

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1850

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 75307). Claimant filed a timely request for hearing. On November 26, 2014, ALJ Vincent conducted a hearing, and on December 3, 2014, issued Hearing Decision 14-UI-29749, concluding that the employer discharged claimant, but not for misconduct. On December 5, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Seven Feathers Hotel & Casino employed claimant from February 2, 2004 to October 3, 2014, last as a table games supervisor assigned to one of the employer's craps table.

(2) The employer's table games procedure required that an employee assigned to protect a gaming table constantly watch the layout of the table to which the employee was assigned. Constant vigilance was necessary to protect the employer's monetary assets, which could total as much as \$40,000. Claimant knew and understood the employer's procedure for employees table games protection duties.

(3) On April 14, 2014, claimant was assigned to protect a craps table and was observed having a difficult time staying awake during his shift.

(4) On June 14, 2014, claimant was assigned to protect a craps table and was observed falling asleep during his shift. In an effort to assist claimant with his job performance, the employer removed claimant from his assignment at the craps table, and provided him with mentoring sessions and training.

(5) On October 3, 2014, claimant was assigned to provide protection at one of the employer's craps tables. The employer's surveillance staff reviewed video footage recorded during claimant's shift and observed that claimant closed his eyes several times over a period of approximately two minutes.

(6) On October 3, 2014, the employer discharged claimant for violating its table games procedure by sleeping on the job.

CONCLUSION AND REASONS: We agree with the ALJ 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) (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 are not misconduct. OAR 471-030-0038(3)(b).

Claimant's actions in briefly falling asleep on the job on October 3, 2014 were clearly not willful – claimant did not deliberately or intentionally fall asleep. Nor was claimant's conduct wantonly negligent. The record does not show that claimant knew, or should have known, that he would fall briefly asleep on October 3, 2014. Claimant testified that he was not tired when he arrived at work on that date, and had no indication that he was starting to feel sleepy. Audio Recording at ~ 14:13 and 15:03. We also do not find that the possibility of claimant falling asleep at work was so likely that he knew or should have known it would happen and acted with indifference by failing to take steps to stay awake. Claimant had only two prior occurrences of sleepiness on the job – on April 14 and June 14, 2014 – and both were unforeseen. Claimant testified that he had not felt tired on those dates and did not “know when it's [becoming sleepy] happening.” Audio Recording at ~ 19:20. Accordingly we conclude that claimant's actions in falling briefly asleep at work on October 3 were not willful or wantonly negligent violations of the employer's expectations and did not constitute misconduct. Claimant is not disqualified from the receipt of benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-29749 is affirmed.

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

DATE of Service: January 15, 2015

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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