EO: 200
BYE: 201650

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

748
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0451

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102502). Claimant filed a timely request for hearing. On March 10, 2016, ALJ Frank conducted a hearing, continued on March 23, 2016, and on March 31, 2016 issued Hearing Decision 16-UI-56246, concluding the employer discharged claimant, but not for misconduct. On April 19, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument was not received by EAB within the time period allowed under OAR 471-041-0080(1) (October 29, 2006), contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Accordingly, under OAR 471-041-0080(1) (October 29, 2006), ORS 657.275(2) and OAR 471-041-0090, we considered only information received into evidence at the hearing when reaching this decision.

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Samaritan Health Services, Inc. employed claimant as an account analyst from January 11, 2011 to December 4, 2015.

(2) The employer expected claimant to maintain the confidentiality of patient records and to avoid divulging "protected health information," as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), to unauthorized parties. Claimant received training regarding the employer's expectations, including training sessions regarding relevant provisions of HIPAA.

(3) The employer's account analysts often sent a series of "canned" letters out to patients advising them that the employer's health plan, Samaritan Choice, would not pay their benefit claims because the plan's questionnaire regarding possible third party liability insurers had not been completed by the patient as requested. Audio Record ~ 23:30 to 25:00. Audio Record ~ 23:30 to 25:00. In approximately October

2015, the employer conducted a meeting with its account analysts, including claimant, advising them discontinue the "canned letters" due to patient complaints about the volume of mail being received. Shortly thereafter, claimant asked for and received permission from her supervisor to send emails to various plan policy holders advising them that their claims would not be paid for the same reason. The employer's account analysts had access to policy holder email addresses only, rather than access to the email addresses of patients under the policy holder's account.

(4) On October 30, 2015, claimant sent an email to a policy holder who was a patient's spouse that identified the patient and the patient's surgery date, and notified the policy holder that a benefit claim relating to the surgery would not be paid until plan's questionnaire was completed and returned. She advised the policy holder that if the questionnaire had not been received, the plan should be contacted and requested to send another. Shortly thereafter, the patient contacted the employer and complained that the email constituted a HIPAA violation because it disclosed some health information to another without permission. The employer then conducted an investigation, during which it discovered that claimant had sent a similar email to an employee concerning a similar issue regarding her spouse. In neither case had the patient provided consent, or been asked to provide consent, to disclose the patient's health information to the policy holder. However, in neither case did claimant believe the email violated HIPAA because her HIPAA training had never addressed the issue, she had received permission to send those emails from her supervisor, and neither a diagnosis nor a specific procedure had been disclosed.

(5) On December 4, 2015, following the completion of its investigation, the employer discharged claimant for violating its HIPAA policy on October 30, 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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.

HIPAA prohibits an employer from disclosing "individually identifiable health information," which HIPAA's implementing regulations refer to as "protected heath information." *See* 42 USC §1320d *et seq.*; 42 CFR §160.103. "Protected health information" is information that relates to medical conditions, the provision of health care or payments for health care that identifies particular individuals or reasonably might be used to identify the individuals to whom the health information relates. 42 CFR §160.03. Under some circumstances, a covered entity is permitted to use or disclose protected health information for treatment, payment, or health care operations. See, 42 CFR §164.502.

The employer asserted that it terminated claimant's employment because the emails in question violated HIPAA by disclosing protected health information without the patient's consent. Audio Record ~ 7:30

to 12:00. However, the employer's witness failed to explain how the emails violated the requirements of HIPAA, specifically 42 CFR §164.502, when they concerned payment related to covered services under a policy holder's account. Claimant asserted she did not believe the emails violated HIPPA because the specific issue never was discussed during the HIPAA training she received and because her supervisor gave her permission to send emails to policy holders concerning patient failures to return the health plan's third party liability questionnaires. Audio Record ~ 23:30 to 25; 31:00 to 33:00. The employer's witness did not dispute either of those assertions. Regardless of whether claimant's email disclosures actually violated HIPAA, because misconduct under ORS 657.176(2)(a) is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated the employer's expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

To satisfy the employer's burden requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or 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 her conduct and knew or should have known her conduct would probably result in violation of standards of behavior the employer had the right to expect of her. Willful or wantonly negligent conduct may not be inferred from results alone. On this record, even if with regard to either email claimant technically violated an employer expectation, based on her understanding of the relevant HIPAA provisions and by requesting and obtaining permission from her supervisor to send the third party liability emails to policy holders, her actions did not demonstrate conscious indifference to the employer's interests. Accordingly, the employer failed to meet its burden to show that claimant's conduct was at least wantonly negligent.

In written argument, the employer asserted that it was denied a fair hearing because the ALJ did not address its testimony that "claimant e-mailed a survey with details relating to the patient's treatment to her spouse." Written Argument at 1. However, the record fails to support that assertion, especially given the employer's testimony regarding the exact wording of the emails sent. Audio Record ~ 10:50 to 12:00. The employer also asserted the ALJ failed to address the possible harm the employer was exposed to as a result of the emails and the fact that it was one of the patients in question who informed the employer of the alleged HIPAA violation. Written Argument at 1. While those factors may have been relevant to the employer's decision to discharge claimant, they do not bear on the nature of claimant's mental state at the time of the alleged infractions. We have reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). The employer's arguments are unfounded.

The employer discharged claimant, but for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 16-UI-56246 is affirmed.

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

DATE of Service: <u>May 26, 2016</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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.