EO: 300
BYE: 201449

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

043
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0604

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 9, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95007). Claimant filed a timely request for hearing. On March 18, 2014, ALJ Holmes-Swanson conducted a hearing, and on March 26, 2014 issued Hearing Decision 14-UI-13446, affirming the Department's decision. On April 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he repeated some of his hearing testimony and offered new information about why it would be inequitable to disqualify him from benefits. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant also did not show that factors or circumstances beyond his reasonable control prevented him from offering the new information into evidence during the hearing as required by OAR 471-041-0090 (October 29, 2006). Because claimant's written argument did not comply with the applicable regulations, EAB did not consider it when reaching this decision. EAB considered only information received into evidence at the hearing.

FINDINGS OF FACT: (1) Harry-David Operations, Inc. employed claimant from August 6, 2004 until December 20, 2013. Claimant was last employed as an RF coordinator.

(2) The employer expected claimant to refrain from using his company computer for non-business purposes, and to refrain from accessing the internet for non-business purposes. Claimant was aware that he was prohibited him from accessing the internet for non-business purposes during his scheduled work for an unreasonable amount of time. Claimant was also aware that the employer had, on occasion, disciplined his coworkers for personal internet use.

(3) On December 3, 2013, two of claimant's supervisors reported to the employer that claimant was accessing the internet through his work computer to play video games during work hours. The supervisors also reported that claimant was staying at work after scheduled hours and coming into work when he was off on weekends to access the internet to play video games. Based on the reports of claimant's supervisors, the employer investigated claimant's internet use history during the period of November 22, 2013 through December 2, 2013.

(4) The employer's internet use history for claimant's computer excluded all times when claimant was clocked out for lunch on a work day. The internet history included only times when claimant was actively using websites and did not include time when claimant merely failed to shut down a website. The internet use history included only websites that had no relation to the employer's business, including video game sites, weather sites, the Wikipedia general information site, news sites, shopping sites, photography sites, religious sites, banking sites and credit card sites. Exhibit 1 at 7-13. On each of the days shown on the internet use history, claimant was scheduled to work eight hours. The internet history revealed that on November 20, 2013, while clocked in at work, claimant visited four non-business-related and game sites for a total of two hours and one minute. Exhibit 1 at 7. On November 21, 2013, while clocked in at work, claimant visited six non-business related and game sites for a total of one hour and twenty-two minutes. Exhibit 1 at 7. On November 22, 2013, while clocked in at work, claimant visited four non-business related and game sites for a total of fifty-nine minutes. Exhibit 1 at 9. On November 25, 2013, while clocked in at work, claimant visited four non-business related and game sites for a total of one hour and twenty-six minutes. Exhibit 1 at 8. On November 26, 2013, while clocked in at work, claimant visited five non-business related and game sites for a total of one hour and fifty-two minutes. Exhibit 1 at 8. On November 27, 2013, while clocked in at work, claimant visited five non-business related and game sites for a total of one hour and forty minutes. Exhibit 1 at 10. November 28, 2013 was Thanksgiving when claimant did not work. On November 29, 2013, while clocked in at work, claimant visited eight non-business related and game sites for a total of two hours and fifty one minutes. Exhibit 1 at 11. On December 2, 2013, while clocked in at work, claimant visited six non-business related and game sites for a total of two hours. Exhibit 1 at 12. On several of these days, claimant stayed at work to use the internet to play video games after his shift was over. Exhibit 1 at 7-13. Claimant also came in to work on the weekends, when he was off work, and used his work computer to play internet video games for several hours, including two hours and thirty seven minutes on Saturday, November 23, 2013, five hours and twenty three minutes on Sunday, November 24, 2013, three hours and thirty seven minutes on Saturday, November 30, 2013 and one hour and eight minutes on Sunday, December 1, 2013. Exhibit 1 at 8, 11.

(5) On December 10, 2013, the employer met with claimant to discuss the internet use history it had obtained from claimant's computer. Claimant did not deny that the accuracy of the internet use history or contend that he was not the one visiting the websites shown. Claimant told the employer that he was not aware that he was prohibited from using the employer's computers when he was off work. On December 10, 2013, the employer suspended claimant from work.

(6) On December 20, 2013, the employer discharged claimant for using the employer's computer to access internet websites during work hours for non-business related purposes.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. Isolated instances of poor judgment and 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).

Claimant did not contend at hearing that the employer's internet history inaccurately listed the websites that he visited or the times when he visited them. Claimant also did not contend that he accessed the sites shown for a business purpose, or that he was not the person who used his computer to access the sites. Claimant's defense to the employer's allegations was that he thought the employer allowed some personal or recreational use of the internet during work hours and most of his personal use of the internet while at work occurred during his breaks. Transcript at 20, 21, 22. Claimant contended that a vice president of human resources told him "a couple of years ago," just before she left employment, that each employee was "allotted a little bit of time on the internet to use for personal use" and a since-deceased supervisor told him much the same in 2007. The extent to which claimant relied on such supposed statements, however, was seriously undercut when he testified that he was also aware that the employer had in the past disciplined certain of his coworkers "for too much internet usage." Transcript at 21, 22, 24. More likely than not, claimant knew at a minimum that the employer was not willing to tolerate an unreasonable amount of time spent on personal internet use during his scheduled work hours.

Of the eight work days shown in the employer's internet history, the minimum amount of time that claimant spent using the internet for personal purposes on a day was approximately one hour. On four of the days shown, claimant made personal use of the internet during work hours for upwards of one hour. On three of the days shown, claimant used the internet for personal purposes during work hours for upwards of two hours and approaching three hours. Since the internet history excluded claimant's personal internet use during the time that claimant was clocked out for lunch, it is implausible that the time claimant spent in personal internet use could have been occurred during his rest breaks. Although claimant conceded that he "might have gone a little bit over" his allotted break times when made personal use of the internet, the sheer magnitude of his use was such that he reasonably was aware it was consuming far more time than allowed for by his breaks. Also given the magnitude of his personal internet use, claimant was reasonably aware that it was excessive and exceeded any reasonable amount of time that the employer might tolerate as a diversion from work during scheduled work hours. By using the internet for personal purposes repeatedly for between one to almost three hours of work time during an eight hour shift, claimant willfully violated the employer's expectations.

Claimant's use of the internet for personal purposes was not excused from constituting misconduct as an isolated instance of poor judgment. An "isolated instance of poor judgment" is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior and must not exceeded poor judgment by causing, among other things, an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). Here, claimant consciously and willfully used the internet when he was at work for personal purposes on eight separate work days for what was, by any definition, an excessive amount of time diverted from his work tasks. Because claimant's willful violations of the employer's expectations were consistent and repeated during

the work days of November 20 through December 2, 2013, they are not excusable as an isolated instance of poor judgment. Nor was claimant's personal internet use excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). In light of the amount of time that claimant was consistently on the internet for personal purposes, it is implausible that claimant subjectively believed that the employer would condone that level of diversion from his work responsibilities.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-13446 is affirmed.

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

DATE of Service: May 20, 2014

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.