on May 22, 2015 issued Hearing Decision 15-UI-38944, affirming the Department's decision. On June 11, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as a mammography technologist from March 4, 2013 to March 3, 2015.

(2) The employer provided mobile mammography screening services. Claimant worked in the employer's mammography screening van. The employer prohibited employees from doing mammography screenings for pregnant patients or patients that might be pregnant, and expected claimant to question patients to determine whether they were or might be pregnant before doing mammography screenings. Claimant understood that expectation.

(3) The employer expected claimant to personally verify English speaking patients' health records. Claimant understood that expectation. The employer expected claimant to personally verify Spanish speaking patients' records using a certified Spanish language interpreter. Claimant did not understand that expectation. She believed, based on information provided to her from individuals she believed had the authority to impart that sort of information, that the Spanish-speaking van driver, who also worked as the receptionist for patients of the van, was to communicate with Spanish-speaking patients, had the ability to verify Spanish-speaking patients' health records for claimant, and would act as a translator when necessary.

(4) On February 24, 2015, a patient who primarily spoke Spanish came to the mammography screening van. The driver-receptionist helped the patient complete her health records, and gave the records to claimant, indicating that they were complete and she had asked the patient all the relevant questions,

including the questions about the patient's menstrual cycle used to determine whether the patient was or might be pregnant. Because claimant believed the driver-receptionist had determined that the patient was not pregnant, claimant did not personally verify the patient's health records or question the patient.

(5) Claimant began the mammography screening by doing one x-ray. Claimant determined that the patient spoke some English, and began conversing with her. The patient indicated that she had missed a couple of menstrual cycles, but had a negative pregnancy test the month before. Claimant suspended services at that point and directed the patient to go to her physician for pregnancy testing. The patient did so, and the test was positive. Claimant spoke with the driver-receptionist, who indicated that the patient had said she was a couple of months late, but that the driver-receptionist misunderstood that the patient was referring to being past due for her mammography screening, and did not understand that the patient was actually reporting her late menstrual cycle.

(6) The employer learned that claimant had x-rayed a pregnant patient from the driver-receptionist and suspended claimant from work. On February 25, 2015, the employer discharged claimant for failing to complete the patient's health record screening or ascertain whether she was or might be pregnant before beginning the patient's mammography screening.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to complete patients' health record screenings before commencing a mammography screening. Claimant understood that expectation. However, she did not understand the method the employer expected claimant to use when completing that task. The employer expected claimant to use a certified interpreter to communicate with Spanish-speaking patients, while claimant believed based on customary practice in the mobile screening van that it was acceptable for the Spanish-speaking driver-receptionist to communicate with Spanish-speaking patients and complete their screenings. In the instance which caused her discharge, claimant relied upon the driver-receptionist to communicate with a Spanish-speaking patient, resulting in her violation of the employer's expectation that claimant refrain from doing mammography screenings on pregnant patients. However, claimant's conduct was the result of a sincere but mistaken belief that she had complied with the employer's expectations with respect to that patient's health record screening, and was not the result of a willful or conscious deviation from the standards of behavior the employer had the right to expect of her.

Because claimant believed in good faith that she was in compliance with the employer's expectations with regard to her behavior with the Spanish-speaking patient on February 24, 2015, her discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 15-UI-38944 is affirmed.

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

DATE of Service: July 31, 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 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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