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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
2016-EAB-0423

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140306). Claimant filed a timely request for hearing. On March 2, 2016 and March 16, 2016, ALJ R. Frank conducted a hearing, and on March 24, 2016 issued Hearing Decision 16-UI-55768, concluding claimant's discharge was not for misconduct. On April 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Spirit Mountain Gaming, Inc. employed claimant as a call center customer service representative from October 8, 2013 to December 29, 2015.

(2) During work hours on December 5, 2015, claimant viewed an internet image captioned "I Found the guy that cleans the leather sofa after filming a porno (NSFW no nudity). His name is the Goblin."[1] Exhibit 1, E-11. The image was from a website that prohibited the display of nudity, pornography or depictions of sexual activity. It depicted an obese man in a motorized wheelchair wiping a sofa with a cloth, and some people in the background. The image did not include nudity or display sexual acts. Claimant showed the image to coworkers and sent the image from his personal phone to a coworker's Facebook account. Before showing the image to some coworkers, claimant warned them they might consider it "inappropriate." Exhibit 1, E-13.

[1] "NSFW" is an abbreviation commonly used on the internet meaning "not safe for work" or "not suitable for work".

(3) Claimant had observed that it was common for coworkers to engage in personal use of their phones, the internet and social media while at work. Claimant and some coworkers shared their social media websites with each other and communicated outside of work. Claimant had also observed a workplace culture in which some coworkers had photos of shirtless men at their workstations. The employer engaged a troupe of exotic male dancers to perform at its entertainment venue and promoted that event. Claimant thought the image he shared with coworkers was funny, did not think it was offensive or pornographic, and did not think he was violating the employer's policies by sharing it with coworkers from his personal device.

(4) The employer later learned that claimant had accessed and shared the image at work and investigated. The employer's marketing manager considered the image "pornographic in nature." Exhibit 1, E-11. He interviewed claimant about the image and his other personal use of the internet during work, and claimant said he thought the image was "funny but not inappropriate nor offensive." Exhibit 1, E-2. The employer interviewed three coworkers, each of whom said that claimant had given them "fair warning" that the image was "inappropriate." Exhibit 1, E-2. The employer concluded that claimant had been dishonest for stating during the interview that the image was not inappropriate.

(5) On December 29, 2015, the employer discharged claimant for violating policies prohibiting personal use of the internet, acting in an undignified manner, being disrespectful to coworkers and being dishonest.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that 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.

According to the employer's separation statement, the employer discharged claimant, in part, based on his personal use of the internet. In the final incident, involving claimant's December 5, 2015 display of an image the marketing manager considered "pornographic," claimant used his personal cell phone while taking a break from work, and forwarded the image to a coworker's personal social media account. The record fails to show whether the employer had wi-fi available or that claimant used it to access the internet on his personal cell phone, and fails to show that the employer prohibited claimant's use of his own device on a break. Regardless, the preponderance of the evidence shows that the employer did not strictly prohibit personal use of the internet. Claimant and coworkers agreed that some internet use was allowed. *See* Exhibit 2. Regarding claimant's coworker's use of the internet to access the image claimant sent to him, claimant cannot be held responsible for any decision on his coworker's part to use the employer's equipment or internet connections to access the image claimant forwarded to him.

The employer also discharged claimant, in part, for acting in an undignified manner and being disrespectful to coworkers. The employer did not specify what it was about claimant's acts that violated the employer's expectations that he act with dignity and respect, but from the context we infer that it was claimant's decision to access and share the image on December 5th. Although the image's caption included the word "porno" and the employer's marketing manager considered the image "pornographic" in nature, "pornography" is generally defined to include depictions of "erotic behavior" intended to "cause sexual excitement" or "arouse a quick intense emotional reaction."[2] In this instance, the image claimant displayed and shared did not depict erotic behavior, nudity or sexual acts, and the intent of the image was not to cause sexual excitement or an intense emotional reaction in the viewer. It appears most likely that intent of the image, and claimant's intent in sharing it with coworkers, was to cause a humorous response in the viewer. The employer's policy defining respect did not prohibit specific behaviors, and it does not appear that claimant's decision to share the image violated the terms of the policy. *See* Exhibit 1, E-7. For purposes of the hearing under review, the employer did not define what it considered to be dignified; however, it appears unlikely that trying to evoke a humorous response from coworkers would, as a matter of common sense, violate such an expectation. To the extent that claimant misjudged the employer's expectations or his coworkers' response to the image, he did not do so willfully or with conscious indifference to the consequences of his conduct.

Finally, the employer discharged claimant after concluding he was dishonest when denying that the image he showed to coworkers was "inappropriate." Claimant felt the image was funny and, subjectively, did not feel that it was inappropriate to share it with coworkers. Claimant warned some coworkers that they might consider the image "inappropriate" or offensive before showing it to them, but, when questioned by management about the image, generally denied having sent or showed inappropriate content during work and, regarding the image at issue, reported that he thought the image was funny. Whether or not something is "inappropriate" is contextual. Something is inappropriate if it is not suited for some purpose or situation.[3] On this record, claimant had shared the image with a consenting coworker who laughed about it, then showed other coworkers the image upon their request and with their consent. In that context, the fact that claimant gave coworkers "fair warning" that they might consider an image inappropriate does not mean that claimant himself felt the image was inappropriate, or that showing the image to coworkers was inappropriate once they consented to see it, or that he was lying when he denied that it was inappropriate. The fact that claimant made an after-the-fact acknowledgment to the employer that the image was inappropriate during a potentially disciplinary interview about the image does not change the fact that, at the time he showed the image to his coworkers, he did not think it was inappropriate to do so.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-55768 is affirmed.

J. S. Cromwell and D. P. Hettle;

[2] *See* www.meriam-webster.com/dictionary/pornography

[3] *See* www.meriam-webster.com/dictionary/inappropriate

Susan Rossiter, not participating.

DATE of Service: May 10, 2016

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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