

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0181

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 83839). The employer filed a timely request for hearing. On January 26, 2016, ALJ L. Lee conducted a hearing, and on January 29, 2016 issued Hearing Decision 16-UI-51966, affirming the Department's decision. On February 18, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Employers Overload, a temporary agency, employed claimant from May 24 to November 17, 2015. During that time, claimant was on a work assignment for the employer's client, Transtar Systems.

(2) Claimant's on-site supervisor typically allowed claimant and his coworkers a 30-minute to 1-hour lunch break. Claimant often slept during his lunch break, and his supervisor woke him up when he wanted claimant to return to work.

(3) On November 17, 2015, claimant started his lunch break at approximately 12:30 p.m., slept until approximately 1:15 p.m., awakened on his own, and returned to work. Transtar Systems ended claimant's work assignment, his supervisor alleging that claimant slept for over two hours after his lunch break ended.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was not for misconduct.

If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b) (August 3, 2011). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). In the case of individuals working for temporary agencies or employee leasing companies, the employment relationship shall be deemed severed at the time that a

work assignment ends. *Id.* Thus, in the present case, claimant was discharged when the employer's client ended his work assignment on November 17, 2015.

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) 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 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).

In the present case, claimant was discharged for allegedly sleeping for over two hours after his lunch break ended on November 17, 2015. However, the employer provided only hearsay information to support that allegation. Audio Record at 10:00. Claimant testified that he started his lunch break at approximately 12:30 p.m., slept until approximately 1:15 p.m., awakened on his own, and returned to work. Audio Record at 20:30-25:00. Absent a basis for concluding that claimant was not a credible witness, we find his sworn testimony more persuasive than the employer's hearsay evidence to the contrary. The employer therefore failed to show that claimant slept for two hours after his lunch break ended. Assuming, *arguendo*, claimant was expected to return to work before 1:15 p.m., the record shows his supervisor typically allowed him a 30-minute to 1-hour lunch break, and woke him up when he wanted claimant to return to work. The employer therefore failed to show claimant knew or should have known sleeping during his lunch break would probably result in his failure to return to work when expected. Absent such a showing, the employer failed to establish misconduct.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 16-UI-51966 is affirmed.

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

DATE of Service: March 7, 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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