EO: 200
BYE: 201603

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-0961

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125856). Claimant filed a timely request for hearing. On April 3, 2015 and April 6, 2015, ALJ Wipperman conducted a hearing, and on April 16, 2015 issued Hearing Decision 15-UI-36987, affirming the Department's decision. On May 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On June 23, 2015, EAB issued Appeals Board Decision 2015-EAB-0520, reversing Hearing Decision 15-UI-36987 and remanding the matter to the Office of Administrative Hearings for additional proceedings. On July 17, 2015, ALJ R. Davis conducted a hearing and on July 23, 2015, issued Hearing Decision 15-UI-41951, concluding that the employer discharged claimant for misconduct. On August 11, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent it was relevant and based on evidence in the record.

FINDINGS OF FACT: (1) City Sprint, a company that provides delivery and logistics services, employed claimant as its transportation services manager from January 1, 2010 until January 9, 2015. Claimant was a salaried employee who normally worked Monday through Friday, from 8 a.m. to 5:30 p.m. At times, however, the employer required him to work additional hours.

(2) In March 2014, the employer's president and chief executive officer (CEO) reorganized the company so that claimant was no longer supervised by LW.[1] The reorganization was motivated by concerns about an inappropriate relationship between claimant and LW. Claimant was directed to have no direct business dealings with LW; he was told that he should work through his supervisor if he needed to contact LW regarding a business matter. 07/17/15 Transcript at 48-49.

(3) On or about August 25, 2014, the CEO learned that LW believed claimant had been harassing her, although she was unwilling to make a formal complaint about his behavior. In a memorandum dated August 25, 2014, the CEO and claimant's supervisor notified claimant that "[w]e have reason to believe you may be in violation of the company's harassment policy, although there have not been any official accusations and/or complaints brought against you at this time." Exhibit 1 H, at 23. Claimant was warned that failure to comply with the company's harassment policy could result in disciplinary action up to and including discharge. *Id.*

(4) The relationship between claimant and LW did not improve, and LW made a formal complaint to the CEO that claimant had sexually harassed her. By memorandum dated August 27, 2014, the CEO suspended claimant with pay, pending an investigation of his behavior. Exhibit 1 I at 24.

(5) The CEO completed his investigation into claimant's behavior. On September 2, 2014, the CEO met with claimant and gave him a memorandum which directed claimant to have no contact with LW for 30 days. In addition, the CEO instructed claimant that "[a]ll business related matters that might normally involve [LW], including <u>but not limited to</u> payroll, pricing, billing or dispatch problems, and all human resource functions, are to be funneled through your immediate supervisor." Exhibit 1 J at 26; (emphasis in original). Immediately after claimant met with the CEO, he called LW, to thank her for convincing the CEO not to fire him. 07/17/15 Transcript at 64.

(6) After the 30-day period during which claimant was directed to have no contact with LW expired, claimant began communicating with LW on business and personal matters. Claimant often sent LW text messages or spoke with her by telephone during work hours. Although the employer's policy prohibited employees from making personal phone calls or sending personal text messages and emails during work hours, the employer had not strictly enforced this policy.

(7) On December 18, 2014, the CEO sent claimant and other managers an email in which he noted that "[i]t has been brought to my attention there is personal texting emailing, phone calls and social networking being made while on company time. This is a direct violation of company policy and violations of this policy or any other company policy could result in suspension and/or termination. I ask that you handle your personal matters while on break and/or lunch time." Exhibit 1 K at 27. Claimant received this email on December 19, 2015, and notified the CEO and his supervisor that he understood this directive. *Id.* The CEO's directive was motivated, at least in part, by LW's complaints that claimant had been subjecting her to unwanted contact by telephone and text messages.

(8) On December 23, 2014, at approximately 9:15 a.m., the CEO met with claimant and told him that LW had been placed on an indefinite leave of absence to address personal matters. The CEO directed claimant to have no contact with LW during her leave; the CEO acknowledged, however, that he could

[1] "LW" is a pseudonym.

not control what claimant did during non-work hours. 07/17/15 Transcript at 6-7; Exhibit 1 Q at 38. Immediately after he met with the CEO, at 9:17 a.m., claimant sent LW a text message; he then called her at 9:38 a.m. and spoke with her for 59 minutes. Also on December 23, 2014, claimant sent LW a text message at 11:44 a.m.; LW called claimant at 12:06 p.m. and spoke with him for 26 minutes. Exhibit 1 O at 34. All claimant's contacts with LW on December 23 concerned personal matters.

(9) On December 24, 2014, claimant sent LW text messages at 11:51 a.m. and 11:53 a.m. Also on December 24, LW called claimant and they spoke for 98 minutes. Exhibit 1 O at 34. All claimant's contacts with LW on December 24 concerned personal matters.

(10) On December 29, 2014, the CEO suspended claimant, pending an investigation into his personal use of electronic devices during work hours and violation of the CEO's directive to have no contact with LW during her leave. Exhibit 1 P at 37.

(11) On January 9, 2015, the CEO discharged claimant for violating its policy regarding social networking and conducting personal business during work hours, and for violating his oral directive not to contact LW during her leave. Exhibit 1 R at 39.

CONCLUSION AND REASONS: We agree with the ALJ. We 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its policy that prohibited personal use of computers and telephones during work hours, and for violating the CEO's directive to refrain from contacting LW while she was on leave. In regard to the employer's policy regarding personal use of electronic devices at work, claimant asserted that the employer had no clear policy prohibiting such usage. According to claimant, employees regularly sent personal texts, made personal phone calls, and visited personal social networking sites during work hours. The record shows that prior to December 18, 2014, claimant may have been uncertain about the employer's policy regarding personal use of electronic devices. The CEO's December 18 memorandum, which claimant acknowledged he read and understood, clearly informed him that he could only send personal text messages, make personal phone calls, and access personal social media sites during his lunch and rest breaks.

Claimant admitted that he had no business reason to contact LW on December 23 and 24, 2015, and that the text messages he sent and the personal phone calls he made to her were personal in nature. 07/17/15 Transcript at 65. He contended, however, that he made these contacts during his lunch and break times.

According to claimant, he was working many extra hours in December 2014, and "took the time [for breaks] where I got it." 07/17/15 Transcript at 70. Claimant's testimony regarding his work hours was implausible, however. His normal work schedule was 8 a.m. to 5:30 p.m.; he was unable to specify what, if any, additional hours he worked on December 23 and 24, claiming only that he worked almost 24 hours a day during December 2014. 07/17/15 Transcript at 71. When the ALJ questioned claimant about his 59 minute phone call to LW at 9:36 a.m. on December 23, asking whether he was working at the time he made the call, claimant responded:

> "Well that's what I'm saying is that I had no working hours. We were- we were running without a client care manager at the time, and – well I was also trying to fulfill my duties, and we had an extremely an extremely green team so basically I took it where I got it, Your Honor; took the time where I got it." 07/17/15 Transcript at 69.

The ALJ then asked claimant if he believed the employer would not have a problem with this call. Claimant responded that "[c]onsidering the shifts that I was working, and the contribution to the Company, I didn't think he'd had [sic] a problem with it whatsoever." *Id.* Claimant knew as a result of a change in supervisors in March 2014 and a disciplinary suspension in September 2014, that the employer was concerned about his contacts with LW during work hours. He also knew, based on the December 18 memorandum he received, that the employer was strictly enforcing its policy regarding personal use of electronic devices at work. Given these circumstances, we find claimant's contention – that because he was working such long hours that the employer would allow him to take breaks to contact LW whenever he wanted to – extremely improbable. We conclude that more likely than not, claimant knew or should have known that the employer prohibited him from contacting LW on personal matters during work hours and that he violated this prohibition on December 23 and 24, 3015. Claimant's conduct was, at a minimum, a wantonly negligent violation of the employer's expectations.[2]

Claimant's actions cannot be excused as an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). An act is isolated if it is 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)(A). On December 23, 2014, claimant sent LW two text messages and called her once; on December 24, 2014, claimant sent LW two text messages and spoke with her 98 minutes on the telephone. Claimant's contact with LW was therefore not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). For the reasons discussed above, we do not find that claimant could have believed in good faith that the employer would excuse his telephone calls and text messages to LW during work hours on December 23 and 24, 2014.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-41951 is affirmed.

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[2] We also note that on September 2, 2014, when the CEO met with claimant and directed him to have no contact with LW for 30 days, claimant violated this prohibition as soon as the meeting with the CEO ended. Claimant's conduct indicated an apparent belief that the nature of his personal relationship with LW justified his failure to comply with the employer's directives.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 21, 2015

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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