EO: 200
BYE: 201752

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

265
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0335

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80102). Claimant filed a timely request for hearing. On March 8, 2017, ALJ Lohr conducted a hearing, and on March 13, 2017 issued Hearing Decision 17-UI-78726, affirming the Department's decision. On March 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Corillian Corporation employed claimant as a project coordinator from August 8, 2016 to January 3, 2017.

(2) The employer prohibited employees from using company computers to access sexually suggestive or explicit content. The employer's policy was "zero tolerance" because visiting those types of sites exposed the employer's company to "a great risk" of "opening the company up to malware and other things." Transcript at 23. The employer's prohibition did not specify that it only applied to use of company computers during work time or certain hours, just that accessing explicit sites was prohibited. On October 27, 2015, claimant completed an online training course that included that prohibition.

(3)The employer issued claimant a company-owned laptop computer; claimant's supervisor required him to take the computer home with him each day. Beginning September 27, 2016 through December 2016, claimant used his company-issued laptop on at least eight occasions to visit at least eighty websites that displayed sexually explicit or suggestive content. He used the laptop to search for, among other things, a dating website, a site called "chatter bait," websites that offered "free adult webcams, live sex, free sex," "fat threesome, BBW, which is big, beautiful women," "a very well-known porn – pornographic site," and a video chatroom that included "a live webcam site that shows pornographic material." Transcript at 15. During that period, claimant downloaded approximately 40 sexually explicit images to his employer-assigned user account on the company-issued laptop. Claimant was off-duty and at home using his home internet connection each time he accessed those sites.

(4) On December 21, 2016, claimant's company-issued laptop was flagged by a system the employer used to monitor company computers for instances in which they were used to access sexually explicit content. On December 28, 2016, the employer notified claimant that he was being placed on administrative leave and confiscated his company-issued laptop.

(5) The employer investigated the laptop and found evidence that claimant had used it to access sexually explicit internet content on at least eight occasions, including September 27, October 13, October 26, November 1, and December 14, 2016. The employer stopped exporting the images and searches after finding eight instances in which claimant had used the laptop for those purposes, although there was much additional similar content the employer did not export. The employer also found the approximately 40 explicit images downloaded to claimant's account in the laptop's local drive. The employer ruled out that claimant accidentally imported the images and browser history onto the laptop by using his personal google account on it, and determined that the only way the images could have gotten onto the company-issued laptop was by someone using the laptop to access and download them. The employer found no evidence that the computer had been hacked or used by anyone else; when asked, claimant denied that anyone else had access to his company-issued laptop computer.

(6) On January 3, 2017, the employer discharged claimant because he had repeatedly used his company-issued laptop to access pornographic and sexually explicit internet content.

CONCLUSIONS AND REASONS: We agree with 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 connected with work. 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.

Claimant argued that he did not recall reading the policy that prohibited use of company computer equipment to access sexually explicit or pornographic content. Transcript at 26. Claimant's argument, essentially that he should not be held responsible for violating the employer's policy because he did not know about it, is not persuasive. It is common for employers in most, if not all, industries in which employees are charged with using company-issued computers as part of their jobs to prohibit employees from using those computers to access or download pornography or other explicit content. Not only is pornography often, as was the case with this employer, considered in the same category as potentially offensive or demeaning materials, accessing websites containing pornography and sexually explicit images also creates an increased risk to employers of being exposed to malware or other hazards to the employers' computer networks like "viruses" and "Trojans." *See accord* Transcript at 9-10, 17. Claimant, as someone who considered himself "fairly computer savvy" and used computers to perform all of his work, should have understood the employer's expectations and the risks his conduct posed to

the employer as a matter of common sense, and therefore should have known he was not permitted to use the employer's equipment to access pornography even if he was not aware of any specific policy prohibiting him from doing so. *See* Transcript at 28. The employer therefore had the right to expect claimant to refrain from using company-issued computer equipment to access pornographic and sexually explicit materials on the internet as a matter of common sense, regardless whether claimant understood the policy itself. Prior to claimant's October 27, 2016 completion of the employer's online policy review, claimant knew or should have known the employer's expectation as a matter of common sense; after October 27, 2016, claimant knew or should have known the employer's expectation both as a matter of common sense and because he had completed a required training module that required him to read the policy that included the prohibition against accessing pornography on company-issued computer equipment.

There is no dispute that claimant did, in fact, access the websites the employer listed during the hearing. *See* Transcript at 25. Although claimant disputed that he downloaded the explicit images to the laptop, the employer established that it is more likely than not that he did, and that he did so intentionally, and that the employer had specifically ruled out the possibility that any sort of accidental download or importing of the type claimant to which claimant alluded had caused the downloads to appear on claimant's company-issued laptop. Claimant argued, nonetheless, that his discharge was for misconduct because he only accessed the websites the employer listed at home, off-duty, using his home internet connection. Transcript at 25-26. Work-connected misconduct is misconduct that has a tendency to affect the work, however, and it need not occur on company time in order to constitute disqualifying misconduct for the purposes of denying unemployment benefits. Claimant's off-duty conduct in this case was work-connected because he used his company-issued laptop to engage in the conduct, he downloaded images to that same laptop, and, by doing so, exposed the employer to the potentially offensive and demeaning images themselves as well as an unacceptable "great risk" of exposure to "malware," "viruses" and "Trojans" for the employer's network and business. Claimant's conduct, although it occurring off-duty, was work-connected.

The evidence shows that it is more likely than not that between September 27, 2016 and December 14, 2016, claimant visited at least eighty pornographic or sexually explicit websites on at least eight different occasions and downloaded approximately 40 pornographic or sexually explicit images, all while using his company-issued laptop. Claimant's conduct constituted willful or wantonly negligent violations of the standards of behavior the employer had the right to expect of him. His conduct cannot be excused as an isolated instance of poor judgment because it involved repeated willful or wantonly negligent exercises of poor judgment over a protracted period of time, all while claimant was conscious of his conduct and, for reasons already explained, knew or should have known his conduct would violate the employer's expectations.[1] His conduct cannot be excused as a good faith error because he neither sincerely believed nor had any factual basis for believing that the employer considered that type of conduct acceptable.[2]

[1] Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct. In order to be considered an isolated instance, however, the individual must only have engaged in a single or infrequent exercise of poor judgment, and not, as happened here, repeated willful or wantonly negligent exercises of poor judgment. *See* OAR 471-030-0038(1)(d).

[2] Under OAR 471-030-0038(3)(b), good faith errors are not misconduct. In order to be considered a good faith error, however, claimant must have sincerely believed his conduct was consistent with the employer's expectations, or have reason

The employer therefore discharged claimant for engaging in work-connected misconduct. Claimant is disqualified from receiving unemployment benefits because of his work separation until he requalifies for benefits under Employment Department law.

DECISION: Hearing Decision 17-UI-78726 is affirmed.

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

DATE of Service: April 3, 2017

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

to believe that the employer would condone his conduct; there is no evidence in this case, however, to suggest that claimant acted in good faith when he repeatedly used the employer's computer equipment to access and download pornography.