

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0944

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124649). Claimant filed a timely request for hearing. On July 14, 2017, ALJ Shoemake conducted a hearing at which the employer did not appear, and on July 18, 2017 issued Hearing Decision 17-UI-88271, concluding the employer discharged claimant, but not for misconduct. On August 4, 2017, the employer filed a timely application for review of Hearing Decision 17-UI-88271 with the Employment Appeals Board (EAB).

With its application for review, the employer submitted a letter to EAB that requested the scheduling of a new hearing, presumably to allow it to present evidence on its behalf, and also presented some information that was not offered during the hearing. EAB construes the employer's request as one to have EAB consider new evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering it shows that it was presented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer did not explain why it failed to appear at the hearing and did not present evidence on its behalf. In the absence of any explanation, there is no basis to conclude that circumstances outside the employer's reasonable control prevented it from offering its information at the hearing. Accordingly, the employer's request to have EAB consider new information is denied.

FINDINGS OF FACT: (1) Visiting Angels employed claimant as an in-home caregiver from January 22, 2016 until March 8, 2017.

(2) The employer expected that claimant would not violate the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The employer also expected that claimant would count the medications for clients during her shifts and would fully document that count in the employer's records. Claimant understood the employer's expectations.

(3) Sometime around the end of February 2017, claimant cared twice for a relatively new client of the employer. That client had received care from many different caregivers during the short time she was a

client. There were issues with the care that some of the employer's caregivers had provided to that client.

(4) On March 8, 2017, the employer's scheduling manager telephoned claimant and told her she was discharged because of her behavior when caring for the new client the second time. The first reason the manager gave claimant for her discharge was that she had violated HIPAA by having her husband drive her to the client's home for work, and by him honking his car horn when he arrived at the home to pick claimant up after her shift was over. Although claimant's husband had driven her to work when she worked for that client, he had never honked his horn when picking her up. Claimant told this to the scheduling manager. The second reason the scheduling manager gave claimant for her discharge was that claimant had turned in blank pages for the medication count for the same client, on which pages she had allegedly written her initials and drawn in a heart after the initials. Claimant had not done so, and denied doing so to the scheduling manager.

CONCLUSIONS AND REASONS: Claimant was discharged 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. 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).

Because the employer did not appear and present evidence at the hearing, the only information about the reasons for claimant's discharge came from claimant's account of her conversation with the employer's scheduling manager on March 8, 2017. While a HIPAA violation would be a serious matter, it is not clear to us, without additional information, how the fact that claimant's husband drove her to the client's house was prohibited by the confidentially provisions or any other provisions of HIPAA. *See* 29 USC §1181 *et seq.*, 42 USC §300gg *et seq.*, 42 USC §1320d *et seq.*; 42 CFR 160.103 *et seq.* Since claimant denied that her husband honked the car horn when he picked her up at the client's house, and there is no independent evidence supporting that he actually did so, there is insufficient evidence in the record to establish that his alleged behavior was or could have been a violation of HIPAA or any other of the employer's standards. Audio at ~9:30. Finally, since claimant denied that she had failed perform the medication count for the client or properly document the medication count, there is no evidence in the record supporting that she violated the employer's standards in the way the scheduling manager stated to her that she had. Audio at ~11:18, ~11:40. This record is insufficient to establish that claimant engaged in the misconduct that the scheduling manager alleged.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-88271 is affirmed.

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

DATE of Service: August 25, 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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