EO: 700
BYE: 201645

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
2016-EAB-0336

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but nor for misconduct (decision # 141407). The employer filed a timely request for hearing. On March 9, 2015, ALJ Mann conducted a hearing, and on March 11, 2015 issued Hearing Decision 16-UI-54883, reversing the Department's decision. On March 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he offered information he did not try to present during the hearing. Although claimant stated in his argument that he "did not really get to say or provide all of the information" in support of his position, he did not contend that the ALJ, anyone else or any circumstances interfered with his ability to do so. Claimant's Written Argument at 1. Since claimant did not show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from offering the information he now seeks to present, EAB did not consider that new information. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Sky Lakes Medical Center, Inc. employed claimant as a patient registration representative from March 10, 2014 until November 20, 2015.

(2) In September 2015, the employer became aware of inaccuracies and inconsistencies in the way patient registration representatives, including claimant, entered information about patients' advance directives for healthcare. Beginning on September 28, 2015, the employer standardized the information it wanted the representatives to enter into a patient's records about the status of the patient's advance directive. Among other things, the employer expected the representatives to inquire of each patient if he or she had a completed advance directive and, depending on the patient's response, to access a drop down menu and click on an appropriate entry. If the patient did not have an advance directive, the employer expected the representatives to offer one to the patient and click on, as appropriate, "form

given" or "refused" from the drop down-menu for entry into the records. Exhibit 1 at 19. If the patient had an advance directive, the employer expected the representatives to enter "requested" if the employer did not have a copy of it and to enter "received" if the patient had given a copy of it to the employer and the copy had been scanned into the employer's electronic system. Exhibit 1 at 18, 19. Notwithstanding the employer's expectations, claimant thought he should enter "received" if he had given a copy of an advance directive form to a patient for the patient to complete, rather than entering "received" to indicate that the employer had received a completed version of the patient's advance directive. Transcript at 39, 40. If the employer or one of its affiliated clinics had offered an advance directive to a patient within 365 days of registration, the representative was not required to offer another one to the patient.

(3) On September 29, 2015, claimant's supervisor sent to him and other patient registration representatives a three page email setting out the employer's policy about advance directives, which included screen shots illustrating how to correctly enter the required information. Exhibit 1 at 18-20. On October 26, 2015 and November 4, 2015, the employer clarified aspects of its policy in an email addressed to claimant and other patient registration representatives and forwarded to them another copy of its September 29, 2015 email setting out and describing the new policy. Exhibit 1 at 21-24, 25-28.

(4) Between approximately October 8, 2015 and November 18, 2015, the employer performed audits of the performance of its patient registration representatives in correctly entering the information required under its new policy about advance directives. The employer determined claimant had made 19 errors in entering information during this period. On November 18, 2015, the employer had a staff meeting about how to correctly enter information about advance directives when registering a patient. After the meeting, claimant's supervisor and the clinic director met with claimant alone, explained the new policy to him in the event he did not understand it and told him it was important to accurately enter information about the status of patients' advance directives. In response to a question about the cause of his errors, claimant stated he must "have been working too fast and probably missed a few [of the appropriate entries]." Exhibit 1 at 3.

(5) After the meeting, claimant registered a patient at 1:30 p.m. on November 18, 2015 and did not change an entry which stated that an advance directive had been received from the patient on May 15, 2015. Exhibit 1 at 14. The employer had not received a copy of that patient's advance directive. On November 18, 2015 at 2:30 p.m., claimant registered another patient and did not change an entry dated September 24, 2015 which stated that an advance directive from the patient was "not on file," from which the employer concluded claimant had not inquired of the patient about his or her advance directive at registration. Exhibit 1 at 15. On November 18, 2015, at 3:00 p.m., claimant registered another patient and failed to make any entry about the patient's advance directive. Exhibit 1 at 16. On November 19, 2015, claimant registered a patient and entered that an advance directive was "received" from the patient that day, when the employer had not received one. Exhibit 1 at 17.

(6) On November 20, 2015, the employer discharged claimant for making four errors in entering information about the status of patients' advance directives after he met with the employer's representatives on November 18, 2015 to discuss the employer's policy about advance directives. Exhibit 1 at 3; Transcript at 10.

CONCLUSIONS 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. 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).

In Hearing Decision 16-UI-54883, the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned that since the employer emphasized the importance of entering accurate information about patients' advance directives on November 18, 2015, since claimant told the employer on November 18, 2015 that his past errors were due to "going too fast" and since claimant was aware of his conduct when he selected the appropriate entry for the status of the patients' advance directives, claimant's "failure to slow down and take reasonable care" to select the correct entry from the drop-down menu "showed indifference to the consequences of his actions," and was wantonly negligent behavior. Hearing Decision 16-UI-54883 at 3. We disagree.

At the outset, the testimony of the employer's witnesses was that the employer discharged claimant for the errors he made in entering information about patients' advance directives after he met privately with his supervisor and the clinic director on November 18, 2015. Transcript at 5, 10; Exhibit 1 at 3. While claimant contended that the first alleged post-meeting mistake that the employer identified him as having made actually occurred before the meeting, and while the employer did not specify exactly the mistakes claimant supposedly made in the medical records it identified, toward the end of the hearing, claimant appeared to concede that the entries the employer identified might contain errors made by him. Transcript at 49. For purposes of this decision, we will assume that claimant made three mistakes on November 18, 2015 when he entered advance directive information after the meeting and one mistake on November 19, 2015. Exhibit 1 at 14-15.

Although the ALJ inferred claimant was wantonly negligent when he made the four errors based on his awareness of the importance of selecting the correct option from the drop-down menu and his supposed acknowledgement that his prior mistakes had been caused by his entering information too quickly, this was not a sound inference. Hearing Decision 16-UI-54883 at 3. First, claimant did not testify that as of November 18, 2015 he knew he was entering information too fast and likely making errors. Claimant's testimony, fairly construed was that, in response to the employer's question on November 18, 2015 about why he was making errors, he assumed he had made some past errors and speculated the errors could have occurred if he proceeded too quickly through the process of entering information. Transcript at 40, 41. Claimant's statement was far short of an admission that he was conscious that he was going too fast when he entered information and he knew his speed was resulting in errors. As well, although the ALJ was correct that claimant was consciously aware, in the sense of knowing what his body was doing when he selected options from the drop-down menu on November 18 and 19, 2015, that type of consciousness does not mean that he was consciously aware that he was likely making errors in selection

or that he was indifferent to the consequences of his behavior when making those selections.. We have consistently construed OAR 471-030-0038(1)(c) to require a showing that a claimant was aware of the likelihood that he was making an error at the time he made the error to establish the state of mind necessary for willful or wantonly negligent behavior. Because there was insufficient evidence in this record to show claimant was conscious that he was likely making an error when he clicked on an option from the drop down menu or failed to make certain inquiries from the patients, rather than having made inadvertent mistakes or omissions, there was insufficient evidence to show, more likely than not, that claimant's errors were the result of wantonly negligent behavior.

Although the employer discharged claimant, it did not prove that claimant's willful or wantonly negligent behavior led to his discharge. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-54883 is set aside, as outlined above.

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

DATE of Service: <u>April 28, 2016</u>

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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