

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1459

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101213). Claimant filed a timely request for hearing. On November 30, 2015, ALJ M. Davis conducted a hearing, and on December 2, 2015 issued Hearing Decision 15-UI-48637, concluding claimant's discharge was not for misconduct. On December 7, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

Some of the employer's argument consisted of information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering that information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Or Cal, Inc. employed claimant as a laborer from November 9, 2013 to February 25, 2015.

(2) The employer prohibited employees from sleeping while on duty. Claimant understood the expectation.

(3) Prior to February 20, 2015, claimant injured his left knee at work. He was prescribed medication for pain that made him drowsy, restricted to light duty, and also restricted from kneeling, squatting, standing or crawling. Claimant was advised by his physician to keep his leg elevated.

(4) On February 20, 2015, claimant sat with his eyes closed and his feet elevated during a break. The operations manager observed claimant in that position and concluded he was asleep while on duty. Claimant denied sleeping.

(5) On February 23, 2015, claimant again sat with his eyes closed and his feet elevated during a break. He set an alarm to wake him at the end of his break in case he fell asleep, but did not fall asleep. A human resources employee entered the room in which claimant worked to check on him, and saw him sitting with his feet on the table. When she opened the door, claimant opened his eyes and put his feet on the floor. Claimant and the human resources person then had a conversation. The human resources employee reported to the operations manager that she had found claimant sleeping while on duty.

(6) On February 25, 2015, the operations manager observed claimant "relaxed again, with his feet up." Transcript at 15. The operations manager believed claimant was asleep. When the operations manager entered the room, claimant "jumped up." *Id.* The operations manager told claimant that the employer did not allow sleeping on the job, and, because the manager had previously talked to claimant about sleeping, the employer was "finished" with having him there and claimant needed to go home. Transcript at 16. Claimant again denied sleeping, but the operations manager felt "[w]e've done everything we could" and discharged him. *Id.*

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 bears 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 allegedly sleeping while on duty. The last incident that preceded claimant's discharge, without which claimant probably would not have been discharged when he was, occurred on February 25, 2015. That incident is, therefore, the initial focus of the discharge analysis. Only if claimant's conduct on that occasion was willful or wantonly negligent would the employer's earlier allegations that claimant slept while on duty be at issue.

The employer had the right to expect claimant not to sleep while on duty, and claimant understood the expectation. However, the employer failed to establish that claimant actually slept while on duty in the final incident. The employer's eyewitness to that event testified based on his observations of claimant before he actually entered the room in which claimant was alleged to have slept. Although the witness observed claimant with his eyes closed and feet elevated, claimant stood the moment the operations manager entered the room and immediately engaged in conversation with him. Transcript at 15. Claimant's responsiveness belies the accusation that he was sleeping at the time the employer's witness observed him, as does the fact that, observed from afar, an awake individual seated with elevated legs and closed eyes would be indistinguishable from a sleeping person in the same position. The preponderance of the evidence does not show that claimant was asleep when the operations manager

observed him on February 25th. Therefore, the preponderance of the evidence does not establish that claimant violated the employer's prohibition against sleeping while on duty on the occasion that caused the employer to discharge him, and misconduct has not been shown.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-48637 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 6, 2016

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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