

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0026

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93804). Claimant filed a timely request for hearing. On December 21, 2016, ALJ Murdock conducted a hearing, and on December 22, 2016 issued Hearing Decision 16-UI-73519, concluding the employer discharged claimant, but not for misconduct. On January 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Cascadia Behavioral Healthcare employed claimant as a secure residential treatment specialist from February 8 to August 16, 2016.

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

(3) On August 16, 2016, the employer discharged claimant for allegedly sleeping while on duty on August 10, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer failed to establish by a preponderance of evidence that claimant's discharge was 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. 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).

The employer discharged claimant for allegedly sleeping while on duty on August 10, 2016. In support of that allegation, the employer's representative, its human resources generalist, testified that at approximately 4:45 a.m. on August 10, an employee notified a supervisor that claimant was sleeping while on duty, and that at approximately 5:10 a.m., the supervisor observed claimant sleeping while on duty. Audio Record at 7:00. The representative further testified that another employee reported claimant sleeping while on duty that morning, and that claimant told the employer's employee relations manager that she wished the employee who notified the supervisor had instead woken her up. Audio Record at 8:30, 17:50.

However, the employer did not call the employees who allegedly observed claimant sleeping while on duty to testify at the hearing, or even identify the two non-supervisory employees. Nor did the employer call the employee relations manager to testify. Nor did it submit documents corroborating its representative's testimony, such as signed written statements from the employees, supervisor or employee relations manager. Claimant categorically denied sleeping while on duty, asserting that at approximately 5:00 a.m. she had assisted one of the employer's residents, and that at 5:10 a.m., she had just returned to her desk and was listening to music on her computer. Audio Record at 12:00-14:30. According to claimant, when the supervisor entered the office, he falsely accused of her and another employee who was talking on the phone of sleeping while on duty, and claimant explained that she had just assisted a resident, and told the supervisor to confirm that with the resident. *Id.* Claimant also denied telling the employee relations manager that she wished the employee who notified the supervisor had instead woken her up, asserting that she told him she was not sleeping while on duty. Audio Record at 10:30.

In written argument, the employer asserted the ALJ erred in determining that claimant's testimony outweighed the "hearsay testimony of three employees," including a supervisor, that claimant was sleeping while on duty, given that claimant was an "interested party," and that the incident occurred in the early morning, when people tend to sleep, and not the early evening as misstated in Hearing Decision 16-UI-73519.¹ However, the ALJ did not determine that claimant's testimony outweighed the hearsay testimony of three employees. The ALJ determined that the testimony of the employer's representative that three employees observed claimant sleeping while on duty was no more than equally balanced with claimant's firsthand testimony that she was not, and that the employer therefore failed to establish by a preponderance of evidence that claimant slept while on duty.² We agree with that determination, given the lack of evidence corroborating the testimony of the employers' witness, who was representing an interested party, which also was an interested party. We similarly find the evidence as to what claimant told the employee relations manager, at best, equally balanced, and the timing of the alleged incident immaterial to whether claimant was a credible witness.

¹ Hearing Decision 16-UI-73519 at 1.

² *Id.* at 3.

We therefore agree with the ALJ that the employer failed to establish by a preponderance of evidence that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 16-UI-73519 is affirmed.

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

DATE of Service: January 25, 2017

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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