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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
2018-EAB-0542

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 90647). The employer filed a timely request for hearing. On May 7, 2018, ALJ Snyder conducted a hearing at which the claimant failed to appear, and on May 11, 2018 issued Order No. 18-UI-109195, affirming the Department's decision. On May 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Around the Clock Support Services LLC employed claimant from December 5, 2016 until February 7, 2018 at the employer's residential facility for adults with intellectual and developmental disabilities.

(2) The employer expected claimant to notify her manager before claimant's shift began if she was going to be absent from work on a scheduled work day. The employer also expected employees to refrain from sleeping during work time. The employer's policy stated that sleeping on the job would result in immediate termination. Claimant understood the employer's policies.

(3) In January 2018, a manager saw claimant sleeping during her shift. The employer questioned claimant about the incident, but claimant was not given a warning or discharged pursuant to the employer's policy.

(4) Claimant had not been warned or disciplined about her attendance before February 2, 2018.

(5) On the morning of February 2, 2018, claimant sent her manager a text message stating that claimant may not report to work for her next scheduled shift on February 3 because she was not feeling well. Claimant stated that she would contact the manager again to confirm if she would report to work on

February 3. Claimant did not contact her manager again before she failed to report to work for her shift on February 3. Claimant was next scheduled to work on February 7, 2018.

(6) On February 7, 2018, claimant reported to work on time for her scheduled shift. Her manager discharged claimant at that time for having failed to notify her manager that she would miss work on February 3. Claimant told her manager that she was unable to report to work on February 3 and understood she did not notify the employer that she would be absent according to the employer's policy.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that 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) (January 11, 2018) 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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to report for work as scheduled or notify her manager in advance of her shift that she would be absent. Although claimant told her manager she might miss work on February 3, she violated the employer's expectation because she did not take the additional step of contacting her manager again to confirm that she would not report to work that day. Based on claimant's statement to her manager on February 7 that she understood she had failed to follow the employer's policy by confirming her absence before her February 3 shift, the preponderance of the evidence shows claimant was conscious that her uncertain text message to her manager on February 2 was not sufficient to notify the employer of her absence on February 3. Claimant's failure to notify her employer with certainty that she would not report to work on February 3 demonstrated indifference to the employer's interest in maintaining an adequate workforce on her scheduled work day and was at least a wantonly negligent violation of the employer's expectations.

An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. A manager saw claimant sleeping during her shift in January 2018, which violated the employer's expectation that employees refrain from sleeping while working. However, because the employer did not give claimant a warning for the incident or discharge her under its policy allowing for immediate discharge when an employee sleeps on the job, we infer that claimant's nap was not intentional. Nor does the record show by a preponderance of evidence that claimant failed to take steps to protect against falling asleep during her shift. The record therefore fails show that claimant's nap was the result of willful or wantonly negligent conduct rather than inadvertent or unforeseeable factors.

Because the record fails to show that the employer warned or disciplined claimant previously for any other willful or wantonly negligent violations, her attendance violation on February 3 was isolated.

Under OAR 471-030-0038(1)(d)(D), some conduct, even if isolated, such as acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible, exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). On this record, claimant's failure to confirm with the employer that she would be absent on February 3 was not unlawful or tantamount to unlawful conduct, and, objectively considered, was not so egregious that the employment relationship could not have been rehabilitated and claimant trusted after receiving a warning concerning such conduct in the future. While claimant's failure to contact her manager again to confirm her absence on February 3 showed poor judgment, it did not exceed mere poor judgment. Her conduct, therefore, was no more than an isolated instance of poor judgment under OAR 471-030-0038(3)(b), and not misconduct.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits on the basis of this work separation.

DECISION: Order No. 18-UI-109195 is affirmed.

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

DATE of Service: <u>June 27, 2018</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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