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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-1089

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125601). Claimant filed a timely request for hearing. On August 11, 2015, ALJ R. Davis conducted a hearing, and on August 26, 2015 issued Hearing Decision 15-UI-43552, reversing the Department's decision. On September 14, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered a great deal of information not presented at the hearing in support its contention that claimant engaged in misconduct. However, the employer did not explain why it did not present the information at the hearing or otherwise show, as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer offered. EAB considered only information received into evidence during the hearing when reaching this decision.

EVIDENTIARY MATTER: Although Hearing Decision 15-UI-43552 states that the ALJ admitted only Exhibit 1 into the record, a review of the audiotape of the hearing shows that the ALJ actually marked four groups of documents as exhibits for identification and admitted into the record the documents comprising Exhibits 1, 3 and 4. Hearing Decision 15-UI-43552 at 1; Audio at ~5:56, ~7:40, ~10:27, ~15:07, ~15:30, ~18:35. Because these exhibits are readily identified from their descriptions at the hearing, EAB has corrected the ALJ's oversight and marked them with the appropriate exhibit numbers. Exhibit 1 includes two pages of phone records, covering the period April 23, 2015 through May 1, 2015, that claimant offered at hearing. Audio at ~5:56. Exhibit 2, which was marked for identification only and which the ALJ did not admit into evidence, includes an administrative complaint, claimant's phone records for the period April 23, 2015 through May 8, 2015, an email and a prescription for medication. Audio at 7:40, ~9:44. Exhibit 3, offered by the employer, includes a chronological summary of claimant's work activities, five pages of emails, handwritten notes titled "Termination Canter," two pages of timecards for claimant, payroll notes, a paycheck stub and seven pages of phone

records for claimant's, the employer's and the executive director's phones. Audio at ~ 10:27, ~12:44, ~15:07. Exhibit 4, offered by claimant, includes a four page summary of claimant's concerns dated April 28, 2015 and five pages of purchase receipts and purchase reimbursement requests. Audio at ~15:30. Any party that objects to EAB's marking these exhibits or to the contents of any of them must submit such objection to this office in writing, setting forth the basis for the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2) (October 29, 2006). Unless such objection is received and sustained, Exhibits 1, 3 and 4, as described above, will remain in the record.

FINDINGS OF FACT: (1) JCHM Habitat for Humanity employed claimant as an office assistant from May 20, 2014 until May 8, 2015.

(2) The employer expected claimant to personally call the executive director before her shift began if she was not going to report for that shift. Claimant understood the employer's expectation.

(3) Sometime in April 2015, claimant was responsible for printing the employer's semi-annual newsletter. Claimant mistakenly printed some of the newsletters in color rather than in black and white. As a result of this mistake, the employer incurred expenses that it otherwise would not have. The newsletter, as printed, also contained several errors.

(4) By April 2015, claimant had become concerned about the expenses for which the executive director sought reimbursement from the employer. Sometime before April 28, 2015, claimant discussed her concerns with the executive director. On April 28, 2015, claimant raised her concerns with the president of the employer's board of directors. Afterward, claimant experienced discomfort in the workplace when the executive director was present. Claimant perceived that the executive director was hostile to her.

(5) Although claimant was allotted five hours of paid time for each day that she worked, claimant often needed to work additional hours. Sometimes, claimant did not record that additional time on her time card. In late April 2015, the executive director told claimant that it was illegal for her to work without pay. The executive director told claimant that she needed to be paid for all time worked and that the executive director had to approve all her work that exceeded five hours on any given day. The executive director then told claimant that she was authorizing her to work up to ten additional hours in the next month, which claimant interpreted to mean in May 2015. On May 1, 2015, claimant worked seven hours, which exceeded her allotted time by two hours. Claimant had not gotten the permission of the executive director in advance because she did not think she needed it since she would not exceed the ten additional hours that the executive director had approved for May 2015.

(6) On May 6, 2015, claimant did not report to work because she was distressed about the executive director's reimbursement requests and thought that the executive director was taking advantage of the employer. Claimant did not contact the executive director to notify her of the absence. Instead, claimant sent emails to the executive committee of the employer's board of directors and to the president of the board in which she stated that she was not comfortable reporting for work that day. Neither one responded to claimant's emails.

(7) On May 8, 2015, the employer discharged claimant for poor work performance, including printing the newsletter in the wrong color, working two hours of additional time without approval on May 1, 2015 and not calling to inform the executive director of her work absence on May 6, 2015.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(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).

The first ground on which the employer discharged claimant was the error she made in printing the employer's newsletter in the wrong color. Transcript at 5, 6, 30-31. Claimant did not deny that she printed some of the newsletters in the wrong color and testified that this happened because she made an "error" and forgot to click the key to remove the printer from its default color setting. Transcript at 19. While claimant's mistake may have caused the employer to incur additional printing costs, it cannot be inferred from this result, alone, that claimant's mistake was caused by her willful or wantonly negligent behavior. To establish that claimant's behavior constituted disqualifying misconduct, the employer must prove, at a minimum, that claimant had the requisite mental state. The employer must show that claimant was conscious of the behavior underlying the alleged misconduct, or in other words, that she was aware of her lapse when it occurred. EAB has consistently held evidence that a claimant made a mistake or an error, alone, is insufficient to establish a willful or wantonly negligent mental state since, by definition, a lapse or mistake is an occurrence of which an individual is not aware at the time it happens.[1] Here, the employer failed to present evidence beyond the fact that an error was made to

[1] *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 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 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. 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);

demonstrate that claimant engaged disqualifying misconduct. Absent such evidence, and in light of EAB's consistent precedent, the employer failed to demonstrate that claimant's error in printing the newsletter was willful or wantonly negligent or otherwise constituted misconduct.

The second ground on which the employer discharged claimant was her failure to obtain the executive director's approval before working two additional hours on May 1, 2015. Transcript at 5. The executive director appeared to concede that up until her conversation with claimant in late April 2015, she had not required claimant to seek such prior authorization. Transcript at 14. While the executive director testified that she told claimant in late April that claimant needed to have her approval before working more than five hours on a particular day, claimant testified that she did not understand the executive director to have stated such a condition. Transcript at 14, 25, 26. When the executive director recounted the details of the late April conversation, she agreed that she specifically told claimant that she could work up to ten hours in excess of her allotted hours in May 2015. Transcript at 35. Claimant's belief – that the executive director approved her to work ten additional hours in May 2015 and that claimant need not obtain advance permission to work these extra hours—was not an unreasonable construction of the executive director's statement. At worst, claimant misunderstood the scope of the executive director's prohibition. Good faith errors are expressly excluded from the definition of misconduct. OAR 471-030-0038(3)(b).

The third ground on which the employer discharged claimant was her failure to call the executive director to report her absence from work on May 6, 2015. Although the employer's evidence on how it communicated this expectation to claimant was not strong, it is assumed for purposes of this decision that it did, and that claimant's behavior in not calling the executive director exhibited an indifference to the employer's standards that was wantonly negligent.

Even if behavior would otherwise constitute misconduct, it is excused from doing so if it was an isolated instance of poor judgment on claimant's part. OAR 471-030-0038(3)(b). To be considered an isolated instance of poor judgment, the behavior at issue must be 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). It also must not have been the type of behavior that, among other things causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, as discussed above, none of the actions for which the employer discharged claimant, other than failing to report her absence on May 1, 2015, involved claimant's willful or wantonly negligent behavior. Both claimant and the employer testified that claimant had never engaged in behavior similar to that on May 6, 2015 by failing to call in to report an absence. Transcript at 13, 23. The employer did not present any evidence of claimant's willful or wantonly negligent violations of its own standards before May 6, 2015. Accordingly, claimant's behavior on May 6, 2015 meets the first requirement to be excused as an isolated instance of poor judgment since it was a single occurrence. Nor did claimant's behavior on May 6, 2015 cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Claimant's reasons for not reporting for work, while violating the employer's standards, were understandable. She was distressed and uncomfortable working in the presence of the

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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).

executive director, against whom she had made serious ethical complaints. Transcript at 21, 22. She did not want to speak to the executive director directly, which she would have needed to do if she reported her absence, but instead sent emails to the executive committee and the board president explaining her reasons for not reporting, and later in the day on May 6, 2015, sent an email to the executive director. Transcript at 22, 23. By claimant's behavior in notifying the employer's management, she showed that she was not acting in a way that was utterly indifferent to the employer's standards or showed a disregard for the employer's interests. On these facts, an employer would have concluded that claimant's absence was due to an ongoing conflict she perceived with the executive director and one about which she thought that the employer was not taking sufficient actions to protect its financial interests. While claimant might have assumed that matters were worse than they actually were, an employer would not have objectively concluded that, as a result of this single day away from work, claimant evidenced behavior that showed it could not trust her in the workplace in the future. Indeed, the reasons that claimant remained way from work showed a serious commitment to the employer's mission and a concern for the employer. Because claimant's behavior on May 6, 2015, while wantonly negligent, was a single event and did not reasonably cause an irreparable breach of trust in the employment relationship, it is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant but did not demonstrate that claimant engaged in disqualifying misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-43552 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: <u>October 7, 2015</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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