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

# EMPLOYMENT APPEALS BOARD DECISION
# 2016-EAB-0493

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On March 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 83007). The employer filed a timely request for hearing. On April 6, 2016, ALJ Vincent conducted a hearing, and on April 13, 2016 issued Hearing Decision 16-UI-57910, affirming the Department's decision. On May 3, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented new information that it did not offer into evidence during the hearing. While the employer stated "I am providing more documentation [to EAB] to properly address issues that need to be better considered," the employer did not explain why it was unable to present this information during the hearing or why it was otherwise prevented by factors or circumstances beyond its reasonable control from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Chiropractic Auto Injury Clinic, LLC employer claimant as an office manager from September 19, 2011 until February 1, 2016.

(2) The employer expected claimant to refrain from removing documents that contained protected patient health information from the work premises as required by the Health Insurance Portability and Accountability Act (HIPAA). Claimant was aware of the employer's expectation.

(3) During at least some of the time claimant worked for the employer, she also operated a side business providing billing services for a naturopathic physician and a massage therapy clinic. Claimant sometimes performed side work for these businesses on the workplace premises when she was on break or before or after her shifts. Claimant sometimes used the employer's computers when she did so, employing a USB drive that had information on it from the other businesses she for which she worked. The employer's owner and other employer representatives never told claimant she was prohibited from

using the employer's computers for this purpose or from performing side work on the employer's premises.

(4) On February 1, 2016, the employer's owner met claimant when she reported for work in the morning and told her she was laid off due to declining revenues. Claimant told the owner she needed to retrieve from her office a briefcase that contained personal papers before she left. The owner told her she could pick the briefcase up later that day and arranged a time for her to do so. Before claimant retrieved the briefcase, the employer's owner looked at its contents and noticed in it an old CMS form that contained protected patient information which was apparently being used as scratch paper. The owner surmised claimant had taken the old CMS form off the workplace premises when she had previously taken her brief case home. The owner believed that, by having done so, claimant violated HIPAA. Later that day, claimant picked up her briefcase from the workplace.

(5) Within a few days after claimant was laid off on February 1, 2016, the owner discovered saved in his computer certain files that he thought showed claimant had been performing billing work for two businesses, the naturopathic physician and the massage therapy clinic, using computers in the workplace during work hours. These documents included fax cover sheets, Excel spreadsheets and documents relating to collections efforts on behalf of those businesses.

**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. 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).

At the outset, it appears that the initial reason the employer decided to discharge claimant was because it had insufficient revenues to continue to employ her. The employer did not contend that any misconduct on claimant's part lead to its initial decision or caused the diminution in revenues that resulted in claimant's layoff. The reason that the employer initially decided to lay claimant off was not due to any misconduct on her part.

The employer's owner testified that concerns about claimant's behavior while employed were discovered after she was already laid off. While these concerns were not the apparent proximate cause of claimant's discharge since the employer was not aware of them before the discharge, we will consider them to avoid the possibility that claimant was not disqualified from benefits solely because of a fortuity in the timing of her discharge.

With respect to the CMS form that the employer thought claimant had been using as scrap paper to make notes on, claimant contended she did not recall having that paper in her briefcase and speculated that if she had taken it home with the many other papers in her briefcase, it was "truly a mistake." Audio at ~19:55. While violations of the regulations underlying HIPAA may be in the nature of absolute liability offenses, for which one may be liable despite not knowing or reasonably knowing that he or she was or

had violated HIPAA, OAR 471-030-0038(1)(c) and OAR 471-030-0038(3) require that to constitute disqualifying misconduct, a claimant must have the state of the mind to constitute willful or wantonly negligent behavior in violation of the employer's standards. Since claimant's testimony that she was not aware she had the CMS form in her briefcase was unrebutted, it appears at most that claimant unwittingly and accidentally violated HIPAA requirements, if she violated them at all. Although claimant might have been negligent in taking the CMS form that she used as scrap paper home with her, inadvertent errors or mistakes do not satisfy the type of consciously aware behavior that it is needed to show disqualifying misconduct. The employer did not meet its burden to prove that claimant engaged in willful or wantonly negligent behavior by taking the CMS form home with her, or that she engaged in misconduct.

With respect to claimant performing services for other employers on the workplace premises, claimant testified she did so only before or after work or while on lunch breaks. Audio at ~16:12. Claimant speculated that she inadvertently saved information about the other businesses on the employer's computers from a USB drive that she used to store her work in progress for those other businesses. Audio at ~16:58. The employer did not rebut claimant's testimony that the employer never specifically prohibited her from doing her other work on the workplace premises during her breaks or using the employer's computers for that purpose. Audio at ~ 17:38, ~17:48. The employer's witness asserted that claimant was aware she was prohibited from performing that work on the premises or using the employer's computers because the employer had discharged another employee approximately three years earlier for soliciting jewelry purchases from the employer's patients. Audio at ~25:22. However, that employee soliciting business during the employer's work hours from the employer's patients was markedly dissimilar from claimant performing work for a second employer when not on duty and in a manner that did not disrupt the employer's business or potentially take advantage of its patients. From the example the employer's witness cited, it was not likely claimant would have known she was prohibited from performing any work for her other employers on the workplace premises and using the employer's computers when she was off-duty. On this record, the employer did not demonstrate that claimant's activities for her other employer's was a willful or wantonly negligent violation of employer standards of which claimant was aware of reasonably aware. Since the employer did not present evidence sufficient to rebut claimant's testimony that she did not perform work for her other employers while on duty, the employer also did not demonstrate that claimant's activities for her other employers took place under circumstances where she might be expected to know as a matter of common sense that the employer would prohibit it.

For those reasons, we conclude that the employer failed to establish by a preponderance of the evidence that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-57190 is affirmed.

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

**DATE of Service: <u>June 8, 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.

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