

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0367**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 102802). Claimant filed a timely request for hearing. On March 7, 2017, ALJ M. Davis conducted a hearing, and on March 8, 2017, issued Hearing Decision 17-UI-78407, concluding that the employer discharged claimant, but not for misconduct. On March 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Asante employed claimant from July 7, 2014 until December 14, 2016, last as a referral coordinator.

(2) On August 23, 2016, claimant began a medical leave of absence from the employer; she expected to return to work on October 18, 2017.

(3) On October 11, 2016, the employer granted claimant an extension of her medical leave of absence, with an expected return to work date of November 30, 2016.

(4) Claimant did not return to work on November 30, 2016. On December 4, 2016, she contacted the employer's business manager of outpatient rehabilitation services, (business manager)<sup>1</sup> explaining that her grandson had died, and requesting additional time off. On December 5, 2016, the business manager contacted claimant and said that she was eligible for three days of bereavement leave and that claimant was therefore expected to return to work on December 8, 2016.

(5) On December 6, 2016, the employer's absence management representative contacted claimant and made an appointment on December 7 to discuss claimant's absence from work. Claimant missed the December 7 appointment and never contacted the absence management representative. Exhibit 1, 12/14/16 letter.

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<sup>1</sup> The business manager was the supervisor of claimant's direct supervisor.

(6) By letter dated December 8, 2016, the absence management representative directed claimant to contact her or claimant's direct supervisor by December 13 to discuss claimant's absence from work. In the letter, the absence manager stated that if claimant did not make these contacts, the employer would "assume you no longer wish to keep your position at Asante and you will be administratively terminated." Exhibit 1, 12/14/16 letter.

(7) On December 13, 2016, claimant sent the business manager a text message. The business manager then called claimant, but was unable to speak to claimant and left a voice mail message. Claimant returned the business manager's call; although she was unable to speak to the business manager, she did not leave a voice mail message. Claimant never contacted or attempted to contact the absence management representative or her immediate supervisor.

(8) By letter to claimant dated December 14, 2016, the absence management representative informed claimant that because claimant had not made the contacts she had been directed to make in the December 8 letter, "[a]s of today December 14, 2016 Asante is no longer able to hold your position. Your position with Asante is administratively terminated." Exhibit 1, 12/14/16 letter.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, but not for misconduct.

**Work Separation.** We begin our analysis by considering the nature of claimant's work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

In its December 8, 2016 letter, the employer indicated that it would consider claimant's failure to contact its representatives by December 13 as an indication that claimant no longer wanted to work for the employer. Claimant, however, was willing to continue to work for the employer but was unable to do so because the employer "administratively terminated" her position on December 14. Claimant's work separation was therefore a discharge.

**Discharge.** 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 employer discharged claimant because she did not timely contact its representatives to discuss her absence from work. At the end of November 2016, claimant was unable to return to work after her

medical leave of absence because of a family emergency – the death of her grandson. By letter dated December 8, 2016, the employer directed claimant to contact its absence management representative or claimant’s direct supervisor by December 13 to discuss her absence. On December 13, 2016, claimant attempted to contact the employer’s business manager by sending a text message; the business manager called then claimant back and left a voice mail message for claimant. Claimant abandoned her efforts to contact the business manager, however, by failing to leave a voice mail message when she returned the business manager’s call but was unable to speak to her. In addition, claimant made no attempt to comply with the employer’s instructions to contact the absence management representative or her direct supervisor on or before December 13. Claimant admitted that her failure to make the contacts the employer had directed to make was an “error of judgment” on her part, and that she “made bad choices.” Audio recording at 27:39. Based on this record, we conclude that claimant was conscious of her conduct, and knew or should have known that her failure to comply with the employer’s instructions to contact its representatives violated the employer’s expectations. Claimant’s actions were therefore at least wantonly negligent.

The employer, however, failed to establish that claimant’s conduct was misconduct, and not an isolated instance of poor judgment. An act is isolated if the exercise of poor judgment is 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). 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 did not assert or show that claimant had engaged in other willful or wantonly negligent behavior during her employment. Audio Record at 14:30. Absent such a showing, the employer failed to establish that claimant’s exercise of poor judgment in failing to comply with the employer’s directive to contact it was not a single or infrequent occurrence. Claimant’s actions did not violate the law and were not tantamount to unlawful conduct. Nor did the employer establish that her conduct created an irreparable breach of trust in the employment relationship, given that claimant had previously and successfully complied with the employer’s instructions to obtain medical leave in August and October 2016. Finally, the employer failed to show that claimant’s actions 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 unemployment benefits based on this work separation.

**DECISION:** Hearing Decision 17-UI-78407 is affirmed.

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

**DATE of Service:** April 11, 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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