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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-1484-R

Reversed
Disqualification

PROCEDURAL HISTORY: On June 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 152005). Claimant filed a timely request for hearing. On July 24, July 30 and August 25, 2014, ALJ Vincent conducted a hearing, and on September 3, 2014, issued Hearing Decision 14-UI-24462, concluding that the employer discharged claimant, but not for misconduct. On September 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

On September 30, 2014, the EAB issued Appeals Board Decision 2014-EAB-1484, remanding the matter back to the Office of Administrative Hearings (OAH) because of an incomplete record.[1] On January 12, 2012, the Office of Administrative Hearings (OAH) supplemented the record and returned this matter to EAB. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

FINDINGS OF FACT: (1) From December 19, 2011 through May 19, 2014, the state of Oregon employed claimant as a program analyst in the Oregon Housing and Community Services (OHCS)

[1] Marked copies of exhibits 1-3 were missing from the record.

agency. At the time of her discharge, claimant's normal work hours were 8:30 a.m. to 5:00 p.m. Transcript (August 25, 2014) at 45.

(2) The state of Oregon, Department of Administrative Services (DAS) policy 107-004-110 regarding acceptable use of state computer systems by employees provides that "State information, computer systems and devices are provided for business purposes only and information on those systems are the sole property of the State of Oregon, subject to its sole control unless an overriding agreement or contract exists to the contrary." (Exhibit 2, p. 81). The policy also prohibits the use of State computer systems "to intentionally view, download, store, transmit, retrieve any information, communication or material which: is harassing or threatening; is obscene, pornographic or sexually explicit." (Exhibit 2, p. 81). DAS policy does, however, permit state agencies to adopt policies to allow employees limited and incidental personal use of state computer systems "as long as there is no or insignificant cost to the state and such use does not violate these guidelines." (Exhibit 2, p. 83).

(3) DAS policy 50/010/03 regarding discrimination and a harassment free workplace prohibits sexual harassment in the workplace. Sexual harassment is defined as "unwelcome, unwanted, or offensive sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when submitting to such conduct is made a term or condition of an individual's employment, or is used as a basis for an employment decision; or, when "[s]uch conduct is unwelcome, unwanted or offensive and has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." (Exhibit 2, p. 92).

(4) In accordance with DAS policy, OHCS adopted internal policy 80.020.02 that allows employees "incidental personal use of e-mail, the internet, networks or services so long as there is no or insignificant cost to the state and it does not violate the policy." (Exhibit 2, p. 79). The policy lists acceptable incidental uses of state computer systems, including, in pertinent part, the following uses: contacting an employee's family or an employee's child's teachers during lunch periods or rest breaks; responding to emergency phone calls or emails; checking the internet for weather information related to travel to and from the worksite; scheduling medical appointments during lunch periods or rest breaks; notifying employees of agency-sponsored events; and contacting other employees regarding matters such as scheduling lunch. The OHCS policy also states that employees are allowed "[i]ncidental internet use for personal research during breaks or lunch periods, not to exceed 30 minutes per day. This includes checking news services, bank balances, personal e-mail accounts, etc." (Exhibit 2, p. 79)

(4) Claimant knew about and understood DAS and OHCS policies concerning acceptable personal use of the state computer system, and DAS policy concerning sexual harassment.

(5) In the spring of 2014, claimant's co-worker asked claimant to edit a novel she was writing entitled "Stolen Innocence." The first five pages of the novel described, in graphic detail, the rape of the novel's protagonist by her father. On March 23, 2014, at 2:43 p.m., claimant's co-worker sent an email from her state account that included the draft of the novel she was writing. Transcript (August 25, 2014) at 74. Claimant saved this material in a folder entitled "Shelly's book" in her state email inbox. Transcript (August 25, 2014) at 41.

(6) On April 28, 2014, at 3:53 p.m. and 4:55 p.m., claimant sent an email from her state account that contained pages from the co-worker's novel that claimant had edited. The pages claimant edited included the description of the rape of the protagonist by her father. Transcript (August 25, 2014) at 52.

(7) On May 9, 2014, at 4:35 p.m., claimant sent an email from her state account that again contained pages from the co-worker's novel that claimant had edited. Claimant concluded her email with the following statement : "I could have gotten more done if I wasn't interrupted every two seconds. Laters, Baby."[2] Transcript (August 25, 2014) at 59.

(8) After one of claimant's co-worker complained that the novel claimant was editing was offensive, OHCS managers investigated the situation. On May 19, 2014, OHCS discharged claimant because she used

> "State electronic equipment to edit, share and store a novel, which in and of itself violate applicable policies relating to acceptable use of the employer's information technology. In addition, you violated the Discrimination and Harassment-Free Workplace policy because the novel was sexually explicit and inappropriate in the workplace policy by sharing/discussing the novel and its contents with co-workers."

(Exhibit 1, p. 5).

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she used the employer's computer system to edit, share, and store a novel that contained sexually explicit material. According to the employer, claimant's actions violated the employer's policies concerning appropriate personal use of the employer's electronic equipment and sexual harassment in the workplace.

[2] "Laters, Baby" was a reference to "Fifty Shades of Gray," a novel. Transcript (August 25, 2014) at 64.

In regard to the asserted violation of the employer's sexual harassment policy – which prohibits "unwelcome, unwanted or offensive" verbal conduct of a sexual nature -- the employer contended that claimant violated this policy by sharing or discussing sexually explicit material in the novel she was editing with her co-workers. The employer failed to meet its burden of proof to demonstrate that claimant violated its sexual harassment policy, however. The only sharing of sexually explicit material in the record occurred when claimant and her co-worker emailed one another excerpts from the novel the co-worker wrote and claimant edited; this conduct was obviously not unwelcome or offensive to either person. The employer's human resources representative testified that an employee learned about the material in the novel, and complained to the human resources department that she found the material offensive. Claimant testified that she did not discuss the novel with anyone other than its author. Where, as here, the evidence is equally balanced on the issue of claimant's violation of the employer's sexual harassment policy, the uncertainty must be resolved against the employer, who has the burden to prove misconduct.

We turn next to the allegation that claimant's conduct violated the employer's policies regarding acceptable use of its electronic equipment. The applicable policies require use of the employer's computers only for business purposes, permit specific and limited personal use of the employer's computers, and prohibit use of the computers to view, store or transmit "sexually explicit" material. Claimant's actions in storing a co-worker's novel that contained sexually explicit material on the employer's computer system, editing portions of the novel, and emailing the edited material to her co-worker violated these policies. Claimant's use of the employer's computer system to edit the novel did not qualify as any one of the acceptable personal uses of the computer permitted under OHCS internal policy 80.020/002. Her emails to her co-worker involved no personal emergencies, family matters, medical appointments, weather conditions for traveling to and from work, or arrangements with other employees a lunch schedule. Nor did claimant's use of the employer's computer involve "[i]ncidental Internet use for personal research during breaks or lunch period," such as "checking news services, bank balances, personal e-mail accounts, etc." In addition, the material claimant stored in the employer's email system and edited contained sexually explicit material – a description of an incestuous rape.

The ALJ, however, concluded that claimant's conduct resulted from good faith errors and therefore must be excused from misconduct under OAR 471-030-0038(3)(b). The ALJ found that claimant believed she was authorized to use her computer for personal matters during her breaks and lunch periods, and that "accepting the e-mail from [her co-worker], editing the attached document, and sending the edited file back was a permitted incidental use." Hearing Decision 14-UI-24462, p. 3. In addition, the ALJ found that claimant believed that because her co-worker's novel "was a work of literature it could not be sexually explicit or pornographic and therefore did not violate the employer's policies." *Id.* We disagree with the ALJ's conclusion that claimant's actions were based on a good faith but erroneous understanding of the employer's acceptable use policies.

We note that the record of the hearing is devoid of any evidence that claimant considered her co-worker's novel a "work of literature." We also note that during a May 13, 2014 investigatory interview with the employer's human resources representatives, claimant stated that she knew that "some of the content of the [novel] was not acceptable," "knew I shouldn't be doing it [editing the co-worker's novel]," knew she should have said no to her co-worker, and knew "it wasn't right to do." Exhibit 2, p. 69, 71 and 75. Thus, claimant knew that her conduct in regard to her co-worker's novel violated the employer's policies concerning acceptable use of its computer systems, and her conscious decision to

engage in such conduct demonstrated indifference to the consequences of her actions. Claimant's conduct therefore was at best wantonly negligent.

Claimant's conduct cannot be excused as an isolated act of poor judgment. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The record shows that on March 23, claimant received a copy of her co-worker's novel (which claimant did not refuse), and on three occasions – twice on April 28 and once on May 9, 2014 – claimant sent emails to her coworker containing edits to portions of the co-worker's novel. Claimant's exercise of poor judgment was a repeated act and pattern of willful or wantonly negligent behavior that occurred over a period of several weeks, and not a single or infrequent occurrence.

The employer discharged claimant for misconduct, and she is disqualified from the receipt of unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-24462 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: <u>December 29, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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