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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0462

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141328). Claimant filed a timely request for hearing. On March 9, 2015 and March 25, 2015, ALJ S. Lee conducted a hearing, and on April 7, 2015 issued Hearing Decision 15-UI-36401, affirming the Department's decision. On April 22, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Dealer Spike, LLC employed claimant as a customer relations representative from January 2, 2014 through November 14, 2014.

(2) The employer's electronic equipment policy provided that all communications and stored information transmitted, received or contained in the employer's information system, whether work-related or private, belonged to the employer. The policy defined "electronic equipment" to include computers and internet access, and stated that employees who chose to use the employer's equipment for personal reasons did so at their own risk. In any event, the policy prohibited employees from using the equipment for their own gain, or to send messages that could be interpreted as harassing, discriminatory, obscene or defamatory.

(3) The employer provided claimant with a copy of its policy and claimant agreed to follow it. Claimant understood that the employer condoned employees and managers engaging in some personal or non-work-related use of the equipment to communicate as a group about food and holidays, and to complain about or tease coworkers. Claimant also understood that some foul language use was condoned, having observed some managers use foul language while sending messages via the employer's equipment.

(4) In February 2014, claimant entered into a personal relationship with her coworker, Locke. Locke and claimant were initially platonic bandmates, but eventually became intimate roommates.

(5) Between February 2014 and November 2014, claimant exchanged messages with Locke via the employer's electronic equipment on a daily or near-daily basis. The daily aggregate duration of the messages ranged from approximately 20 minutes to as long as 2 hours 46 minutes, which totaled more than a quarter of claimant's work day. The aggregate span of some sessions included[1]:

February 14, 2014:	1 hour 10 minutes
February 27, 2014:	1 hour 30 minutes
February 28, 2014:	2 hours 19 minutes
March 4, 2014:	2 hours 36 minutes
June 4, 2014:	1 hour 36 minutes
June 6, 2014:	1 hour 27 minutes
June 9, 2014:	2 hours 46 minutes
June 10, 2014:	2 hours 43 minutes
July 28, 2014:	2 hours 22 minutes
November 5, 2014:	1 hour 2 minutes

(6) Claimant worked flexible hours and did not have scheduled break periods. Some of the messages may have been sent while claimant was taking a lunch or rest break. Many, if not most, did not, including, for example, an exchange lasting approximately 26 minutes between 5:03 and 5:26 p.m. during which claimant indicated that she was working, an exchange regarding lunch plans that lasted 24 minutes, and an exchange about going to lunch that lasted 31 minutes. Claimant frequently exchanged messages with Locke throughout the day regarding their band, music and rehearsals.

(7) Claimant used the employer's equipment for a period spanning 22 minutes to exchange messages with Locke that concerned Locke's on-duty development of his own business, and spent another 23 minutes on another occasion viewing real estate listings that were not work-related. Exhibit E-6 at 357-358; 447.[2] Claimant used the employer's equipment to send Locke a message that stated "fuck Dealer Spike" on one occasion, and "Dealer Spike = (puke)" on another occasion. Exhibit E-6 at 380, 394.

(8) On February 27, 2014, claimant used the employer's equipment to perform internet searches including a search for "slutty gif," "Slutty+mime," and searches resulting in "a lot of super sluts and O-faces," and searching for sexually suggestive things, and exchanged messages with Locke concerning the searches. Exhibit E-6 at 12.

(9) On February 28, 2014, over a time span of an hour, claimant exchanged the following messages with Locke via the employer's electronic equipment:

[1] The aggregate durations listed are a sampling of some of the longer durations culled from approximately 500 pages of messages claimant exchanged with Locke during her approximately 11 months of employment.

[2] We note that, in reaching this decision, we did not attribute Locke's statements to claimant, and considered them only as evidence of the timing and context under which claimant's statements occurred.

C[3]: I need to find some hard drugs for that shit.
L: haha, i've got you covered. What do you need?
* * *
C: What do you got? I'll take almost anything lol
* * *
L: umm, well. I have some mushrooms and L in my freezer, some sass in my drawer, and i believe there are still a couple MDMA press tabs floating around my room somewhere haha.
C: Sass? lol
C: oh man MDMA sounds wonderful for Tool
C: mushrooms would be awesome, but I want to remember this one
L: Sass is similar to MDMA
L: but without the second M
L: So it's just MDA
L: The second M is a methanphetmine [*sic*]
L: So all the fun, but without the jaw grinding. Still an upper, but not quite as much
C: ohhh I see. that might be perfect. Jordan's jaw doesn't stop grinding for like 15 hours I swear.
L: Well then he should probably stick to Sass. I prefer it personally.
L: It's much easier to wind down at the end of the night. It still makes you feel all trippy/happy/dancy though.
C: PERFECT! That's the one. * * *

Exhibit E-6 at 16. On March 5, 2014, over the span of 55 minutes, claimant exchanged the following messages with Locke:

C: BTW are you still able to offer me goodies for Tool tomorrow?
* * *
L: All of my LSD is gone. * * * I got in to the molly last night after you went home, and shared with the peole [*sic*] partying at my house, so I imagine there isn't much left, but i'm not sure. * * * I still have plenty of oil, and could pick up some sass tonight for the show tomorrow if you guys want it. * * *
C: Haha that is tempting, but we're probably better off buying some sass. How much to I need to get to you?
L: * * * I usually pay $80 a gram . . . [i]t usually runs upwards of $120 . . .
* * *
C: I know for sure we'll take a gram. I think he'll also want some oil so I'll ask
* * *
C: how much for oil?
L: $20 / G
C: shit that's so cheap
* * *
L: haha, so you need to get a tokey tool?

[3] "C" refers to claimant's messages; "L" refers to Locke's messages. Locke's messages are included in the findings for context. The messages were not attributed to claimant, and claimant was not considered responsible for the content of Locke's messages.

C: I might still have one in a box somewhere…. but maybe not…. I'm not entirely motivated to find out….. so I might just buy another…. so yes lol

Exhibit E-6 at 21-23. On March 6, 2014, claimant exchanged the following messages with Locke using the employer's equipment:

L: I managed to get one of the things that you asked for. He was finishing up a batch of oil last night while I was there, and it wasn't ready yet. But he is going to the show with me tonight and I asked him to bring it along. :)
C: Thanks!!! I'm less concerned about getting the oil anyway haha
C: That actually works out nicely- because Jordan handed me cash before I left today, and apparently 80+20=80
* * *
C: sooo how long does it take to kick in? is it the same as molly?
* * *
L: I usually feel it within 15 or 20 minutes. Within 40 it takes over haha.
L: Granted i'm usually drinking with it, I'm sure you'd feel it faster coming from sobriety.
C: That's what I want to hear! Haha that should be perfect then.

Exhibit E-6 at 23-24.

(10) On May 28, 2014, claimant exchanged messages with Locke in which she characterized "pee[ing]" oneself as "kinky stuff." Exhibit E-6 at 309. Locke replied, "I don't think there's anything kinky about peeing yourself," and claimant responded, "Tell that to the asians," and later sent him a message that included reference to "pleasuring her." Exhibit E-6 at 310. On June 20, 2014, Locke directed claimant to view three web pages, including one titled "what-you-need-to-know-about-penis-snatching." Exhibit E-6 at 383. Claimant's response indicated that she viewed the web pages.

(11) During the week prior to November 14, 2014, the employer terminated Locke's employment. While reviewing his computer, the employer learned of the extent and content of the messages claimant exchanged with Locke during business hours and while working. On November 14, 2014, the employer discharged claimant. The employer's cited reasons for discharging claimant included her violations of the employer's electronic equipment policy and an alleged violation of the employer's fraternization policy based upon her relationship with Locke.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ 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.

The employer had an electronic equipment policy that stated the electronic equipment and data that passed through the equipment belonged to the employer, and that employees could not expect privacy while using the equipment. The policy also prohibited the use of the electronic equipment for personal benefit, or to send messages that may be interpreted as harassing, discriminatory, obscene or defamatory. Claimant agreed to adhere to the policy on hire, but violated it during her employment.

Claimant argued that the employer violated the law by keeping record of the messages she exchanged with Locke. Transcript at 33. However, claimant did not show that the Skype account she used was a social media account, nor did she show that the employer accessed the account or requested access to her account using her username or password, and therefore failed to show a law violation occurred.[4] Claimant argued that she had an expectation of privacy. Transcript at 34-35. However, the employer's policy specifically stated that employees did not have an expectation of privacy when using the employer's equipment, defined to include internet service, and engaged in personal use of the equipment at their own risk.

Claimant argued that the employer's company culture included personal use of the electronic equipment, and offered into evidence record of an extended exchange between multiple employees discussing food, teasing a coworker, and complaining about a coworker, and making arrangement for a company-wide event that included foul language and several racially insensitive comments. We agree that the record shows that the employer did not have a zero tolerance policy regarding personal or non-work-related use of the electronic systems. However, the exchange claimant submitted is markedly different from the messages claimant exchanged with Locke, which were exclusively between them, were predominantly personal in nature and did not concern any workplace-related matters like the exchange claimant submitted, and spanned large amounts of time, including at least two exchanges that spanned over a quarter of claimant's work day.

Claimant also argued that her exchanges with Locke did not occur during work time. Given claimant's flexible work and break schedule and the fact that the records the employer submitted did not include time records showing what time claimant worked each day, we agree with claimant that the record does not conclusively establish that each of her exchanges with Locke occurred during work. However, the content of claimant's messages indicates that many did. For example, claimant exchanged messages with Locke over a 26-minute period on February 25, 2014 during which she indicated she was working. Exhibit E-6 at 11. On June 9, 2014, claimant exchanged messages with Locke over a 24 minute period during which they were planning a lunch break. Exhibit E-6 at 348. On October 20, 2014, claimant exchanged messages with Locke for 31 minutes about the lunch break they were about to take. Exhibit E-6 at 480.

The preponderance of the evidence shows that claimant repeatedly violated the employer's electronic equipment policy throughout her employment by using the equipment for extended periods of personal use with content that violated the employer's policy, under circumstances where she knew or should

[4] ORS 657A.330 prohibits employers from requiring or requesting access to employees' personal social media accounts via their usernames and passwords, but does not prohibit an employer from using its own systems to log or monitor employees' use of the employers' electronic equipment.

have known the employer's expectations and demonstrated her indifference to it. For example, claimant consciously spent a significant portion of the vast majority of her work days engaged in exchanging personal messages with Locke, in violation of the employer's policy, including many days when claimant spent over an hour of her work day engaged in personal use of the equipment instead of working, and at least two days when claimant spent over a quarter of her work day engaged in that conduct. Among other things, she used the equipment to make racially charged remarks about "asians," view sexually suggestive websites, help Locke find space for his business, develop the band she and Locke shared, make derogatory statements about the employer's business, and on multiple occasions, to discuss her use or planned use of illegal drugs and arrange drug buys through Locke. Claimant's misuse of the employer's equipment was, at a minimum, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Given the extent and nature of claimant's misuse of the employer's equipment, claimant did not and could not reasonably have believed that the employer would accept or condone her conduct, and her misuse of the employer's equipment was not based on her mistaken belief that the employer would. Therefore, her violations were not the result of a good faith error. For claimant's exercise of poor judgment to be considered an isolated instance, it must have been a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). The record shows that claimant's conduct consisted of repeated instances of poor judgment spanning approximately 11 months. Her conduct was not isolated.

The employer discharged claimant for misconduct based on her repeated violations of the employer's electronic equipment policy throughout her term of employment. She is, therefore, disqualified from receiving unemployment insurance benefits because of her work separation. Having so concluded, we need not, and do not, address the employer's allegation that her violation of the fraternization policy also was misconduct.

DECISION: Hearing Decision 15-UI-36401 is affirmed.

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: <u>June 16, 2015</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 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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