

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0112**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 75803). The employer filed a timely request for hearing. On January 17, 2017, ALJ Frank conducted a hearing, and on January 19, 2017 issued Hearing Decision 17-UI-74975, affirming the Department's decision. On January 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

**FINDINGS OF FACT:** (1) Avord Taylor Inc. employed claimant as a direct support professional from July 18 to November 11, 2016.

(2) The employer expected its direct support professionals to remain awake while on duty. Claimant understood that expectation.

(3) On November 5, 2016, claimant experienced a severe migraine headache while on duty. The only medication readily available was Tylenol PM, a non-prescription pain reliever and sleep aid, which claimant therefore took to treat her headache. At approximately 6:15 a.m., claimant lay down on a couch, closed her eyes and rubbed her temples in an attempt to relieve the headache. Sometime after 6:15 a.m., claimant inadvertently fell asleep until she was awakened by a noise at approximately 6:30 a.m.

(4) The employer discharged claimant for sleeping while on duty on November 5, 2016.

**CONCLUSIONS AND REASONS:** The employer failed to establish that claimant's discharge was for misconduct, and not an isolated instance of poor judgment.

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to remain awake while on duty, and discharged her for violating that expectation on November 5, 2016. In lying down on a couch and closing her eyes after having taken a medication that included a sleep aid, claimant consciously engaged in conduct she knew or should have known would probably result in a violation of the employer's expectations. Claimant's conduct demonstrated indifference to the consequences of her actions, and therefore was wantonly negligent.

However, the employer failed to establish that claimant's conduct on November 5 was misconduct, and not an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment is a single for infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Isolated acts exceed mere poor judgment, and therefore do not fall within the exculpatory provisions of OAR 471-030-0038(3) only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued relationship impossible. OAR 471-030-0038(1)(d)(D).

Here, the employer conceded that claimant had not fallen asleep while on duty on other occasions, and did not assert or show that she had engaged in other willful or wantonly negligent behavior during her brief period of employment. Audio Record at 14:30. Absent such a showing, the employer failed to establish that claimant's exercise of poor judgment on November 5 was not a single occurrence or infrequent occurrence. Claimant's failure to remain awake while on duty did not violate the law and was not tantamount to unlawful conduct. Nor did the employer establish that it create an irreparable breach of trust in the employment relationship, given that claimant took the only readily available medication to treat her severe migraine headache, and the record fails to show she deliberately slept while on duty. Finally, the employer failed to show that claimant's conduct otherwise made a continued employment relationship impossible.

The employer failed to establish that claimant's discharge was for misconduct, and not an isolated instance of poor judgment. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Hearing Decision 17-UI-74975 is affirmed.

Susan Rossiter and D. P. Hettle;

J. S. Cromwell, not participating.

**DATE of Service: February 15, 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](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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