EO: 200
BYE: 201803

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
2017-EAB-0567

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81258). Claimant filed a timely request for hearing. On April 17, 2017, ALJ Lohr conducted a hearing, and on April 21, 2017 issued Hearing Decision 17-UI-81505, reversing the Department's decision. On April 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Advocate Care, LLC, an adult residential care facility, employed claimant as activities director from April 6, 2015 until January 23, 2017.

(2) The employer expected claimant would not disclose confidential information about a resident's care or treatment to anyone not having a defined role in that care or treatment. Claimant understood the employer's expectation.

(3) Claimant was also a "mandatory reporter" under Oregon abuse prevention statutes and regulations. As a "mandatory reporter" claimant was required to report to any suspected abuse or neglect of an adult to a local law enforcement agency of the Oregon Department of Human Services (DHS) if she became aware of it. Claimant's son was employed by Columbia Community Mental Health as an adult abuse investigator and was also a "mandatory reporter." On occasion, DHS's Office of Adult Abuse Prevention and Investigation retained claimant's son to conduct investigations of adult abuse on its behalf.

(4) On December 22, 2016, the employer issued a written warning to claimant for disclosing confidential information about residents or staff members to people who did not have defined treatment roles with the resident or were not otherwise authorized to receive the information. The warning advised claimant that she could be discharged for any further violations of the employer's confidentiality policy.

(5) Shortly before January 20, 2017, while claimant was on shift, she became aware that a resident appeared very ill. In fact, the resident had that morning started the process of withdrawing from alcohol under the supervision of his private physician. The physician had advised the employer that it was likely the resident would need to be transported to a medical facility when he had been without alcohol for approximately 48 hours to ensure a safe detoxification. After only a very few hours of withdrawal, the resident told claimant he needed to be transported to a medical facility and then demanded it. The resident told claimant that his physician wanted him to be transported that facility by ambulance. Based on the resident's apparent level of discomfort, claimant went to the employer's administrator for permission to call an ambulance. The administrator told claimant that she did not think a transfer or an ambulance was needed, did not want emergency medical technicians disrupting the facility, and thought calling an ambulance for the resident was wasteful. However, the administrator asked claimant to call the resident's treating physician for instructions. When claimant reached the physician who was covering for the resident's physician, he told claimant that the resident should be transported immediately to a medical facility. Claimant reported what the physician had said to the administrator and the administrator told claimant to contact a particular nurse to evaluate the resident's status. At that time, claimant checked on the resident and thought his condition was "really, really, really bad." Transcript at 34. In fact, in addition alcohol-withdrawal symptoms, the resident had developed a serious infection, which was not yet known to the employer's staff. The resident again demanded to be taken to a medical facility. Claimant left several messages for the nurse that the administrator had instructed her to call, but did not receive any response. Claimant reported back to the administrator that she could not reach the nurse and the administrator told her to continue trying. Claimant then tried unsuccessfully to contact the head nurse and the other nurse, and left messages for both. When claimant was finally able to speak with the head nurse, that nurse told claimant that despite what the covering physician had told her, the employer still needed an instruction from a treating physician authorizing the resident's transport. At this time, claimant had been trying to facilitate the resident's transfer to a medical facility for several hours. Claimant again checked on the resident and his condition had not improved. Because her shift was over, claimant went to her supervisor, explained the resident's situation and her concerns and asked the supervisor to follow up to make sure the resident was taken to a medical facility. Claimant then left the facility. At that time, claimant was concerned that there would be additional delays, or that the resident would not be transported to a medical facility, would sustain unnecessary discomfort and would not receive the level of care he needed.

(6) After leaving the facility, claimant attended a class and reached her home at approximately 6:30 p.m. Claimant sent a text message to a coworker inquiring whether the resident had yet been transported by ambulance to a medical facility. The coworker responded that he had not and was still at the employer's facility. Claimant then spoke to her son, who lived with her, about the resident's situation. Since her son was an abuse investigator, claimant thought she could disclose general information about the situation without violating the employer's confidentiality policy. Claimant provided a "brief generalized description" of what had happened at the employer's facility. Transcript at 53. Claimant did not disclose the resident's name. Claimant's son advised claimant that the situation she described appeared to involve suspected abuse or neglect and, in his opinion, she should report it to DHS. At claimant's request, the son contacted a Multnomah County agency to which reports of abuse were made and shortly thereafter, an abuse investigator from DHS contacted claimant. Claimant described what she had witnessed to the investigator and made a report of suspected abuse. At the request of the DHS investigator, claimant then contacted Multnomah County emergency services and learned that an ambulance had been dispatched that evening to transport the resident to a medical facility.

(7) On January 23, 2017, the employer discharged claimant for violating its confidentiality policy by disclosing confidential information about the resident to her son, who did not have a defined role in the resident's care and treatment.

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 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 of an employee. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

While the evidence at hearing was not well developed about the nature of the employer's business and how precisely claimant was subject to mandatory abuse reporting requirements, claimant stated she was a mandatory reporter and none of the employer's witnesses contended otherwise. *See* ORS 124 .050 *et seq.*; OAR 411-020-0000 (January 15, 2015) *et seq.* For purposes of this decision, we accept that claimant had a mandatory statutory duty to report to DHS any suspected abuse of an adult of which she became aware regardless of how she gained knowledge of the suspected abuse. Since the statutes creating the duty to report only recognize exceptions for information that is reported to a psychiatrist, psychologist, member of the clergy or an attorney as part of an otherwise privileged communication, it is difficult to conclude that the employer's confidentiality policy was not superseded by claimant's reporting duties so long as those reports were made in good faith to DHS, one of DHS's designees or to a local law enforcement agency. *See* ORS 124.065(1); ORS 124.075. However, as we understand the employer's contentions, it is challenging claimant's disclosure of information about the resident's situation to her son and not claimant's disclosure of information to DHS on January 12, 2017. Transcript at 18, 19, 23, 26, 62.

Claimant's son did not have any "defined role" in the resident's care and treatment and claimant was therefore prohibited from disclosing "confidential information" to him about the resident under the employer's confidentiality policy. However, the employer's witnesses did not define at hearing what information it considered "confidential." It is not at all clear on this record that claimant disclosed confidential information to her son about the resident since the employer did not know what claimant had told her son, claimant testified only that she did not provide the resident's name or other specific identifying information and her son testified that claimant only gave him "a brief generalized description." Transcript at 18, 30, 53. Based on this evidence, we are reluctant to conclude that claimant provided confidential information to her son on January 12, 2017.

Assuming claimant did disclose some information to her son that was confidential in the course of seeking assistance in making a report of suspected abuse to DHS, the evidence is insufficient to show that her behavior was a willful or wantonly negligent violation of the employer's standards. Given that claimant's son was employed as an abuse investigator and on occasion was designated to conduct abuse investigations for DHS, it was not unreasonable for claimant to think that discussions with him about suspected abuse would be treated like reports made directly to DHS and exempted from the employer's confidentiality policy. Transcript at 26-29. No evidence was presented at hearing suggesting or tending to suggest that claimant was not acting in good faith when she described to her son what she had observed and sought his opinion on whether what she had observed constituted suspected abuse and when she subsequently reported those observations of suspected abuse or neglect to DHS. Claimant's testimony at hearing that she was genuinely concerned about the welfare of the resident appeared sincere. On this record, the employer did not present sufficient evidence to demonstrate either that claimant was not acting in good faith in light of her mandatory obligations to report any suspected abuse or that she was indifferent to the resident's needs or to the employer's overriding interest in ensuring residents were not abused or neglected. On this record, the employer did not meet its burden to demonstrate that claimant willfully or with wanton negligence violated its confidentiality policy, either by providing confidential information to her son or by otherwise acting in a manner that was indifferent to the employer's interests.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-81505 is affirmed.

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

DATE of Service: <u>June 19, 2017</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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