

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1245

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August, 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 170554). Claimant filed a timely request for hearing. On September 30 and October 2, 2015, ALJ S. Lee conducted a hearing, and on October 8, 2015 issued Hearing Decision 15-UI-45619, concluding the employer discharged claimant, but not for misconduct. On October 16, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of Salem employed claimant from September 24, 2004 to June 15, 2015, last as an assistant technician in its pumps and control section.

(2) The employer prohibited employees from sleeping while on duty, and leaving the employer's vehicles running when not in use. Claimant understood he was prohibited from sleeping while on duty.

(3) On May 5, 2015, claimant drove one of the employer's vehicles to a malfunctioning communications tower and charged the tower's batteries with a portable generator. Claimant sat in the vehicle while the batteries were being charged, and left the vehicle running while he listened to an audio book. Claimant fell asleep while listening to the audio book. After being awakened, claimant exited the vehicle and left it running while he checked the portable generator.

(4) The employer expected employees to wear hard hats at any below ground level or possible ground level job sites. Claimant understood that expectation. The employer also expected employees to test confined spaces with a gas/oxygen detector before entering, and to continue monitoring all confined spaces with a gas/oxygen detector after entering. Claimant understood he was expected to monitor confined spaces with a gas/oxygen detector after entering.

(5) On May 14, 2015, claimant inspected a sewer pump station, which was a confined space below ground. Claimant forgot to wear his hard hat, and did not test the sewer pump station before entering. After entering, claimant monitored the pump station with a gas/oxygen detector clipped to his belt.

(6) The employer discharged claimant for his conduct on May 5 and 14, 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, in part, for falling asleep while on duty on May 5, 2015. However, the record fails to that claimant made a conscious decision to sleep while on duty, or that he knew or should have known he probably would fall asleep while listening to the audio book. Claimant may have been careless, arguably negligent, but his failure to remain awake while on duty was not willful, and did not rise to the level of *wanton* negligence as defined under OAR 471-030-0038(1)(c).

The employer also discharged claimant, in part, for leaving the employer's vehicle running while not in use on May 5, 2015. At hearing, however, claimant testified that he was unaware that employees were prohibited from leaving the employer's vehicles running while not in use. Transcript at 30. The evidence as to whether claimant understood the employer's expectations in that regard was, at best, equally balanced. The employer therefore failed to establish by a preponderance of evidence that claimant's conduct was not the result of a good faith error in his understanding of the employer's expectations. Good faith errors are not misconduct.

The employer also discharged claimant, in part, for failing to wear his hard hat while inspecting a sewer station, which was a confined space below ground, on May 14, 2015. However, claimant forgot to wear his hard hat, and therefore did not consciously do so. Nor does the record show that claimant consciously engaged in other conduct that he knew or should have known would cause him to forget to wear his hard hat. Claimant was careless, arguably negligent, but his failure to wear his hard hat was not willful, and did not rise to the level of *wanton* negligence as defined under OAR 471-030-0038(1)(c).

The employer also discharge claimant, in part, for failing to test the sewer pump station with a gas/oxygen detector before entering, or properly monitor it with a gas/oxygen detector after entering. At hearing, however, claimant testified that he was not required to test the sewer pump station before entering because it had been designated a non-permit confined space after several year of testing determined that it did not contain atmospheric hazard, or have the potential to contain any such hazard capable of causing death or serious physical harm. Transcript at 38-39. Claimant further testified that

monitoring the pump station with a gas/oxygen detector clipped to his belt complied with the employer's expectations in that regard. Transcript at 39-40. The evidence as to whether claimant understood those expectations is, at best, equally balanced. The employer therefore failed to establish by a preponderance of evidence that claimant's conduct was not the result of a good faith error in his understanding of the employer's expectations. Good faith errors are not misconduct.

The employer therefore failed to establish that claimant was discharged for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-45619 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 9, 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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