

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0459

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155530). Claimant filed a timely request for hearing. On May 1, 2019, ALJ S. Lee conducted a hearing, and on May 9, 2019 issued Order No. 19-UI-129671, reversing the Department's decision. On May 15, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Salem Clinic PC employed claimant as a billing and insurance coder from February 23, 2011 until March 13, 2019.

(2) The employer expected that claimant would not access a patient's medical records unless she had a business-related reason for doing so. Claimant understood the employer's expectations.

(3) Although the employer assigned particular providers to claimant and other coders, claimant sometimes did coding in the medical records of patients who were not seen by the provider assigned to her. Claimant was an experienced coder, and when requested by a coworker to assist in properly coding a chart, she sometimes accessed the medical records of a patient not seen by her assigned provider to provide that assistance. Claimant also accessed the medical records of patients not seen by the provider to which she was assigned to answer questions that came to her from patients, providers, the business office and insurance companies about how diagnoses, treatment and other information had been coded for purposes of insurance coverage and billing. Claimant often received such requests because she was one of the few coders with a phone at her desk.

(4) Around March 12, 2019, it was brought to the attention of the employer's compliance officer that the medical record of a particular patient's visit to the emergency department had been left unattended on a copy machine. The medical record appeared to have been altered to substitute claimant's first name, date of birth and primary care provider for those of the actual patient. The employer suspected claimant was involved in the alteration. Because of its suspicions, the employer audited the medical records of the patient to determine if claimant had accessed them.

(5) The audit of the patient's medical records revealed that claimant had accessed them on 37 different days since January 2, 2018. It appeared that claimant had actually performed coding in the patient's medical record on only one of those days, and she had never been assigned to perform coding for the provider who saw the patient. The days that claimant accessed the patient's medical records, she typically accessed multiple data types for brief periods of time. *See Exhibit 1 at 16-40.*

(6) On March 12, 2019, the compliance officer and the associate administrator spoke to claimant about the apparently altered medical record. Claimant stated she was not responsible for the alteration, denied knowledge of it and stated that she was not familiar with the patient whose name had originally appeared on the medical record. When the employer representatives expressed doubt that claimant did not know the patient at issue, claimant gave her phone to them. The phone log showed that claimant's phone had been used to call the patient on some occasions. Claimant told the employer representatives that she had not contacted the patient. At the conclusion of the discussion, the employer representatives told claimant that they wanted to meet with her the next day to learn if she was able give them any additional information. Later that day, a person who had been temporarily staying with claimant and to whom claimant had loaned her phone to, told claimant that the patient was the person's ex-husband and that the person had phoned her ex-husband with claimant's phone.

(7) Before meeting with claimant on March 13, 2019, one of claimant's coworkers reported to the employer representatives that claimant had spoken of a boyfriend who had the same name as the patient at issue. At the meeting, claimant continued to deny that she was acquainted with the patient and stated that she did not know whether or not she had accessed the medical record of the patient or how many times she might have done so. Claimant told the representatives that if she had accessed the patient's medical record, she must have been assisting a coworker or responding to a question that required her to access the patient's medical record. On March 13, 2019, the employer discharged claimant for accessing the patient's medical record without having a business-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. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent' means 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." OAR 471-030-0038(1)(c). The employer had the burden to prove more likely than not that it discharged claimant for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

The employer's principal argument at hearing was, in essence, that claimant must have accessed the medical records for the particular patient without a business reason based on various circumstantial factors. Those factors were, at root, that claimant accessed those records too often for that access to have

been for legitimate reasons, such as responding to a coworker's request for coding assistance or to questions from a provider, the business office, or an insurance company about coding. Notably, however, the employer's witnesses did not demonstrate, more likely than not, that claimant was not or would not be called upon to respond to such requests or questions. Nor did the employer take the position that it would not have been appropriate for claimant to access the patient's medical record to respond to those requests or questions. While claimant may have accessed the medical record of the patient at issue more frequently than was expected, the preponderance of the evidence did not rule out that claimant was doing so for legitimate, business-related reasons. On this record, the employer did not meet its evidentiary burden to show that claimant engaged in misconduct when she accessed the medical records of the patient at issue.

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

DECISION: Order No. 19-UI-129671 is affirmed.

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

DATE of Service: June 19, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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