

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0539**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162232). Claimant filed a timely request for hearing. On April 15, 2016, ALJ Dorr conducted a hearing, and on April 21, 2016 issued Hearing Decision 16-UI-57865, concluding the employer discharged claimant, but not for misconduct. On May 10, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the employer's written argument and the entire hearing record when reaching this decision.

**FINDINGS OF FACT:** (1) The Dalles Irrigation District employed claimant from August 2, 2004 until February 18, 2016 as a field supervisor.

(2) The employer expected claimant to refrain from sleeping during his shift except during his lunch and rest breaks. Claimant understood the employer's expectations as a matter of common sense.

(3) On January 28, 2016, near the end of claimant's shift, the employer's operations manager drove to the location where claimant was working and, as he approached claimant from approximately 300 yards from the front, saw claimant sitting in the driver's seat of his vehicle with his hood over his head and his head down. The manager pulled up next to claimant's vehicle and saw that claimant remained seated with his head down, not moving. The operations manager left the area and sent claimant a text message stating, "I hope you were not sleeping." Audio Record at 9:44 to 9:57. Claimant did not respond to the text message. The operations manager reported the incident to the employer's board of directors that day.

- (4) Claimant received no warnings and was never disciplined by the employer before February 1, 2016.
- (5) On February 1, 2016, the operations manager discussed the January 28 incident with claimant. Claimant denied having been asleep during his shift. The operations manager suspended claimant pending a review by the employer's board of directors.
- (6) On February 2, 2016, the employer's board of directors voted to discharge claimant for sleeping during his shift. During the board meeting, the employer's office manager reported that she had also seen claimant sleeping in his vehicle during work hours on January 7, 2016. The office manager did not report that alleged incident to the employer before February 2, 2016.
- (7) On February 18, 2016, the employer's attorney discharged claimant on behalf of the employer.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant, 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 and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer discharged claimant because he violated the employer's reasonable expectation that he refrain from sleeping during work hours on January 28, 2016. Claimant denied having been asleep in his vehicle on January 28. Audio Record at 17:39 to 17:50; Exhibit 1 at 1. The employer's evidence regarding the January 28 incident included testimony from the operations manager who witnessed the incident, a written statement from claimant's coworker, and a discipline documentation form completed by the operations manager on January 28. Exhibit 1 at 1, 3. The employer argued in its written argument that some evidentiary weight should be accorded to the coworker's statement. We conclude the coworker's statement had little probative value because it was only a vague affirmation of "the information documented by the [employer's] Operations Manager," and did not detail what information the coworker intended to affirm. *See* Exhibit 1 at 3.

However, we also conclude that the probative value of the employer's specific, consistent and detailed account at hearing of the January 28 incident, corroborated by the discipline documentation form that the operations manager completed on January 28, outweighed claimant's denial. Exhibit 1 at 1. We are persuaded that claimant's posture and lack of responsiveness when the operations manager drove by him and up to his vehicle window on January 28 shows that it was more probable than not that claimant was

sleeping. Moreover, we infer that claimant knew or should have known that he would probably fall asleep if he sat alone with his hood over his head in his parked vehicle near the end of his shift, and therefore was, at best, wantonly negligent.

Claimant's conduct on January 28 was, however, excused from constituting misconduct as an isolated instance. A claimant's behavior is an "isolated instance of poor judgment" if it is, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(a). The employer's office manager reported to the employer, for the first time on February 2, 2016, that she had seen claimant sleeping during his shift on January 7, 2016. That hearsay testimony was the employer's only evidence at hearing that claimant was sleeping during his shift on January 7. Unlike the testimony from the employer's operations manager, claimant did not have the opportunity to question the office manager regarding her observations, truthfulness or potential bias, since she was not present during the hearing. On this record, the employer had the alternative of presenting first-hand testimony from the office manager to substantiate the allegations regarding January 7, and the facts sought to be proved were central to showing misconduct. Moreover, the credibility of the hearsay allegation is weakened by the fact that the office manager did not report the alleged incident to the employer until the board meeting nearly one month later. We are not persuaded by the employer's argument that the similarity of the final incident to the alleged January 7 incident should "tip the scale" in the employer's favor, especially where claimant has never been disciplined during more than 11 years of employment. *See Employer's Argument at 5.*

Claimant denied that he was asleep in his truck on January 7, 2016. Absent a basis to conclude that claimant was not credible, his sworn, firsthand testimony was more persuasive than the employer's hearsay testimony. Accordingly, the employer failed to show by a preponderance of the evidence that claimant was sleeping during his shift on January 7. Therefore, the final incident on January 28 was no more than an isolated instance of willful or wantonly negligent conduct.

We conclude that the employer discharged claimant for an isolated instance of poor judgment, and not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 16-UI-57865 is affirmed.

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

**DATE of Service:** June 14, 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](http://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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