BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

GREGORY W BLANK Claimant, and MASON CITY CLINIC PC Employer.	:	HEARING NUMBER: 08B-UI-06375 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Gregory W. Blank, worked for Mason City Clinic, PC from March 29, 2005 through June 6, 2008 as a full-time physician's assistant in the cardiology department where he had access to electronic medical records. (Tr. 2, 12, 13, 45, 63, Exhibit 7) Based on his employment with the Mason City Clinic, Mr. Blank was also allowed hospital privileges at Mercy Hospital on whose campus the employer is located. (Tr. 9, 11, 13, 20, 42, 65)

Employees having medical records access are allowed to access information only as it relates to each employee's work. Thus, Mr. Blank had access only to cardiac patients as needed. (Tr. 15, 17) In order to obtain access, the claimant must have written authorization for the same. (Tr. 18, 66) There are no

exceptions for accessing anyone's medical records, including family members, unless work-related and

written authorization is provided. (Tr. 16, 18-19, 20) Mason City Clinic has a form that allows family members permission to obtain access for their medical records. (Tr. 32) The doctor, with whom Mr. Blank worked (Dr. Congello), oftentimes authorized Blank to log into the computer using Dr. Congello's password only for cardiology patients. (Tr. 38, 67)

Every year, the employer holds meetings to stress the importance of confidentiality. (Tr. 9, 14) Mr. Blank signed in acknowledgement of receipt the employer's policy regarding safety, confidentiality and access of information. Tr. 2, 3, 52, 64, Exhibits 5 & 6) Part of Mr. Blank's responsibilities included work in the pacer device clinics, pacer checks on people with pace makers, "… [assessing and dealing with… questions that staff… nursing staff… mid-level providers… [and] patients on that service." (Tr. 12)

In February, the claimant's son became ill and was hospitalized. He requested a form in which to obtain permission to gain access to his son's medical records. (Tr. 46, 48) Mr. Blank was not his child's healthcare provider, nor was his child a cardiac patient. (Tr. 41, Exhibit 2) He did not receive the form until one month later (mid-March) with the intervention of Mercy Medical Center's CEO, Mr. Fitzpatrick, at which point he returned the form that he signed and notarized on March 18th, 2008. (Tr. 46-47, 54, 73) The claimant accessed his son's electronic medical records without prior authorization from Dr. Congello. (Tr. 43, 67) Kurt Harle, the Director of HIM Privacy Officer, confronted the claimant indicating that he could not access his son's actual medical records because it was against the hospital's HIPAA policy; however, the claimant could access the written paper version of the same or discuss his son with the latter's doctor. (Tr. 47, 53, 67, Exhibit 1) Unbeknownst to the employer at the time, both men (Fitzpatrick and Harle) (Tr. 22-23) verbally warned Mr. Blank about violating HIPAA law, and reiterated the hospital's policies and procedures to him. (Tr. 9-10, 14, 15, 42) Mr. Fitzpatrick also warned the claimant that "… further incidents would not be tolerated. If another incident occurs, disciplinary action would be taken to a higher level…" (Exhibit 2)

In an unrelated matter, the employer issued a verbal correction action notice to Mr. Blank after a meeting between the claimant, the employer and Dr. Congello. (Tr. 26-27) The claimant was placed on probationary status in mid-April to which he was placed on paid suspension. (Tr. 60-61)

In May of 2008, the claimant's wife and daughter were hospitalized due to an illness similar to his son's illness back in February-March. (Tr. 48, 49, 57-58) Dr. Congello granted the claimant a paid leave of absence (Tr. 52, 58, 60) to care for his family in the hospital due to the mounting stress and distraction he was experiencing. (Tr. 58, 69, 72) In the meantime, while using Dr. Congello's password for accessing work-related medical records (Tr. 59), Mr. Blank gained access to both his wife and daughter's medical records for which he was not a part of the hospital's treatment team, nor were they cardiac patients under his care. (Tr. 28, 50-51, 68, 71) He did not obtain a request form because his last experience with requesting his son's records took over a month. (Tr. 48, 74) However, his wife gave him verbal permission to obtain both her and their daughters medical records. (Tr. 30, 43, 79) Mr. Blank was required to obtain written permission to access any medical information.

When the hospital learned of Mr. Blank's policy violation, the hospital immediately contacted the employer regarding this "very serious" incident that occurred in May. (Tr. 9, 15) The hospital also informed the employer about the March incident and the warning it gave Mr. Blank about violating its confidentiality policy. (Exhibit 2) The employer met with Mr. Blank on June 4th to question him about the accusation. (Tr. 54, 61, 62, 68) The claimant, initially, denied violating the hospital's access policy. However, after continued questioning, he indicated that "[he might have… [he couldn't] remember for sure…" (Tr. 17, 36-37, 38, 68, 77) On June 6th, the employer called the claimant into a meeting wherein the employer terminated Mr. Blank for "[i]nappropriate acts of confidential patient information that his job did not require him to access…," which was a HIPAA violation. (Tr. 2, 18, 21, 25, 46, Exhibit 4)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

> *Misconduct* is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An

employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The employer established that it has a confidentiality policy for which Mr. Blank had knowledge given the employer's unrefuted testimony regarding its annual meetings on the subject (Tr. 9, 14), and based on the claimant's signature of acknowledgement of the same. (Tr. 2, 3, 52, 64, Exhibits 5 & 6) In addition, the claimant admitted having knowledge and understanding of the employer's policies and procedures regarding his employment. (Tr. 2, 3, 52, 64, Exhibits 5 & 6) Although the employer and the hospital have separate policies, the spirit of those policies engulfs the same underlying principles with regard to confidentiality of patients' medical records. Thus, any reasonable person would understand that violating the hospital's confidentiality policy would be the same as violating the employer's policy given the relationship Mr. Blank had with the hospital as a physician's assistant having hospital privileges.

When the claimant accessed his son's electronic medical records in March, hospital personnel (Fitzpatrick and Harle) immediately accosted him regarding his inappropriate action. (Tr. 9-10, 14, 15, 22-23, 42) His argument that Fitzpatrick impliedly authorized him to obtain access is contradicted by the employer's documentary evidence that Fitzpatrick authored, which specifically established that Blank had violated HIPAA; further incidents would not be tolerated; and that any future such action would result in disciplinary action that "… would be taken to a higher level…" (Exhibit 2) If Mr. Blank did not know at the time he accessed his son's records that his job could be in jeopardy, he knew of the precariousness of his action *after* the incident based on his conversation with these two men in March of 2008. His 'privileged' access was limited to cardiology patients under his care and with the 'privileged' use of Dr. Congello's user ID and password. (Tr. 9, 11, 13, 20, 38, 42, 65, 67) By virtue of the fact that Blank was not a member of his son's healthcare team, nor was his son a cardiac patient, Blank went beyond the scope of his employment as a cardiac physician's assistant to access his son's records. (Tr. 41)

Blank's argument that the employer (Mason City Clinic) never warned him about any HIPAA violation lacks merit as the employer did not learn of this misdeed until early June, after the second violation. This renders Mr. Blank's second violation (accessing his wife and daughter's medical records in May without prior written authorization) even more culpable than the March incident. Firstly, Blank was already on notice that such access was prohibited. Secondly, he did so while purportedly on leave, using Dr. Congello's password and user ID, which violated the hospital's policy that forbade accessing your own or family members' information electronically without going through proper procedures, i.e., written request and subsequent authorization. (Tr. 3, 30, 43)
Thirdly, neither his wife nor daughter was a cardiac patient under his care (Tr. 28, 44, 50-51, 68, 71) even though he fervently argues to the contrary. (Tr. 50)

Blank's failure to follow the appropriate protocol undermined the very reason HIPAA's policies are in place. These policies exist not only for confidentiality purposes, but for security reasons as well. (Tr. 66) It was not unreasonable for the hospital to expect strict adherence to its policy with regard to its electronic system, which "allows inputs, records [that] could be theoretically changed… you just can't let anybody wander around…" (Tr. 66) It was incumbent upon the claimant to follow the proper procedures, i.e., obtain written permission or discuss his family's health with their attending physicians.

His failure to follow protocol the second time, after being warned was a blatant disregard for the employer's interests.

"Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985). Good faith under this standard is not determined by the Petitioner's subjective understanding. Good faith is measured by an objective standard of reasonableness. "The key question is what a reasonable person would have believed under the circumstances." Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988); accord O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993) (objective good faith is test in quits for good cause).

Given the claimant's initial denial of violating the policy, coupled with his subsequent concession and rationale for why he failed to follow protocol, we find his conflicting testimony diminishes his credibility. Mr. Blank admittedly knew he could have problems with his employment when he accessed his wife and daughter's electronic medical records presumably based on his prior warning in March. (Tr. 68-69) Even his wife admitted the questionability of her husband's actions when she testified that she could see how employer may have considered Mr. Blank's accessing of the family medical records in May of 2008 as a policy violation. (Tr. 80) Mr. Blank testified that he knew his action was against policy, but he believed he was doing the right thing and offers, essentially, the argument that for expediency's sake, he forewent the proper procedures. (Tr. 73, 78) Unfortunately, his end does not justify the means. This final act was a willful and intentional disregard of the hospital's directive, which had serious implications for his continued employment with Mason City Clinic.

Blank's argument that the employer never warned him or followed progressive disciplinary measures has some merit; however, the court in Diggs v. Employment Appeal Board, 478 N.W.2d 432, 434 Iowa App. 1991) (citing Henry, 391 N.W.2d at 736) held that "In order to be disqualified from benefits for a single incident of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the employer has a right to expect of employees." . Further, "[w]illfull misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." Pierce v. Iowa Department of Job Service, 425 N.W.2d 679, 680 (Iowa 1988) (citing Myers, 373 N.W.2d 507, 510(Iowa App. 1985). "However, an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause." Id. (citing Woods v. Iowa Dept. of Job Service, 327 N.W.2d 768, 771 (Iowa App. 1982).

The employer established Mr. Blank's misconduct in this case. The claimant was admittedly and understandably under duress over his family's illness, however, given his past warning and his admission, he understood full well what the ramifications of his action would be. His argument that he forgot that he was using Congello's password is not credible given his admission. (Tr. 50, 63, 69) And while Mr. Blank and his legal representative are correct in that HIPAA does not preclude a parent from accessing their minor child's medical records, the employer provided ample evidence via testimony and documentation of the appropriate protocol Mr. Blank needed to follow. Based on this record, we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated August 22, 2008 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

AMG/fnv