

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0301

Reversed & Remanded

PROCEDURAL HISTORY: On January 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124003). Claimant filed a timely request for hearing. On February 19, 2016, ALJ Vincent conducted a hearing, and on February 26, 2016 issued Hearing Decision 16-UI-53931, concluding claimant's discharge was not for misconduct. On March 15, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record. We did not consider the new information under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), but note that the employer may, at its discretion, offer the documents into evidence during the remand hearing according to the rules and instructions contained in the notice of hearing the Office of Administrative Hearings will mail to the parties. The employer should note that its use of color-coding to differentiate each category of patient records from the others made most of the highlighted materials it sent appear illegible in the record, and resubmit its materials without color-coding.¹

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-53931 should be reversed, and this matter remanded.

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.

Claimant's job involved identifying patients without access to ongoing healthcare who might benefit from skilled nursing, home health, hospice or the employer's Community Engagement Grant, which

¹ Materials submitted into evidence for unemployment insurance hearings and appeals are scanned into an e-file. The scanning process is not color-enabled, so all colored materials appear in shades of gray to black. During the scanning process, passages of text that are highlighted typically become so darkened that the passages are illegible.

required that she access confidential health records in the employer's electronic health record system. The employer considered it unacceptable for claimant to look at charts predating her employment or those of individuals (such as employees) with access to healthcare.

The employer alleged that claimant accessed 211 charts that did not meet the access criteria of her job. Among the charts claimant accessed were that of a deceased person, 79 charts from clinic and emergency room visits that occurred prior to her employment, including charts of 4 Morrow County Health District coworkers, 5 of their family members' charts, 12 charts of Lakeview Heights coworkers, 14 of their family members' charts, 2 charts of her husband, and 35 others. She also accessed charts from 3 Morrow County Health District coworkers, 3 of their family members' charts, 2 charts of her Lakeview Heights coworkers, 6 of their family members' charts, 1 chart of a Lakeview Heights patient, and 117 charts that included pediatric, gynecological, mental health, and other types of visits that did not require claimant to follow up to ensure the patients had access to healthcare.

In response to the employer's allegation, claimant explained that she accessed a doctor's emergency room records "on an accident." Transcript at 22. She admitted accessing her husband's chart to use for training purposes. Transcript at 24-25. She testified that she did not "believe that I ever did look at treatment information," but did not "remember the exact screens" she navigated through when accessing a patient's records and "was not real familiar with the system." Transcript at 23. She did not explain whether or why she would have accessed records of coworkers or their families. Transcript at 23-25.

The employer's chief nursing officer, a "super user" of the employer's electronic health records, testified that "[y]ou don't accidentally fall into a chart," and "you have to come out of one and go into another." Transcript at 29, 30. She explained that claimant accessed the charts of one of the employer's directors, who already had access to healthcare, a coworker, her husband, her son, her father's employer, and severely mentally ill patients that did not fall into claimant's area of responsibility. Transcript at 31. The chief nursing officer also rebutted claimant's allegation that she had to access Lakeview Heights records because it was the employer's only facility, establishing that the employer had a halfway house, helped with home health and hospice, and provided nursing management or home healthcare for two assisted living facilities. *Compare* Transcript at 25, Transcript at 31-32.

Although the chief nursing officer specifically rebutted much of claimant's testimony, the ALJ did not follow up on the chief nursing officer's testimony or ask claimant to clarify what she did in consideration of the chief nursing officer's testimony, and instead ended the hearing. In Hearing Decision 16-UI-53931, the ALJ then concluded that claimant's discharge was not for misconduct. The ALJ found that, although the employer had records of claimant accessing patient charts without a business purpose 211 times during fewer than five months of employment, claimant's duties required her to do so. Hearing Decision 16-UI-53931 at 1-2. The ALJ reasoned that the employer had presented only "conclusory evidence" of misconduct, claimant "gave a plausible denial," and, "without more information on the contents of each file at issue, the evidence is at most balanced as to whether the claimant violated the employer's policies." *Id.* at 3. We disagree that the record was sufficiently developed to support any conclusion on the misconduct issue, and remand for development of the record.

On remand, the ALJ should ask claimant whether she understood that she was prohibited from accessing individuals' electronic health records without a business reason. The ALJ should ask claimant to

explain how she defined a “business reason” for accessing charts. The ALJ should ask claimant to explain what business reasons she would generally have had, given her job duties, to access the charts, including asking how she decided which charts to enter, whether the charts she accessed all fit within those parameters, what process she used to access them, what screens she had to navigate through, and any other follow-up questions based on claimant’s testimony.

The ALJ should ask claimant whether she agrees that she accessed a deceased person’s chart, 79 charts from clinic and emergency room visits that occurred prior to her employment, including charts of 4 Morrow County Health District coworkers, 5 of their family members’ charts, 12 charts of Lakeview Heights coworkers, 14 of their family members’ charts, 2 charts of her husband, and 35 others that did not relate to her job duties. The ALJ should also ask claimant whether she accessed 132 charts from appointments and emergency room visits that occurred after she began, including those of 3 Morrow County Health District coworkers, 3 of their family members’ charts, 2 charts of her Lakeview Heights coworkers, 6 of their family members’ charts, 1 chart of a Lakeview Heights patient, and 117 charts that included pediatric, gynecological, mental health, and other types of visits that did not require claimant to follow up to ensure the patients had access to healthcare. The ALJ should ask claimant whether she accessed her son’s chart or her father’s employer’s chart. The ALJ should ask claimant to specify why she accessed all of those charts, whether she thought she had a business reason for doing so, if so, what the business reason was, and, if not, why she accessed the charts without a business reason.

The ALJ should also ask the chief nursing officer what it means to be a “super user” of the employer’s computer system. The ALJ should ask her for greater detail about how employees access the electronic health record screens, including how employees enter the system and what screens they navigate through to access the records at issue. The ALJ should ask the chief nursing officer about specific examples from the employer’s evidence, for instance, when claimant accessed the doctor’s emergency room records, allegedly “on an accident,” what specific screens and records did claimant access, what data must she have entered to do so, and what must she have clicked on in order to see each portion of the records she accessed. The ALJ should ask the chief nursing officer to give a couple of other examples the employer alleges shows that claimant flagrantly violated the employer’s confidentiality requirements or establishes that claimant was accessing those records out of curiosity rather than out of business necessity. Claimant testified that she never accessed treatment records, so the ALJ should ask the chief nursing officer whether claimant ever accessed treatment records, and, if so, how often, and what she must have clicked on in order to see those records.

The ALJ should also ask the employer about the timing of the incidents, for example, whether they all occurred during the first few weeks of claimant’s employment or throughout the five months of employment. The ALJ should ask the employer the dates of the incidents. The ALJ should also ask the employer how long claimant spent looking at a sampling of the medical records – for instance, when claimant alleges she accidentally looked at a doctor’s emergency room records, did she exit the record immediately or stay inside the doctor’s records and navigate through several screens? How many screens did she look at, how long did she spend in the doctor’s records, and did she print or copy any of the records? The ALJ should also ask the employer’s witnesses what claimant should have done if she accidentally accessed a record – for example, should she have reported the accidental access to anyone, how would she have known to do so, was there an “escape” key or button she was supposed to click on to immediately close the record, would she have had to “back” out of a screen she accidentally accessed to get to a neutral screen?

Finally, the ALJ should allow each party the opportunity to respond to the others' testimony, and ask any follow-up questions necessary based on the information each party provides.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for misconduct, Hearing Decision 16-UI-53931 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-53931 is set aside, and this matter remanded for further proceedings consistent with this order.²

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

DATE of Service: April 12, 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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² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-53931 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.