

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0412

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 170231). Claimant filed a timely request for hearing. On March 26, 2015, ALJ Holmes-Swanson conducted a hearing, and on March 27, 2015 issued Hearing Decision 15-UI-35884, affirming the Department's decision. On April 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Spirit Mountain Gaming, Inc. employed claimant as a night shift security officer in its casino from April 10, 2012 until January 26, 2015.

(2) When claimant was assigned to work in the dispatch office, his job duties included entering dispatch information into the employer's computer system and viewing the computer monitor, observing the employer's alarm panel display to determine if any alarms were activated, watching the employer's door access panel display to determine if unauthorized access was attempted or made through any doors, answering a telephone and dispatching security officers in response to appropriate calls, and listening to the radio traffic generated by other security officers. All of the panels had audible alarms that alerted claimant to any activity on them.

(3) The employer expected claimant to remain "alert enough" to perform those duties during his shifts. Transcript at 13, 17. Claimant understood.

(4) On May 9, 2014, near the end of his shift, claimant parked his patrol vehicle in front of the main casino entrance to wait for the arrival of the security officer who was going to relieve him. Over a five

minute period, the employer's surveillance department observed claimant closing his eyes while he waited for times ranging between eight and eighteen seconds. The employer gave claimant a written warning for "nodding off" while on duty and not remaining sufficiently alert on May 9, 2014. Exhibit 1 at 9.

(5) On the nights of January 20 to 21, 2015 and January 21 to 22, 2015, claimant was working in the dispatch office. The dispatch office was slow on those nights and claimant was training a new hire. On some occasions during those nights, the employer's video surveillance showed claimant sitting in his office chair, then leaning his head back and tilting his head up with his face toward the office ceiling. Claimant's eyes were not visible to the surveillance camera. Several times during these two shifts, the surveillance video also showed no movement from claimant for periods of time ranging between a few seconds to approximately seven minutes. Claimant's eyes also were not visible to the surveillance camera during the times when his body was still. Exhibit 1 at 5-6; Transcript at 7-8. The employer concluded that claimant had fallen asleep during his shift on those days.

(6) On January 26, 2015, the employer discharged claimant for not remaining "alert enough" to perform his job duties on January 20 to 21, 2015 and January 21 to 22, 2015.

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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's position at hearing was that claimant's body language as observed on the surveillance videos from January 20 to 21, 2015 and January 21 to 22, 2015 demonstrated that claimant did not meet its expectations of remaining "alert enough" to perform his assigned job duties. Transcript at 13, 17. The employer's witness conceded that the employer was unable to establish that claimant had fallen asleep while on duty on those days, and claimant testified that he had not done so. Transcript at 17, 33. The record therefore fails to show that claimant was sleeping during the relevant periods.

Claimant contended that he had remained alert throughout his shift, notwithstanding the brief episodes that the employer's witness observed on the surveillance videos when claimant was still or sitting with his face tilted toward the ceiling. The employer did not set forth for claimant a description of the specific actions or body positions it would use to determine whether he was "alert enough" or not "alert enough" to perform his duties, and it is not reasonable to impute to claimant an awareness that the employer prohibited him from being motionless in his office chair, or looking at the ceiling in the dispatch office rather than the monitors or panels in that office for brief periods of times during his shifts, provided he was otherwise alert enough to perform his duties. Further, the employer's witness did not rebut claimant's testimony that he was sufficiently alert to perform all of his job duties in a timely manner during the shifts at issue, and did not present any evidence that claimant did not respond adequately to any alarms, dispatch calls or radio traffic during those shifts.

Finally, while the employer asserted that it was not permissible for claimant to look up at the ceiling for limited periods of time during his shifts, even if he remained sufficiently alert to perform his job duties, because “it gives the perception that [an employee] is not performing their job duties,” the employer discharged claimant for his alleged failure to remain “alert enough” to perform those job duties and not because he appeared to lack alertness. Transcript at 13, 37. Absent evidence that claimant was actually asleep during his shifts or was demonstrably unable to perform his job duties due to lack of alertness when he was looking up at the ceiling or sitting motionless, the employer did not meet its burden to show that claimant’s behavior was a willful or wantonly negligent violation of the employer’s reasonable standards.

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

DECISION: Hearing Decision 15-UI-35884 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 3, 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 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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