

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0469

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104559). Claimant filed a timely request for hearing. On April 18, 2017, ALJ M. Davis conducted a hearing, and on April 20, 2017 issued Hearing Decision 17-UI-81396, affirming the Department's decision. On April 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered claimant's argument only to the extent the information in it was received into evidence at the hearing.

FINDINGS OF FACT: (1) Asante Physician Partners employed claimant as a certified medical assistant at its Ashland location from April 18, 2016 to February 16, 2017.

(2) In accordance with the federal Health Insurance Portability and Accountability Act (HIPAA), the employer considered its patients' medical records protected health information and, as a matter of policy, prohibited employees from accessing them without a business reason for doing so. The employer notified claimant of its policy upon hire.

(3) In November 11, 2016, claimant heard that a murder had occurred in a local family. Claimant was curious to know if members of the family were seen at the Ashland clinic or by her physician. Claimant accessed medical records for members of the family identified in the news and learned that they did not have a relationship with the clinic or physician.

(4) The employer's privacy officers routinely screened medical records associated with public interest stories to verify that those medical records were only accessed by employees with business reasons for accessing them. On January 25, 2017, a privacy officer notified claimant's practice manager that

claimant had accessed the medical records at issue. That day, the practice manager interviewed claimant about the matter. Claimant admitted that she had accessed the patients' records, stating that she did so because she was curious to know whether the people in the news story were the employer's patients.

(5) On February 16, 2017, the employer discharged claimant for accessing patients' medical records without a business need.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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.

There is no dispute that claimant accessed patients' medical records under circumstances where the patients did not attend the clinic where claimant worked, were not patients of the physician for whom claimant worked, and were not in need of care or assistance from her. Claimant argued that she nevertheless had business reasons for accessing those records, citing to her physician's custom of initiating contact with his patients after their hospital visits, having claimant call the patients to check on them, or sending condolence letters to patients who had lost family members, and her desire to be proactive. Audio recording at ~ 14:10. Those situations are distinguishable from this one, however. In those situations, the physician for whom claimant worked asked her to initiate contact with the patients, simultaneously establishing that those other patients were actually her physician's patients and giving claimant a legitimate business reason for looking into their records in order to perform the task the physician had asked her to do. *Accord* Audio recording at ~ 18:45.

By comparison, in the final incident claimant did not even know if the medical records she accessed belonged to her physicians' patients, the physician had not asked her to look at those records or contact those patients, and claimant did not have any need, beyond her curiosity, to see the contents of those records at the time she accessed them. Claimant also argued that, had the patients whose records she accessed been patients at her clinic or been seen by her physician, her conduct would have been acceptable. We disagree. Regardless where those patients were seen, or by which doctor, at the time claimant accessed those patients records she was not doing so to provide treatment, collect payment, or for any other reason related to the treatment of the patients, and therefore had no business reason to justify accessing those records. Claimant knew or should have known that accessing patients' medical records because she was curious to know if they had received treatment from her physician or at the Ashland clinic would violate the employer's expectations. Her conduct was, at a minimum wantonly negligent.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant accessed the patient records at issue because she was curious to know if the patients were the employer's patients. The employer's policy provided, however, that employees were not permitted to access patients' medical records to satisfy their curiosity. Audio recording at ~ 23:15. As previously noted, the circumstances of the situation at issue was different from previous instances where claimant's physician had directed her to access his patients' medical records. Claimant understood she was only permitted to access patients' medical records if she had a business need to do so, and given that she knew at the time that she was not providing those patients with medical care, responding to their call, and had not been directed to work with them by her physician, she did not access the records based on a sincere misunderstanding that she had a business reason for accessing those records.

Claimant's conduct also cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) because although it appears it was a single instance of wantonly negligent behavior, the conduct involved a violation of the law and therefore exceeded mere poor judgment under OAR 471-030-0038(1)(d)(D). 45 CFR §164.502(1), a provision within the Health Insurance Portability and Accountability Act (HIPAA), specifies that permitted use of individuals' protected health information is, in pertinent part, "[f]or treatment, payment, or health care operations." Disclosure of protected health information from one entity to another, as occurred in this case, is allowed "for health care operations activities of the entity that receives the information, if each entity either has or has had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship," or if the disclosure is for quality assessment and improvement activities, reviewing the competence or qualifications of health care professionals, or for health care fraud and abuse detection and compliance. *See* 45 CFR §164.506(b)(4). When claimant accessed patients' records because she was curious to find out if certain patients were seen by her physician and clinic, she was not accessing the records for a permissible reason under HIPAA. Claimant's conduct therefore violated the law; conduct that violates the law cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation until she requalifies by earning four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-81396 is affirmed.

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

DATE of Service: May 15, 2017

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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