

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0672

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73335). Claimant filed a timely request for hearing. On June 19 and 20, 2018, ALJ Janzen conducted a hearing, and on June 21, 2018 issued Order No. 18-UI-111771, concluding that claimant's discharge was not for misconduct. On July 3, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's and claimant's written arguments when reaching this decision.

FINDINGS OF FACT: (1) Asante employed claimant as a coordinator of hospitality services in its hospital from July 26, 2010 until April 13, 2018.

(2) The employer expected employees to comply with the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 USC §§300gg, 42 USC §1320d *et seq.* and 29 USC §1181 *et seq.* HIPAA prohibited the employer's employees from accessing protected health information and personal information about patients in their records unless the employee had job-related reasons for doing so. Claimant understood the employer's expectations. The employer considered information contained in the hospital census that identified patients by name and the hospital unit to which they had been admitted to constitute protected health information.

(3) One of claimant's duties was to visit, or "make rounds" of patients admitted to various units of the hospital to assess their level of satisfaction with the employer's environmental services, including housekeeping and cleanliness. In approximately 2013, claimant and the then-supervisor of the environmental services department developed protocols for the patient rounds that hospitality coordinators, including claimant, made. Since that time, claimant had prepared for the patient rounds she made each day by accessing and reviewing the census for the hospital units she intended to visit that day. Claimant would then export the names, room numbers and admission dates for the patients in those units from the census to a spreadsheet. Claimant's supervisor in 2013 had approved of the manner in

which claimant prepared for rounds and specifically instructed claimant to know in advance of entering a patient's room both the first and last names of the patient in order to greet them formally, which claimant could learn if she accessed the census for the unit in which she was making rounds. The employer never notified claimant that the protocols of the former supervisor for preparing for rounds had been changed.

(4) In connection with the hospital's obstetrics (OB) unit, also referred to as the Family Birth Center (FBC), claimant's former supervisor had instructed claimant, beginning sometime around 2013, to make rounds in the OB/FBC unit, but only of patients who were on bedrest or observation and not of patients who were in active labor. The employer never notified claimant that the protocols of the former supervisor for making rounds in the OB/FBC unit had been changed. After 2013 and before April 10, 2018, claimant periodically accessed the census for the OB/FBC unit and on several occasions made rounds of patients who were on bedrest in that unit.

(5) Every Monday, the manager of housekeeping sent out a weekly email to the hospitality coordinators and other leadership informing them of recent patient satisfaction scores and alerting them to which units had low scores and where they should focus their attention and the rounds they made. In early April 2018, claimant and other hospitality coordinators received an email from the manager of housekeeping that claimant understood to state that patient satisfaction scores were low in the OB/FBC and 1 East units, and that they should focus their rounds on patients in those units to bring up the patient scores. The 1 East unit was also known as the hospital's maternal child unit, which was where patients were usually transferred after having given birth in the OB/FBC unit. After receiving the email from the manager of housekeeping in early April 2018, claimant looked at the census for OB/FBC unit on eight to ten occasions in anticipation of possibly making rounds in that unit. After early April 2018, claimant made some rounds in the OB/FBC unit of patients on bedrest.

(6) On April 10, 2018, claimant intended to make rounds in the OB/FBC unit if any admitted patients were on bedrest. Claimant accessed the census for the OB/FBC, which showed only three admitted patients, and noticed that her adult daughter was one of the three admitted to the FBC. Claimant's daughter was pregnant and April 10, 2018 had initially been her expected delivery date before it was later determined that she likely would deliver later. Claimant asked her supervisor, and her supervisor allowed her, to make a personal visit to her daughter in the FBC. Claimant did so and learned that her daughter had experienced childbirth related complications. Claimant became upset and emotional. With her supervisor's approval, claimant took the rest of the day off.

(7) On April 11, 2018, claimant's supervisor notified the director of support services that claimant's coworkers had reported to her that claimant had learned of her daughter's April 10, 2018 admission to the hospital for childbirth by accessing the census for the OB/FBC unit on April 10, 2018, and not from her daughter. On April 12, 2018, the director spoke to claimant about her reason for reviewing the FBC census on April 10, 2018, and claimant stated that as part of her job she made rounds in the FBC and when she accessed the census for the FBC for rounds she thought she might make that day she saw that her daughter was a patient.

(8) On April 13, 2018, the employer discharged claimant because it determined that she had violated HIPAA and its policies by accessing information about her daughter in the OB/FBC census on April 10, 2018 without having a job-related reason for doing so.

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) (January 11, 2018) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In discharge cases, the employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant based on its contention that claimant did not have a job-related reason for accessing the patient census for the OB/FBC unit on April 10, 2018 because she was not supposed to perform patient rounds on that unit and, even if she was, she did not need to know the identity of the admitted patients to perform those rounds. Transcript of June 19, 2018 Hearing (Transcript 1) at 12, 13, 29, 30, 33; Transcript of June 20, 2018 Hearing (Transcript 2) at 29, 36, 37, 39. With respect to accessing the OB/FBC census to learn the names of the patients she would be making rounds on, claimant testified that her former supervisor had wanted her to know the patients' full names in advance for purposes of a formal greeting when she entered their rooms, the supervisor and she had developed the protocol of learning the names by consulting the census before performing rounds, and claimant had been accessing the censuses of units for this purpose on a regular basis since approximately 2013. Transcript 2 at 7-8, 41-44. The employer's witnesses, including claimant's current supervisor as well as the manager of housekeeping candidly testified that they did not know how claimant regularly prepared to perform her rounds, whether she customarily accessed unit censuses, or what claimant's former supervisor had approved or condoned. Transcript 2 at, 30, 34, 37, 42. In response to claimant's specific testimony that she continued to consult the censuses before making rounds because that had been the approach under her former supervisor, none of the employer's witnesses suggested that, after the supervisor left, claimant had ever been specifically informed that she was prohibited from accessing the censuses, that claimant was told doing so was a violation of HIPAA, or that the employer's policy interpreting HIPAA had changed from that adopted by her former supervisor. Transcript 2 at 34, 41, 42. In light of the evidence, the employer did not show by a preponderance of the evidence that claimant did not have a job-related reason to access the patient census to prepare for making patient rounds or should have known the employer prohibited her from doing so.

In connection with whether performing rounds in the OB/FBC unit was a part of claimant's duties, claimant testified, also in line with practices approved by her former supervisor, that she had been making rounds of patients on bedrest in that unit since 2013 and had continued doing so after the supervisor left. Transcript 2 at 22-23. As above, the employer's witnesses testified both that they did not know what claimant's former supervisor had approved or that claimant's regular practice was to perform rounds in the OB/FBC unit. Transcript 1 at 19-20, Transcript 2 at 34, 41-42. In response to claimant's further testimony that an email sent to her and the other hospitality coordinators by the manager of housekeeping in early April 2018 specifically instructed them to perform patient rounds in the OB/FBC and 1 East units, the employer's witnesses testified that they thought the email might possibly have referred only to performing rounds in the maternal child or 1 East units. Transcript 1 at 19; Transcript 2 at 28-29. However, their testimony about the contents of the email appeared hesitant and diffident.

Because no party produced the email in question, EAB is left with the conflicting recollections of the parties as to its contents. Where, as here, there is no reason to doubt the credibility of either party's witnesses or the accuracy of their testimony and the evidence on a disputed issue is evenly balanced, that issue must be resolved against the employer since it is the party with the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, claimant's account of contents of the early April email from the housing manager is accepted. Based on that email, performing rounds in the OB/FBC unit was within the scope of claimant's job duties and claimant accessed the April 10, 2018 census for that unit in preparation for those rounds. As such, the employer did not demonstrate by a preponderance of the evidence that claimant did not access that census on April 10, 2018 in order to discharge a job related duty, or that claimant's doing so was a violation of HIPAA.

The employer did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-111771 is affirmed.

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

DATE of Service: August 6, 2018

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.

Please help us improve our service by completing an online customer service survey. 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.