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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0563

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 24, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 75557). The employer filed a timely request for hearing. On March 13, 2014 ALJ Hoyer conducted a hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13234, affirming the Department's decision. On April 4, 2013, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer filed a written argument in which it argued that the ALJ misinterpreted the testimony of its witnesses and also offered new evidence to support its contention that claimant was aware of its policy prohibiting personal use of its information systems, including email and internet access. Written Argument at 2, 8. The employer contended that it did not present this new information at hearing because it did not know that claimant's understanding of what its policy meant might be an issue. However, an employer preparing its evidence for a hearing should be reasonably aware that to demonstrate claimant's willful or wantonly negligent violations of its policies, as is required under OAR 471-030-0038(3)(a), it must present at least some evidence to support the conclusion that claimant was aware of the policy and consciously disregarded it. *See* OAR 471-030-0038(1)(c). Because the nature of the evidence it needed to present to establish that claimant was disqualified from benefits was a matter within the employer's reasonable control, its explanation failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). Accordingly, EAB did not consider the new information that the employer offered, and EAB limited its consideration to information received into evidence at the hearing at the hearing. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Lee Built Construction Company employed claimant as a relationship manager from November 13, 2012 until December 4, 2013. Claimant usually worked for the employer

on weekdays from 8:00 a.m. to 5:00 p.m., with one hour off for a lunch break. The employer did not give claimant any rest breaks when she was at work

(2) When claimant was hired, the employer did not have an employee handbook or a comprehensive compendium of its policies. The employer did not have a formal, specific policy stating the extent to which it allowed or did not allow employees to use office email or to use office computers to access the internet for personal purposes during scheduled work time. The atmosphere in the workplace was relaxed. Claimant and other employees were in the habit of exchanging personal emails within the employer's information system, and forwarding items of personal interest to each other. Claimant and other employees accessed the internet for personal reasons or for diversion during the work day when they had some "downtime," including, among other things, viewing videos of all types on Youtube, shopping on the Amazon website, receiving "deals of the day" messages from various websites and accessing sports and general news and information sites. Transcript at 32. In addition to these activities, the employer permitted employees to listen to music during the workday using the Pandora website. Based on the behavior of other employees, claimant understood that the employer allowed the exchange of personal communications between coworkers using the employer's system and allowed access to the internet for personal use so long as it did not interfere with productivity. Claimant became accustomed to writing an internet blog at work for approximately ten to twenty minutes per day, reading other blogs, checking various news sites and, while she worked, listening to music on Youtube or Pandora. Claimant thought she accessed the internet or the employer's email for personal purposes mostly during her lunch breaks or when she would have had rest breaks if the employer had provided them. Claimant thought the amount of work time she spent using the employer's information systems for personal purposes was acceptable to the employer. The employer never told claimant that it thought her personal use of the employer's information systems was excessive or that she needed to restrict her personal use activities.

(3) On November 12, 2013, the employer installed monitoring software on its office computers to track the purposes for which employees used its information systems.

(4) Sometime before November 13, 2013, the employer released its first employee handbook after a year of working on it and distributed it to employees. In a section titled "Privacy," the handbook stated that the employer's information systems included computers, email and the internet and that those systems were "intended for business use," and, although "incidental and occasional non-business use [of those systems] is permitted," that personal use "should not affect individual productivity, harm the Company or otherwise disrupt the workplace." Exhibit 1 at 14. On November 13, 2013, the employer held a meeting to review the entire hand book with all office employees, including claimant. The meeting to introduce the handbook lasted for approximately two hours. The handbook was read verbatim in its entirety, including the "Privacy" section. The "Privacy" section of the hand book was not emphasized particularly, and there were many other sections in the handbook to read. In general, the discussion at the meeting focused on the impact of the handbook on activities in the field. Transcript at 41. The general manager did point out generally, however, that some sections in the handbook were sections of which office employees, like claimant, should be aware. Transcript at 41. At the meeting, the employer did not define what it meant by the type of "incidental" or "occasional" personal use of its information systems that it allowed in the "Privacy" section and did not provide any objective measures or standards for the employees to gauge an acceptable level of personal use. To break the tedium of reading the entire handbook, the employer's presenters joked and tried to interject humor into their meeting presentations when they could. Claimant's main "takeaway" from the meeting was its emphasis on

safety policies and, as it related to use of the employer's information systems, that the employer could monitor employees' activities on their computers. Transcript at 33.

(5) On approximately November 18, 2013, claimant and a coworker were having a conversation with the employer's production manager about various office and personal topics. The production manager commented that she thought that the employer might monitor the office computers for excessive personal use and "everyone needed to pay attention to personal usage of computers." Transcript at 55. On November 21, 2013, claimant signed an acknowledgement that she had received a copy of the employee handbook.

(6) Sometime before December 4, 2013, the employer's general manager suspected claimant and other employees of excessive personal use of the employer's information systems, including office email and the internet. The general manager obtained a report of claimant's activities using those systems from November 22, 2013, the day after she signed the acknowledgement that she had received the new handbook, through December 3, 2013. The activity reports listed the time, duration of the activity and the websites that claimant visited on each day during that period and, when available, the emails that she had received and from whom. Exhibit 1 at 23-96. The criteria the employer used to determine which activities that claimant engaged in during this period were personal use activities were not specified. The employer concluded, based on its determination of what was personal use, that claimant engaged in personal use activities on the following days, as examples: December 3, 2013 for 2.08 hours or 26.11 % of her scheduled work time; on December 2, 2013 for 2.05 hours or 25% of her scheduled work time; and on November 27, 2013 for forty two minutes or 7% of her scheduled work time. Exhibit 1 at 32, 86, 97; Transcript at 12, 24. Overall, between November 22, 2013 through December 2, 2013, the employer concluded that claimant spent 13% of her scheduled work time in using the employer's information systems for personal purposes. Transcript at 25.

(7) On December 4, 2013, the employer discharged claimant for excessive personal use of the employer's information systems during work hours from November 22, 2013 through December 3, 2013.

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. 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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). This burden necessarily includes showing not only that claimant objectively violated the employer's policy but that claimant had the requisite mental state to establish that the violation was willful or wantonly negligent.

The employer's witnesses did not dispute claimant's description of the relaxed workplace attitude about personal use of the employer's information systems before the employer issued its first employee handbook. Although the general manager vigorously stated at hearing and in the employer's written argument that it was the employer's position that, by issuing the handbook and reading it to employees, claimant should have been on notice that all but the most minimal of personal use was prohibited, the matter is not so simple. *See* Transcript at 51; Written Argument at 6. Against the backdrop of the level of personal use to which claimant was accustomed and thought was acceptable before the handbook was issued, a mere reading of the "Privacy" section in the midst of reading many, many other handbook sections would not reasonably have alerted claimant that her previous level of personal use was now prohibited by the employer. The employer did not present any evidence that it took any steps to highlight that it was implementing a new and different expectation for personal use of the employer's information systems. Although the employer argued in its written argument that it "warned" claimant about unacceptable levels of personal use, it did not. Written Argument at 2, 4. What the employer cites as "warnings' were the handbook "Privacy" section, the November 13, 2013 meeting, a rebuke one time from the general manager about claimant's personal cell phone use, and that on November 18, 2013 the production manager mentioned to claimant that the employer was probably monitoring employees' personal use on their computers. Written Argument at 4. This is not evidence that the employer ever "warned" claimant in the usual sense that word is used, by telling claimant that her customary level of personal use was excessive and would lead to disciplinary sanctions if she continued it. The production manager's statement about the employer's likely monitoring of personal use falls far short of telling claimant that the employer now considered her level of personal use excessive, and claimant's failure to change her use behavior in light of this knowledge demonstrates more than anything else that she did not think that the employer would consider her level of personal use unacceptable. Moreover, a cursory review of the activity logs the employer submitted shows that claimant spent a great deal of time each day using the employer's information systems for many discrete tasks and often very rapidly shifted from one task to another task without spending much time on each task. Exhibit 1 at 23-97. Given this pattern, assuming that claimant's personal use was objectively excessive, it is unlikely claimant was aware of the amount of time that she was spending in personal use and, absent clear notice from the employer that she was required to restrict that use, it is unlikely that she knew she was violating the employer's standards. On the facts in this record, the employer did not demonstrate, more likely than not, that claimant had the required mental state to show that she willfully or with wanton negligence violated the employer's standards.

At hearing and in its written argument, the employer contended that the sheer magnitude of claimant's personal use of its information systems, as measured from the activity logs it submitted, was beyond any reasonable definition of acceptable personal use while on work time and, by that magnitude, claimant must have been aware that her personal use was excessive. *See* Transcript at 51; Written Argument at 7. Although certain levels of personal use might be sufficient impute such awareness, we do not consider this argument because the employer's activity logs of claimant's personal use are not sufficiently reliable to establish, more likely than not, the amount of claimant's personal use. For example, the employer did not dispute claimant's contention that certain emails were incorrectly included as personal use in its activity logs because they were from the employer's customers. *See* Transcript at 29; Exhibit 1 at 29 (entries for 14:45, 14:48). The employer did not dispute claimant's contention that she thought it was permitted to listen to music on Youtube because the employer allowed its employee to listen to music at work from the Pandora website. *See* Transcript at 37; Written Argument at 2. However, the employer included various Youtube visits as personal use on the activity logs, and we are unable to determine if,

for particular entries, claimant was using that site to listen to music. In addition, the employer included as personal use on the activity logs some use visits to an apparent offshoot of the Pandora site to listen to holiday music. *See* Exhibit 1 at 85 (entries for 16:46, 16:47). The activity logs that the employer submitted were voluminous, comprising 74 pages presented in a small font and, based on the entries, we cannot independently determine whether many of claimant's use activities were personal use or not. As examples, our review showed entries classified as personal use that were identified only as "Inbox-"Microsoft Outlook" (Exhibit 1 at 23, 34), as "??? Message (HTML)" (Exhibit 1 at 48; 49), as Confirmation Message (HTML)" and "Deleted Items-Microsoft Outlook" (Exhibit 1 at 53), messages from a coworker (Jennifer) with no reference subject (Exhibit 1 at 53), and an email titled "HUGE FAVOR" (Exhibit 1 at 68, 71). Although the employer's production manager contended that he did not include as personal use on the logs any activity that might be "borderline," he did not explain what criteria the employer used to classify certain use as personal use. Transcript at 50. Claimant's unchallenged rebuttal to classifying certain log activities as personal use when they actually were business related raises serious questions about the accuracy of the logs which we cannot independently resolve. The employer did not demonstrate, more likely than not, that its activity logs were an accurate depiction of claimant's personal use of the employer's information systems, or that claimant actually was engaged in the amount of personal use shown on the logs. As such, there was no reliable measure of claimant's personal use for the period November 22, 2013 through December 3, 2013 and it cannot be concluded that her personal use was objectively excessive.

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

DECISION: Hearing Decision 14-UI-13234 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: <u>May 23, 2014</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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.