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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

2014-EAB-1011

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135714). Claimant filed a timely request for hearing. On May 28, 2014, ALJ Han conducted a hearing, and on May 29, 2014 issued Hearing Decision 14-UI-18626, reversing the Department's decision. On June 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) DePaul Treatment Centers, Inc. employed claimant as a milieu counselor in a residential drug and alcohol treatment facility for adolescent patients until March 31, 2014. Claimant worked the graveyard shift, from 11:00 p.m. until 7:00 a.m.

(2) As a graveyard shift milieu counselor, claimant was responsible for supervising patients and monitoring them while they were sleeping. The employer expected claimant, while on shift, to remain alert to the patients' actions and to refrain from falling asleep. Claimant was aware of the employer's expectations.

(3) On March 15, 2012, the employer issued to claimant a warning for "dozing off" during her graveyard shift on March 14, 2012. The warning notified claimant that if she ever again fell asleep or "even doze[d] off for a few seconds" during her shift, she would be immediately discharged. Exhibit 2 at 8. After claimant received this warning, she developed strategies to ensure that she remained awake during her shift. Claimant implemented the following strategies whenever she felt sleepy during a shift: working on paperwork; switching the tasks on which she was working, getting up and walking; and, using the employer's treadmill. Claimant was unable to take a break from the floor on which she worked during her shifts to maintain her alertness after the employer implemented a schedule that did not allow her to leave the floor.

(4) On March 27 to March 28, 2014, claimant worked her usual graveyard shift. At times during that shift, claimant closed her eyes while listening to audio tapes and "may have gone into a nod," but not a heavy sleep. Transcript at 23. On March 28, 2014, a 14 year-old patient from the floor on which claimant had worked during the previous night, reported to a milieu counselor on duty that she had come out from her room to use the restroom twice during the night. The patient stated that she had noticed each time that claimant appeared to be asleep, with closed eyes, feet propped up and snoring. The employer's human resources manager and milieu supervisor were notified of the patient's report and discussed it with claimant on March 28, 2014. Claimant told them that she did not recall falling asleep during the shift and that she might have "rest[ed] her eyes for a minute or nodded off," but was not in a "deep sleep" or "zonked out." Transcript at 7, 12, 16.

(5) On March 31, 2014, the employer discharged claimant for falling asleep during her shift on March 27 to 28, 2014.

CONCLUSIONS AND REASONS: 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) (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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The evidence in the record is unclear about whether claimant fell asleep during her shift on March 27 to 28, 2014 and, if she did, the nature, duration and extent of that sleep. The patient's report can be construed as suggesting a sleep episode of some duration, particularly since it referred to claimant's snoring. Claimant's testimony appears to have been that she might have "gone into a nod," which we construe as lasting only a very few seconds. Transcript at 23. The patient did not testify, and there is no first-hand information from her clarifying her observations in a way that allows a determination of the level of sleep reasonably indicated. On this record, claimant's first-hand testimony is entitled to greater weight than the hearsay evidence that the employer presented. At worst, claimant very briefly nodded off during her shift on March 27 to March 28, 2014 and, more likely than not, returned quickly to wakefulness.

Assuming claimant nodded off briefly during her shift, the employer did not show that this behavior met the "consciousness" element necessary to establish claimant's willful or wantonly negligent state of mind. *See* OAR 471-030-0038(1)(c)). A loss of full alertness for a few moments as a person resists the impulse to sleep is reasonably not, as a matter of common experience, a conscious act. Although the employer had warned claimant against "dozing off" in 2012, that prior warning, alone, does not eliminate the employer's burden to demonstrate that claimant's behavior on March 27 to March 28, 2014

in entering into a "nod" was a conscious act.[1] Absent evidence that claimant's behavior in nodding off very briefly was a conscious act, the employer cannot meet an essential requirement to establish claimant's willful or wantonly negligent misconduct.[2]. At hearing, the employer's representative appeared to implicitly recognize the employer's difficulty in demonstrating that claimant's behavior was conscious when she seemed to argue that claimant's behavior was wantonly negligent on March 27 to March 28, 2014 because she had failed to employ the strategies she had previously used to stay awake. Transcript at 12-13, 17. However, the assertion that claimant did not take these steps was speculative, and the employer failed to present evidence that claimant was aware that she was likely to nod off and that she had consciously decided not to use the strategies on March 27 to March 28, 2014. Since the employer did not present sufficient evidence to show, more likely than not, that claimant's briefly nodding off was a conscious act, the employer did not meet its burden to demonstrate that claimant's behavior in doing so was misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-18626 is affirmed.

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[1] *See e.g., Marian Ghionea* (Employment Appeals Board, 12-AB-1710, July 17, 2012) (that claimant had previously engaged in behavior about which she received warnings, does not without additional evidence establish that a repetition of the same behavior was a conscious act and was wantonly negligent); *Donald E. Austin* (Employment Appeals Board, 12-AB-0295, March 6, 2012) (although claimant had been warned on at least five prior occasions, his repetition of the same behavior did not show a conscious state of mind without additional evidence showing his awareness of his behavior at the time he made it); *Robert S. Ponce* (Employment Appeals Board, 10-AB-4079, January 19, 2011) (although claimant had been warned three previous times, his repetition of the same error did not in and of itself show the conscious state of mind necessary to establish wanton negligence); *David A. Hull* (Employment Appeals Board, 10-AB-3779, January 5, 2011) (although claimant was placed on a work improvement plan for prior errors, his repetition of the same error, without more, did not show the conscious state of mind necessary to establish wanton negligence).

[2] *See e.g. Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent); *Marina V. Berlachenko* (employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not wantonly negligent); *Paul A. Klinko* (employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence clamant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010 (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).

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

DATE of Service: July 18, 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. 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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