

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1142**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 132924). The employer filed a timely request for hearing. On September 22, 2016, ALJ Vincent conducted a hearing, and on September 30, 2016 issued Hearing Decision 16-UI-68936, concluding the employer discharged claimant for misconduct. On October 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that he provided a copy of it to the other parties as required by OAR 471-041-008- (October 29, 2006). Claimant's written argument also presented information that was not offered into evidence during the hearing, and failed to show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's a written argument or the new information he sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Northern Oregon Corrections employed claimant as a juvenile detention officer from July 1, 1999 until June 30, 2016.

(2) Claimant worked a graveyard shift. The employer expected claimant to remain awake during his shift. Claimant understood the employer's expectations.

(3) Sometime between June 1, 2016 and June 30, 2016, the employer received a report that claimant was falling asleep during his shifts. The employer reviewed surveillance videos of claimant at work in his work area. After reviewing the videos, the employer determined that claimant had not moved sufficiently during lengthy periods of time to activate motion sensors that caused the video cameras to record during his shifts on the following days: April 13, 2016 (2:00 a.m. to 5:45 a.m.); April 14, 2016 (12:30 a.m. to 5:38 a.m.); April 15, 2016 (1:13 a.m. to 5:25 a.m.); April 21, 2016 (1:43 a.m. to 2:00 a.m. and 3:40 a.m. to 5:44 a.m.); April 22, 2016 (12:53 a.m. to 5:42 a.m.); April 27, 2016 (12:47 a.m. to 5:22 a.m.); May 4, 2015 (1:10 a.m. to 5:25 a.m.); May 6, 2016 (12:12 a.m. to 5:02 a.m.); May 10, 2016

(12:42 a.m. to 4:59 a.m.); May 12, 2016 (2:44 a.m. to 5:45 a.m.); May 13, 2016 (12:42 a.m. to 5:16 a.m.); May 29, 2016 (11:19 p.m. to midnight); May 25, 2016 (1:20 a.m. to 5:20 a.m.); May 26, 2016 (12:38 a.m. to 5:26 a.m.); May 27, 2016 (12:30 a.m. to 5:10 a.m.); and June 1, 2016 (midnight to 5:20 a.m.).

(4) During the shifts when the cameras ceased to record claimant's activity due to lack of movement, claimant was sitting at computer in the booking area. Two surveillance cameras were mounted in the booking area, one to the rear of claimant and mounted approximately eight to ten feet high at the intersection of the side and rear walls. The view recorded by this camera looked down on the back of claimant's head, his shoulders and his back. Claimant's face was not visible due to the camera angle. The second camera was located in the middle of a wall to claimant's side and its view recorded a side view of claimant's body. Claimant's face was also not visible to the second camera. The employer reviewed the surveillance from the camera located to claimant's rear. Most of the times when claimant was recorded, the main lights were turned off in the booking area to conserve electricity while indirect background lighting or "night lights" continued to provide illumination. The cameras recorded only when sensors detected motion in the room. If the sensors did not detect motion the recording stopped, and did not resume until the sensors perceived new motion. Once the cameras stopped recording, it took "quite a bit of movement" to trigger them to record again. Audio at ~37:36.

(5) During the times preceding or subsequent to the cameras ceasing to record claimant's due to lack of motion, the employer observed claimant engaging in "some movement," "adjusting in the seat," sometimes "getting up" and sometimes looking at his cell phone. Audio at ~15:20. Although "nobody would know for sure" that claimant was sleeping while sitting at the chair in the booking area during his shift, the employer concluded that claimant was "apparently sleeping" based on "the lack of movement." Audio at ~21:53.

(6) On June 30, 2016, the employer discharged claimant for allegedly sleeping on the job.

**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 connected with work. 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).

In Hearing Decision 16-UI-68396, the ALJ found that the employer demonstrated that claimant had repeatedly slept during shifts between April 13, 2016 and June 1, 2016, and concluded that claimant's discharge was for misconduct. We disagree.

At hearing, the employer's witness conceded that the employer's videos did not establish conclusively that claimant was sleeping on duty since his face was not visible to the camera, and the employer had concluded that claimant was "apparently sleeping" because he was not moving enough to activate the camera. Audio at ~7:55, ~21:53. However, the evidence that the employer presented did not address

claimant's contention that he was not sleeping when the camera stopped recording but was engaged in activities that involved movements below the threshold that triggered the camera to record, such as listening to music, looking at his cell phone, playing video games on the cell phone, etc. Audio at ~29:53. The employer's evidence did not suggest that claimant was prohibited from engaging in such activities to keep himself awake during his shifts, nor did it rule out that such activities or like activities would not have created a level of activity that would have been detected by the motion sensors and activated the camera to record. The employer also did not dispute claimant's contention that the level of activity needed to keep the cameras recording involved "quite a bit of movement," and sitting at the counter reading or making limited movements with his head and hands would not activate or keep the cameras activated and recording. Audio at ~37:36. Nor did the employer dispute that the motion detectors required one to "get up and walk around" to activate the cameras and, presumably, to keep them activated and recording. Audio at ~37:46. Absent evidence ruling out that claimant was at the counter performing the activities he contended he was, or that, if he had been, the motion sensors would have activated the cameras to record those activities, the employer did not meet its burden to show, more likely than not, that the failure of the cameras to record claimant's movements was a reliable basis from which to infer he was sleeping while on duty. Because it did not rule out these circumstances existed, the employer did not meet its burden to establish misconduct.

The employer discharged claimant but did not establish that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 16-UI-68396 is set aside, as outlined above.

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

**DATE of Service:** October 31, 2016

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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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