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BYE: 201717

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
2016-EAB-0866

Reversed
Disqualification

PROCEDURAL HISTORY: On June 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113049). Claimant filed a timely request for hearing. On July 1, 2016, ALJ Frank conducted a hearing that was continued on July 19, 2016, and on July 22, 2016 issued Hearing Decision 16-UI-64311, reversing the Department's decision. On July 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered new information not presented during the hearing. The employer did not show that factors or circumstances beyond its reasonable control prevented it from offering the information at the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information the employer sought to present when reaching this decision.

EAB considered claimant's written argument when reaching this decision. In claimant's written argument, she requested that EAB remand this matter for testimony from a witness on her behalf that the ALJ did not call to substantiate aspects of her testimony. EAB denies claimant's request, principally because claimant conceded the facts on which its decision rests.

FINDINGS OF FACT: (1) Pain Management Northwest, Inc. employed claimant as a medical assistant until she was discharged on August 4, 2014. On December 2, 2014, the employer re-hired claimant and employed her until May 4, 2016

(2) During work, the employer expected claimant to limit her use of the employer's computers, the internet and the employer's email "mainly to clinic-related business." Exhibit 1 at 67. Although the

employer allowed "incidental personal use of that technology," it expected personal use would be "limited to lunch or meal breaks." *Id.* Claimant understood the employer allowed her to use its computers and email for personal purposes only during her lunch time and break times. Transcript at 40.

(3) On August 3, 2015, claimant sent a file to her sister using the employer's computer during work hours. This transmission was for personal purposes. Claimant was not on break. Transcript at 57-58; Exhibit 2 at 3. On September 3, 2015, claimant sent an email to two coworkers during work hours using the employer's computer. The email mentioned a comment made about a food party. This transmission was for personal purposes and claimant was not on break. Exhibit 2 at 3. On September 15, 2015, claimant sent her boyfriend a link using the employer's computer during work hours. The transmission was for personal purposes and claimant was not on break. Exhibit 2 at 3.

(4) On October 20, 2015, claimant sent a link to a coworker using the employer's computer during work hours. This transmission was in response to the coworker's inquiry and it was for personal purposes. Exhibit 2 at 3. On November 17, 2015, claimant forwarded a rental application to herself at her personal email account using the employer's computer during work hours. This transmission was for personal purposes and claimant was not on break. Exhibit 2 at 3; Transcript at 57. On December 9, 2015, claimant sent an email to two coworkers inquiring about their plans for lunch that day using the employer's computer during work hours. This transmission was for personal purposes and claimant was not on a break. Exhibit 2 at 3.

(5) On April 5, 2016, claimant and a coworker used the employer's computers to exchange emails discussing how hungry they were, the menu selections at a restaurant and claimant sent an image of a sandwich to the coworker. Exhibit 1 at 8, 9. This transmission was during work hours, was for personal purposes and claimant was not on break. Exhibit 2 at 4. On April 7, 2016, claimant and a coworker used the employer's computers during work hours to exchange emails discussing what they wanted to eat for lunch and where they wanted to eat it. Exhibit 1 at 6, 7. This transmission was for personal purposes and claimant was not on break.

(6) Sometime in approximately April 2016, the employer was having new software installed on its computers and, as a result, the employer obtained the passwords of its employees. The employer conducted an audit of its employees' use of its computers and discovered several instances of personal use by claimant and others when they were not on break. The two coworkers with whom claimant exchanged personal emails were issued disciplinary warnings for their personal use of the employer's computers since they had no significant disciplinary histories. Due to claimant's disciplinary history, which included a previous discharge by the employer, the employer decided to discharge claimant again, this time for personal use of the employer's computer during work hours while not on break.

(7) On May 4, 2016, the employer discharged claimant.

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(30(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 16-UI-64311, the ALJ concluded the employer did not demonstrate that it discharged claimant for misconduct. The ALJ reasoned that the employer did not show that "claimant's personal use of the company network was excessive opposed to incidental, as specified by the [employer's] policy." Hearing Decision 16-UI-64311 at 4. The ALJ further reasoned that because two of her coworkers were exchanging personal emails with her, "claimant more than likely considered the conduct condoned, or a good faith error." Hearing Decision 16-UI-64311 at 4. We disagree.

The ALJ's interpretation of the employer's prohibition against personal use of its computers is not consistent with the language of the policy or claimant's understanding of it. The policy does not allow all personal use so long as it is "not excessive" but, fairly read, limits the personal use it allows to times when the employee is on meal or rest breaks. Claimant also understood the employer's policy to limit non-prohibited personal computer use to meal and rest breaks. Transcript at 40. The ALJ applied an incorrect standard in determining that claimant did not violate the employer's expectations. As well, there is no evidence in the record supporting the ALJ's conclusion that because two coworkers occasionally sent claimant personal emails when they were not on break, claimant believed the *employer* authorized any personal use of its computers during work time. In fact, claimant was quite clear about how she understood the employer's policy and, given the clarity of that understanding, any contention that the coworkers' actions led her to misunderstand the scope of the employer's prohibition would be implausible. Transcript at 40. While claimant testified she did not think the employer would discharge her for violating its policy against personal use of the employer's computers during work time, there is a significant difference between misunderstanding what is prohibited behavior and misunderstanding the sanction the employer may impose for engaging in prohibited behavior. Transcript at 42. Misconduct may be established even if it did not reasonably occur to claimant that she would be discharged for certain behavior if she knew or reasonably should have known that engaging in that behavior violated the employer's standards. *See* OAR 471-030-0038(3)(a).

Here, claimant conceded she violated her own understanding of the employer's standards by sending some personal emails when she was not on break, both in her testimony and in the summary exhibit she prepared for the hearing. Transcript at 40, 44, 57, 58; Exhibit 2 at 3-4. Although claimant asserted in her written argument that the employer's policy on breaks was so haphazard that it could not be reliably determined if claimant was or was not on break when she sent any of the personal emails, claimant was not apparently confused about whether she was or was not on break when she conceded at hearing that at least some of the emails the employer introduced were sent when she was not on break. Transcript at 40, 44, 57, 58; Exhibit 2 at 3-4. The eight emails we have identified in the findings of fact appear, more likely than not, to have been sent by claimant for personal purposes when she was not on break. By sending emails of this type under these circumstances, claimant violated the employer's expectations with at least wanton negligence.

Claimant's wantonly negligent behavior in sending the personal emails between August 3, 2015 and April 7, 2016 may be excused from constituting misconduct if that behavior was an isolated instance of

poor judgment under OAR 471-030-0038(3)(b). To be considered an excusable as an "isolated instance of poor judgment," claimant's behavior must have been, among other things, 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). In this case, claimant violated the employer's standards with at least wanton negligence at least eight times in an approximately nine month period. Because claimant's wantonly negligent behavior was neither a single nor an infrequent occurrence, it may not be excused as an isolated instance of poor judgment.

Claimant's wantonly negligent behavior also was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Given the clarity with which claimant testified she understood the employer's prohibition, it is implausible she was mistaken about the behavior that the employer prohibited.

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

DECISION: Hearing Decision 16-UI-64311 is set aside, as outlined above.

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

DATE of Service: <u>August 24, 2016</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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