

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

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0600**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision #110755). The employer filed a timely request for hearing. On May 9, 2016, ALJ Buckley conducted a hearing at which claimant did not appear, and issued Hearing Decision 16-UI-59221, affirming the Department's decision. On May 29, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching his decision.

**FINDINGS OF FACT:** (1) Asante employed claimant as a certified nursing assistant (CNA) from January 15, 2015 until February 4, 2016.

(2) The employer expected claimant to refrain from falling asleep when assigned to work as a patient safety attendant monitoring psychiatric patients to ensure they did not harm themselves or others. The employer also expected claimant to complete all required recordkeeping during her shift and to follow the instructions of supervisors. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On October 26, 2015, the employer issued a counseling notice to claimant for failing to monitor patients' vital signs on many separate occasions and for "multiple" reports that she had "disappeared" from the unit to which she was assigned, supposedly for breaks or meals, and not complying with the employer's protocol of checking out of the unit when she left. Exhibit 1 at 6. At the coaching meeting regarding this notice, the employer emphasized the importance of monitoring vital signs, keeping correct records, and signing out of the unit to alert other staff that she was gone.

(4) On November 16, 2015, the employer issued to claimant a disciplinary warning for failing to report for a scheduled shift on November 2, 2015 and not notifying the employer about her absence, and failing to attend a scheduled meeting with the employer on November 5, 2015. Claimant told the employer she had forgotten that she worked on November 2, 2015.

(5) On January 6, 2015, claimant asked the charge nurse at approximately 10:00 p.m. if she could leave her shift early. The charge nurse asked claimant if she was current on patient recordkeeping and if she had checked the vital signs of a post-operative patient very recently admitted to the unit and assigned to claimant's care. Claimant told the charge nurse all of those tasks were completed. The charge nurse told claimant she could leave early, but that she needed to sign out when she left. Claimant left work that night and did not sign out. Later that night, the employer checked on the post-operative patient and discovered that claimant had not recorded any vital signs for the patient. The employer also determined that claimant had not completed the most of the patient records she was required to keep that night.

(6) On January 14, 2016, claimant was assigned to work as a patient safety monitor. At approximately 1:00 a.m. a coworker observed claimant sleeping on the job. The coworker awakened claimant. When the employer was able to discuss this incident with claimant, she stated she did not recall it and she did not dispute the accuracy of the coworker's observations of her.

(7) After January 14, 2016, the employer tried to meet with claimant to discuss the incidents on January 6 and 14, 2016. Due to cancellations of several proposed meetings, the employer was not able to meet with claimant until shortly before February 2, 2016. As to the incident on January 6, 2016, claimant stated she thought she had completed all required documentation and tasks. As to the incident on January 14, 2016, claimant stated she did not recall it but did not dispute the accuracy of her coworker's observations.

(8) On February 2, 2016, the employer discharged claimant for her behavior on January 6 and 14, 2016.

**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. 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 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-59221, the ALJ concluded the employer did not show that it discharged claimant for misconduct. The ALJ reasoned that claimant's falling asleep on January 14, 2016 was most likely non-volitional behavior and claimant therefore did not have the state of mind needed to establish a willful or wantonly negligent violation of the employer's standards. Hearing Decision 16-UI-59221 at

3. We agree. The ALJ further reasoned that claimant's assertion to the employer that she thought she had completed all required documentation on January 6, 2016 was sufficient to show that she was not consciously indifferent to the employer's standards, and her behavior on that day was not wantonly negligent. With respect to this incident, we disagree with the ALJ and conclude claimant's behavior constituted misconduct.

It is implausible that claimant thought she had completed all required patient recordkeeping on January 6, 2016, including for the recently admitted post-operative patient, when the employer's witness testified that she had not completed any records for the post-operative patient and her charting for the other patients was far from current. Audio at ~15:30, ~16:22, ~16:56. Although claimant might have overlooked that she had not completed some of the required documentation, it is not likely she would mistakenly believe that her recordkeeping for the post-operative patient was current when she had recorded nothing at all for that patient or that she would mistakenly believe she was largely done with the recordkeeping for other patients when she had recorded almost nothing for them. In addition, claimant did not check out when she left work on January 6, 2016 as the charge nurse had instructed her to do only a short time before, and it is implausible that she innocently forgot those instructions. In both of these particulars, claimant's behavior on January 6, 2016 showed at least a conscious indifference to the employer's standards when she reasonably knew or should have known she probably was violating those standards. Claimant's behavior on January 6, 2016 was wantonly negligent.

While claimant's behavior on January 6, 2016 may have been wantonly negligent, it will be excused from constituting misconduct if it was an isolated instance of poor judgment. Behavior is considered excusable on this ground if, among other things, it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0039(1)(d)(A). Here, claimant's behavior on January 6, 2016 was not isolated since it comprised two separate wantonly negligent acts: the failure to complete record-keeping and the failure to sign out as the charge nurse had instructed. As well, the behavior for which claimant was warned in October 2015 and her multiple "disappearances" from the unit is not the sort of behavior that is inadvertent or about which a person has no conscious awareness. It is inferred that claimant's behavior in violation of the employer's standards in October 2015 was wantonly negligent. Since claimant's wantonly negligent behavior was repeated, her wanton negligent on January 6, 2016 is not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). There is no evidence in this record that claimant sincerely but mistakenly believed that the employer would excuse her from patient record-keeping on January 6, 2016 or from complying with the instructions of the charge nurse. There is insufficient evidence to support that a good faith error gave rise to claimant's behavior on January 6, 2016.

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

**DECISION:** Hearing Decision 16-UI-59221 is reversed as set out above.

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

**DATE of Service: July 8, 2016**

**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](http://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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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