

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0365

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151027). Claimant filed a timely request for hearing. On February 8 and 17, 2017 and March 6 and 9, 2017, ALJ Seideman conducted a hearing, and on March 10, 2017 issued Hearing Decision 17-UI-78659, affirming the Department’s decision. On March 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Columbia Care Services, Inc. employed claimant from April 4, 2016 until November 29, 2016 as a resident assistant at a mental health residential treatment facility.

(2) The employer permitted employees to use its computers for personal email and internet use during “employee non-work time.” Exhibit 1 at 2.

(3) On November 23, 2016, claimant worked from 7:30 a.m. until 4:30 p.m. Claimant had a 30-minute lunch, two breaks, assisted a client on an outing from noon to 2:00 p.m., and had an in-person meeting with a client for 2.5 hours during her shift. Claimant used the employer’s computer to complete billing, her communication log, and work email on November 23.

(4) Staff reported to the employer’s administrator that, on November 23, claimant spent “80 percent” of her shift on the computer and did not engage with the residents other than for one two-hour period. Transcript at 6. The administrator obtained a report from its information technology department that showed that multiple shopping and job search websites had been accessed between 7:30 a.m. and 6:00 p.m. on November 23 from the computer claimant used during her shift. The report did not show how long the internet user remained at each site, or who was using the computer at those times because employees do not have individual passwords. Claimant used the employer’s computer for work and, during her breaks and lunch, for personal use on November 23. Nobody other than claimant saw what was on the screen while claimant was using the computer.

(5) On November 29, 2016, the employer discharged claimant for allegedly shopping online during most of her shift on November 23, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 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.

The ALJ implicitly found the employer's witnesses' testimony credible and relied upon it to support the conclusions that claimant attended a meeting when she and other employees were warned about internet use,¹ and that she was "on the computer most of the day" and "was hiding what she was doing"² on November 23, 2016. Based on those findings, the ALJ determined that the employer discharged claimant for misconduct because her violation was a willful disregard of the employer's internet policy and was not an isolated instance of poor judgment because it was of "such a large nature" that it made a continuing employment relationship impossible.³ The ALJ did not give equal weight to claimant's evidence denying some of the employer's evidence. 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). We disagree that the employer's evidence was sufficiently reliable to show, by a preponderance of the evidence, that claimant willfully or wantonly violated a known expectation that she refrain from using the employer's computer for personal use other than during her breaks or lunch.

The employer's internet policy did not prohibit employees from using the employer's computers to access the internet for personal use, but limited personal use to non-work time. The employer's computer records showed that someone used one of the employer's computers to visit store, bank and job search websites beginning at 7:30 a.m. and continuing after claimant left work at 3:30 p.m., until 6:00 p.m. First, claimant provided evidence that showed that the employer's list of internet searches may have been inaccurate because it contained portions that were duplicated in the list, thus making the list of sites visited appear longer. Transcript at 76, 85-86. Nobody other than claimant saw the computer screen while claimant was working. Claimant testified from firsthand knowledge that she accessed a credit card site and shopping sites only during her breaks and lunch on November 23.

¹ Hearing Decision 17-UI-78659 at 2.

² *Id.* at 3.

³ *Id.* at 4.

Transcript at 41. Because the employer's computer records do not show the duration of a user's visit to a website, it does not show claimant's internet use extended past the end of her breaks or lunch. Also, because all the employees used the same internet password, no specific internet use could be linked to claimant. Moreover, because the improper searches continued after claimant left work, the computer records show that someone other than claimant conducted impermissible internet searches. The employer's report regarding the internet usage on November 28 was provided by the employer's internet technology department and was taken from one computer. The employer argued that the report showed claimant, and not another employee, engaged in the improper internet usage because she used the subject computer for most of her shift. Transcript at 110. However, claimant did not use the computer from noon to 2:00 p.m., or during a separate 2.5 hour meeting. When using the computer, claimant performed work duties, including billing, work email and her communication log. Claimant's testimony about her activities on November 23 was from her firsthand knowledge and supported by her billing records and was thus at least as reliable as the employer's evidence about claimant's activities. *See* Transcript at 27, 40.

We find the evidence as to whether claimant accessed the internet for personal reasons during non-break work time, at best, equally balanced regarding November 23. Absent a preponderance of evidence showing that claimant engaged in personal use of the internet other than during her breaks and lunch, the employer failed to establish that claimant violated its expectations in that regard. We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 17-UI-78659 is set aside, as outlined above.⁴

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

DATE of Service: April 21, 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.

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⁴ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.