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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-0827

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 26 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 14226). The employer filed a timely request for hearing. On June 26, 2015, ALJ Wyatt conducted a hearing, and on July 2, 2015 issued Hearing Decision 15-UI-41078, affirming the Department's decision. On July 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Camelot Theater Company employed claimant as an office manager from October 9, 2012 until April 14, 2015. The employer operated a community theater and produced several shows each year.

(2) Before November 2014, claimant's duties had expanded to include responsibilities for the day to day operations of the theater. By November 2014, the theater had experienced growth and its operations had become more complicated. In November 2014, the employer hired a paid executive director to oversee theater operations. Claimant reported to the new executive director. The executive director disliked what he perceived as claimant's failure to accept his oversight over the theater's operations and the standards he announced for the theater's operations.

(3) In January 2015, the employer approved a work schedule for claimant in which she started work at 10:00 a.m. on Tuesdays, Wednesdays, Fridays and Saturdays and at 11:00 a.m. on Thursdays. The employer expected claimant to report on time for work, to perform reasonably satisfactory work and to refrain from behaviors that unreasonably jeopardized the theater's relationship with its sponsors and donors. Claimant understood the employer's expectations as a matter of common sense.

(4) On April 2, 2015, the executive director met with claimant to discuss her work during his tenure and issued a written warning to claimant for unsatisfactory work performance. Exhibit 2 at 5. The warning stated, among other things, that claimant was consistently late in starting work, that claimant made an error in ordering playbills that resulted in the employer incurring an expense for unused playbills, that

claimant had "inappropriate and unprofessional communications" with two sponsors, Yogurt Hut and Stars & Dreams, that resulted in the theater's loss of their sponsorships and that claimant was "difficult" and quarrelsome" at work and had created an "adversarial work environment." Exhibit 2 at 5. The warning stated that the executive director would meet with claimant at 10:00 a.m. every Tuesday to discuss whether her work had improved. Exhibit 2 at 6. The warning advised claimant that if she failed to show "immediate and sustained improvement" in her performance, she was subject to further disciplinary actions, up to and including discharge. Exhibit 2 at 5.

(5) On Tuesday, April 6, 2015 and Tuesday April 13, 2015, claimant was not in the theater at 10:00 a.m. for her meeting with the executive director. Claimant was away from the theater at that time picking up the employer's mail at the local post office.

(6) On April 12, 2015, the employer learned that claimant had mistakenly ordered from a printer 280 8.5" x 11" and 10 8.5" x 14" posters to promote the theater's production of "Arsenic and Old Lace" when she should have ordered 10 8.5" x 11" and 280 8.5" x 14" posters.

(7) On April 12 or 13, 2015, the executive director spoke with the owner of Stars & Dreams, the sponsor mentioned in the April 2, 2015 warning. The owner told the executive director that claimant had said to him that she did not like the bakery goods that Stars & Stripes was donating to the theater for resale, that the goods were not selling, and that if Stars & Dreams did not improve the quality of its donated goods, claimant was going to purchase replacement goods at a local store. Claimant had actually told the owner, in response to a question about the sales of the donated items, that they were not selling well. Transcript at 50. When the owner told claimant that Stars & Dreams had difficulty donating the volume of bakery goods it was committed to supplying the theater, claimant told the owner not to worry and if Stars & Dreams was unable to provide the required goods, the theater could purchase additional goods at a local store. Transcript at 50-51.

(8) On April 12 or 13, 2015, claimant closed her office door when she was at work and the executive director perceived that she was "surly" when spoken to that day. Transcript at 31. The owner thought that claimant closed her door to disguise the fact that she was working on a document to reply to the April 2, 2015 warning. Transcript at 32. Claimant actually closed her door to reduce the office noise while she worked on the program for the theater's production of "Arsenic and Old Lace." Transcript at 45. Claimant did not compose the rebuttal document during work hours, but on her own time when she was away from work. All claimant did at work with the rebuttal document was to transfer the already prepared document from a thumb drive to allow her to attach it as a pdf file to an email to the executive director, which she sent on April 13, 2015.

(9) On April 14, 2015, the employer discharged claimant for failing to improve her work performance after she received the April 2, 2015 warning, including her alleged continued tardiness in reporting for work, the manner in which the employer discovered that she had communicated to the owner of Stars & Dreams, her continued hostility at work and the error she made in ordering the posters for the production of "Arsenic and Old Lace." Transcript at 33.

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

During the hearing, the employer's witnesses testified at length about the events underlying warning issued to claimant on April 2, 2015. Transcript at 9-18, 36-39. However, claimant was not discharged on April 2, 2915 for those events, and the testimony of the employer's witnesses was that claimant was discharged on April 14, 2015 for her failure to show improvement in the areas outlined by the April 2, 2014 warning. Transcript at 33. 43. The focus of our analysis to determine whether the employer discharged claimant for misconduct is claimant's behavior between April 2, 2015 and April 14, 2015.

With respect to claimant's continued tardiness in reporting for work after April 2, 2015, the employer's witness, the executive director, was only able to state with specificity that claimant was not on time for her 10:00 a.m. weekly meetings with him on Tuesday, April 7, 2015 and Tuesday April 14, 2015. Transcript at 30; Exhibit 2 at 6. The executive director did not state how late claimant was or if she arrived in the workplace shortly after her 10:00 a.m. scheduled start time. The executive director's testimony did not rule out claimant's explanation that, although could have reported for work on time, she regularly commenced her workday by arriving at the local post office to pick up the employer's mail at 10:00 a.m. before she proceeded to the theater. Transcript at 53-56. Because the executive director's testimony did not preclude that claimant started her workdays on April 7 and April 14, 2015 by reporting to the post office by 10:00 a.m. to perform the work task of picking up the employer's mail, the employer did not meet its burden to establish that claimant was tardy on either of those days, or on any days between April 2 and April 14, 2015.

With respect to claimant's mistake in the correct numbers of posters in the correct size for the theater's production of "Arsenic and Old Lace," the executive director agreed that it was an "error" and a "detail that [claimant] was not paying attention to." Transcript at 19. Claimant explained her lapse in ordering the correct number of posters as a "human mistake," possibly caused by distractions and interruptions in the workplace. Transcript at 66. EAB has consistently held that a claimant's errors due to inadvertent mistakes, lapses or oversights, without more, do not show the state of mind needed to establish that claimant engaged in willful or wantonly negligent misconduct.[1] On this record, the employer did not

[1] *See Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not willful or wantonly negligent); *Marina V. Berlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not willful wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence clamant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L.*

present sufficient evidence to show that claimant's mistake was willful or wantonly negligent rather than merely due to ordinary negligence. The employer did not meet its burden to show that claimant's error in ordering the posters was misconduct.

With respect to claimant's communications with the owner of Stars & Dreams, the employer also did not meet its burden to demonstrate that they were willful or wantonly negligent violations of the employer's standards. While the owner of Stars & Dreams may have reported to the executive director that he was offended by claimant's statements, as he interpreted them, claimant's account of what she actually said to the owner was plausible, and plausibly could have resulted in the owner's misconstruction of their meaning. Although claimant might have been somewhat less candid with the owner, there was nothing in her statements that made her reasonably aware that they were offensive or that claimant reasonably should have known that they would be interpreted as offensive or that she was jeopardizing the Stars & Dreams continued sponsorship of the theater. The employer did not demonstrate that claimant violated the employer's expectations by her communications with the owner of Stars & Dreams.

With respect to claimant's alleged misuse of work time on April 12 or 13, 2015, the executive director did not know what documents claimant was working on during that work day. While the executive director speculated that claimant was preparing the rebuttal document that work day, he did not present any information that supported his speculation, such as, for example, that he saw what claimant was typing. Transcript at 32. The executive director did not dispute claimant's testimony that she was, in fact, preparing the program for "Arsenic and Old Lace" on that day. Transcript at 45. The employer did not establish, more likely than not, that claimant misused work time on April 12 or 13, 2015. The executive director also contended that claimant's behavior in the theater on April 12 or 13, 2015 violated the employer's expectations because it was "real surly." Transcript at 31. Absent specific evidence about what claimant did or said to evidence this "surliness," it cannot be concluded that claimant's behavior that day reasonably violated the employer's expectations about reasonably appropriate workplace behavior. The employer did not meet is burden to show that claimant's workplace activities or her workplace behavior on April 12 or 13, 2015 was a willful or a wantonly negligent violation of the employer's reasonable standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-41078 is affirmed.

Rutschman (Employment Appeals Board, 10-AB-1155, May 14, 2010 (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).

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

DATE of Service: August 25, 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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