

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0649**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #80853). Claimant filed a timely request for hearing. On April 15, 2014, ALJ Triana conducted a hearing, and on April 16, 2014 issued Hearing Decision 14-UI-15322, concluding the employer discharged claimant, but not for misconduct. On April 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Marion County employed claimant from July 19, 2011 to February 4, 2014 as an equipment operator and relief ferry operator.

(2) The employer had a standard of conduct that prohibited employees from engaging in the improper or unauthorized use of the employer's vehicles, equipment or supplies. Claimant received a copy of the employer's written policy at hire. Exhibit 1.

(3) Approximately four times during 2013, claimant had entered the employer's facility after hours, while he was off duty, to sleep in one of the employer's vehicles. Claimant told two supervisors that he had done so. One supervisor told claimant that he and other employees sometimes slept in the employer's vehicles at night.

(4) Prior to January 25, 2014, claimant had not received any warnings or been disciplined by the employer.

(5) On January 25, 2014, claimant left his house at approximately 8:30 p.m. after an argument with his wife. Claimant entered the employer's facility with his keys, which allowed him 24-hour access to the facility, and fell asleep in a vehicle parked inside the facility. Claimant did not have the keys to the employer's vehicle. He was scheduled to work on January 26, 2014 at 7:00 a.m. Claimant's wife contacted the police, alleging claimant had assaulted her. At approximately 11:00 p.m., the police

arrived at the employer's facility and arrested claimant for allegedly driving his personal vehicle under the influence of intoxicants.

(6) On February 4, 2014, the employer discharged claimant for the improper and unauthorized use of a county vehicle on January 25, 2013. Exhibit 1.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, 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). 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 discharged claimant for sleeping in a county vehicle, on county premises, while he was off duty. However, the employer's policy does not explicitly prohibit employees from entering the employer's facility or sleeping in the employer's vehicles while off duty, or define what constitutes "improper or unauthorized use" of a vehicle. See Exhibit 1, Audio Record ~ 15:20 to 15:40. Claimant testified at hearing, unrefuted, that he had slept in the employer's vehicle at night while off-duty three or four times during 2013, with the employer's knowledge. Audio Record ~ 18:31 to 19:00. Claimant testified that it was common for employees to access the employer's facility after hours, and that the employer gave employees 24-hour access to the facility. Audio Record ~ 19:11 to 19:28. Moreover, claimant testified that he had told two supervisors about having slept in a vehicle in the facility. Audio Record ~ 19:55 to 20:18. The employer did not tell claimant such conduct was improper. Audio Record ~ 20:26 to 20:39. Instead, one supervisor told claimant that he and other employees had also, on occasion, slept in the employer's vehicles while off duty. Audio Record ~ 20:19 to 20:25. Absent evidence that claimant knew or should have known that sleeping in the employer's vehicle on the employer's premises while off duty violated the employer's expectations, the record does not show that claimant acted with a willful or wantonly negligent disregard of the employer's expectations.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 14-UI-15322 is affirmed.

Susan Rossiter and Tony Corcoran;  
D. E. Larson and J.S. Cromwell, *pro tempore*, not participating.

**DATE of Service: May 21, 2014**

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.