

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0834

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 120000). Claimant filed a timely request for hearing. On April 24, 2014, ALJ Kirkwood conducted a hearing, and on April 25, 2014, issued Hearing Decision 14-UI-16133, concluding that the employer discharged claimant but not for misconduct. On May 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) From September 25, 2008 to February 18, 2014, Opportunity Foundation of Central Oregon employed claimant as a direct support professional. Claimant provided care and support for adults with intellectual and developmental disabilities in a residential setting.

(2) Claimant was assigned to work a graveyard shift, from 12 to 8 a.m. with one other employee. The employer expected that claimant and her coworker would remain awake during the entire shift. Claimant knew and understood this expectation. Claimant and her coworker received one 30 minute break during their shift; they were paid for this time, however, because they were expected to remain available to attend to the needs of the residents.

(3) On February 17, 2014, at approximately 4:15 a.m., claimant sat down in a recliner in the living room of the residence where she worked to rest and watch a movie. Claimant's coworker had previously begun to rest in a recliner in the same room at approximately 3:30 a.m. At approximately 5:00 a.m., claimant's coworker got out of the recliner and began to bathe a resident. The claimant did not hear her coworker get up, and the coworker did not ask claimant to assist her. When claimant heard the coworker running bath water for the resident, however, she got up and helped her coworker bathe the resident.

(4) The coworker reported to the employer that claimant had fallen asleep during her February 17, 2014 shift. On February 18, 2014, the employer discharged claimant for falling asleep during her shift.

**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. 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 failing to remain awake during her shift on February 17, 2014. The employer's evidence consisted entirely of hearsay testimony regarding the observations of claimant's coworker on February 17. Claimant denied that she fell asleep, however. Absent a basis to conclude that claimant was not credible, her sworn, firsthand testimony had more weight than the testimony of the employer's witness. Accordingly, the employer failed to meet its burden of proof to show that claimant violated its expectation by falling asleep during her shift.

We conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-16133 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** June 24, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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