

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0081

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 11653). Claimant filed a timely request for hearing. On December 29, 2015, ALJ Frank conducted a hearing, and on January 6, 2016 issued Hearing Decision 16-UI-50551, affirming the Department's decision. On January 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) PT Northwest, LLC employed claimant from April 2, 2006 until November 5, 2015, last as patient services coordinator.

(2) The employer expected claimant to take precautions to reasonably safeguarded funds, negotiable instruments and other items of value the employer received as payment for its services. The employer also expected claimant to deliver the payments it received reasonably promptly to its billing office. Claimant understood the employer's expectations as a matter of common sense.

(3) On Monday, October 19, 2015, claimant returned to work after a vacation. By the end of that day, the employer had accumulated \$1,100 in cash, several checks and several credit card receipts in patient copayments that claimant intended to deposit at the billing office that evening. Because claimant had worked late, she did not make the deposit before the billing office closed at 7:00 p.m. and took the copayments home with her. Claimant intended to deliver the copayments to the billing office on October 20, 2015, after it opened at 6:00 a.m. However, claimant was notified in the middle of the night that her father, who was in Seattle, Washington, was seriously ill and immediately left for Seattle. Claimant did not deliver the copayments to the billing office and they remained in her residence.

(4) Shortly after October 19, 2015, the employer discovered that it could not account for the copayments and concluded they were missing. The employer searched for the copayments, but could not locate them. Claimant did not contact the employer on October 20, 21 and 22, 2015 to inform it she had the

copayments. On October 23, 2015, the employer's clinic director sent claimant a text message telling her the copayments were missing and asking her if she knew what had happened to them.

(5) On the evening of October 23, 2015, claimant returned home briefly. After employer was closed on that night, claimant went to the workplace and returned the missing copayments, including \$1,100 in cash, the checks and the credit card receipts. Claimant then sent a text message to the clinic director informing her that she had delivered the missing copayments to the workplace and they were on a table in the clinic director's office. Claimant then left again for Seattle to attend to her ill father.

(6) On November 5, 2015, the employer discharged claimant because it considered that she violated the Health Insurance Portability and Accountability Act (HIPAA) and her responsibility to safeguard the copayments by taking the copayments to her home on October 19, 2015.

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

While the employer's witness testified at length about her belief that claimant violated HIPAA when she took the copayments to her home on October 19, 2015, she also stated that claimant had failed to safeguard the copayments themselves, as things of value which the employer had received for its services. Audio at ~8:20, ~17:16, ~18:27, ~19:35. Since the employer's witness was unable to demonstrate that HIPAA protections covered the type of non-medical information in or represented by the copayments and claimant testified she was not aware that HIPAA itself prohibited her from taking the copayments home, this case is approached as one involving a violation of the employer's expectation that claimant would behave reasonably in promptly depositing the copayments and taking reasonable precautions to safeguard them.

As matter of common sense, claimant understood the employer expected her to act reasonably with respect to items of intrinsic value like the employer's copayments as well as the financial information about patients that appeared on the checks and credit card receipts. Those copayments represented a week of receipts, including a substantial amount of cash. It is understandable that claimant believed she was more effectively protecting the employer's property by taking the copayments home rather than leaving them at the office when she was unable to take them to the billing office. Having taken the copayments home, it was a violation of the employer's standards for claimant to fail to inform the employer for four days that she had the missing copayments. Notably, claimant did not contend that she forgot she had the copayments during those four days or that some exigent circumstance surrounding her father's illness prevented her from notifying the employer about their location. Not having shown pressing circumstances, claimant's lengthy delay in informing the employer that she had the copayments was at a minimum wantonly negligent.

Claimant's wantonly negligent behavior in failing to inform the employer that she had the copayments may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as excusable, claimant's wantonly negligent behavior must have been, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). Here, claimant failed to communicate to the employer for four days that she had the missing copayments, and only did so after the clinic director contacted her. Claimant's default was prolonged and continued over several separate days. Within the meaning of OAR 471-030-0038(1)(d)(A), claimant's wanton negligence was not a single or infrequent occurrence. For this reason, it is not excused from constituting misconduct as an isolated act of poor judgment.

Nor was claimant's wantonly negligent behavior excusable as a good faith error under OAR 471-030-0038(3)(b). While claimant contended that the clinic director had on occasion taken copayments home with her to deposit the next morning, she did not contend that the clinic director gave her permission to do so, or that the clinic director had, without informing the employer, delayed several days in depositing them. Audio at ~28:30, ~31:26. It was implausible that claimant sincerely believed that the employer would condone her removing the copayments, items of value, from the employer's premises and remaining silent about their location for several days. For this reason, claimant's wanton negligent is not excused from constituting misconduct as a good faith error.

The employer demonstrated that it discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-50551 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 11, 2016

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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