

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0582**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155355). Claimant filed a timely request for hearing. On May 1, 2017, ALJ Monroe conducted a hearing, and on May 5, 2017 issued Hearing Decision 17-UI-82800, concluding claimant's discharge was not for misconduct. On May 15, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Business Connections, Inc. employed claimant as a telephone operator from October 28, 2013 to February 16, 2017.

(2) The employer operated an answering service for a variety of businesses and government entities. Claimant's job was to answer inbound phone calls for those businesses and entities, some of which involved urgent or life-threatening matters.

(3) Claimant primarily worked the graveyard shift, and worked alone from approximately midnight to 5:00 a.m. There were frequent breaks between calls during that shift, and claimant understood based on some graveyard shift recruitment flyers he believed the employer had issued that he was allowed to read, do homework, or nap during the graveyard shift, so long as he answered the phone each time it rang.

(4) Beginning sometime in 2016, claimant experienced periods of time in which the employer's phone system became disconnected. The system did not alert workers when it became disconnected. During those periods, claimant could not place any outbound calls and no inbound calls rang through. Because claimant did not hear the phone ring, he did not know that there were inbound calls to answer, and he failed to answer them. Claimant spoke with a day shift employee, day shift supervisor and a graveyard shift employee, all of whom had experienced the same type of thing he experienced. Claimant understood that there was likely a system-wide problem that prevented him from answering those calls.

(5) On January 4, 2017, an agent summary report showed that claimant had ignored 46 calls, including 15 calls in less than an hour. On January 5, 2017, other agent summary reports showed that claimant had ignored either 46 calls or 54 calls. On January 6, 2017, an agent summary report showed claimant ignored 51 calls. The employer's operations manager considered claimant's ignored call rate unusually high and asked claimant about it a couple of times. Claimant replied on at least one occasion that the ignored calls were because of "some weird system issue." Exhibit 1 at 17.

(6) Prior to February 16, 2017, claimant had taken naps at work two times, lasting no more than ten minutes each time. Claimant was awakened from both naps by the sound of the employer's phone ringing. He did not fail to answer inbound calls on either occasion.

(7) During the week of February 16, 2017, claimant worked an extra shift and had difficulty adjusting his sleep schedule. On February 15, 2017, claimant began taking a new medication. On the night of February 15, 2017 through February 16, 2017, claimant worked the graveyard shift. He last answered a call at 3:49 a.m. He missed four calls while awake between 3:49 a.m. and 4:30 a.m. because he did not hear the phone ring. At 4:31 a.m., claimant looked at the clock then leaned his head back in his chair to take a nap. Claimant slept until 5:14 a.m.

(8) At 4:46 a.m., an employee who was scheduled to start work at 5:00 a.m. arrived at work. The employee pressed a door buzzer and shook the door handle many times and claimant did not let her in the building because he was asleep and did not hear her. She tried to get in again at 4:52 a.m., 4:55 a.m. and 5:15 a.m., but claimant did not respond; four minutes after waking, at 5:18 a.m., claimant let his coworker into the building. Shortly thereafter, claimant tried to make an outbound call using the employer's system and got a message indicating that the phones were disconnected due to a system error. At that time, he had not heard the phone ring since 3:49 a.m.

(9) The employer reviewed its agent summary report for February 16, 2017, which showed that claimant had missed 117 calls during his shift, including 36 calls between 3:49 a.m. and 5:17 a.m., any number of which might have been regarding a life-threatening situation. The employer knew that claimant had been sleeping on February 16<sup>th</sup>, and concluded that claimant must have been sleeping at work every other time he had a significant number of ignored calls when his coworkers had not. On February 16, 2017, the employer discharged claimant for sleeping at work.

**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 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.

As a preliminary matter, the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). To meet that burden, the employer must prove that it is more likely than not that claimant not only acted as the employer alleged, but that he also committed those acts with a willful or wantonly negligent mental state. For the reasons that follow, we conclude that the employer did not meet its burden in this case.

The employer alleged that claimant must have been sleeping on each occasion on which his ignored call rate was abnormally high. Claimant acknowledged that he slept at work on only three occasions, the final incident on February 16<sup>th</sup> and two prior occasions during which he awakened due to the ringing phone and did not miss calls because he had slept. He also explained that he had experienced an unresolved system error, and had conversed with at least three other workers from two shifts and they all experienced the same type of system errors. Therefore, although there is no dispute that the employer's agent summary reports showed claimant had an abnormally high ignored call rate during a few shifts, the record fails to show that the reason for the missed calls was that claimant was asleep.

With respect to the final incident, although the evidence varied as to how long claimant slept, there is no factual dispute that claimant slept at work. Based on claimant's testimony at the hearing that he looked at the clock then put his head back in his seat and closed his eyes to nap, it is apparent that claimant intentionally chose to sleep while on duty. While the employer alleged that claimant violated its expectations by sleeping on duty, the evidence about the employer's expectations, and claimant's understanding of them, is again no better than equally balanced. Claimant testified that he thought it was acceptable to nap at work and had, likely on more than one occasion, seen a flyer the employer placed in his inbox to recruit others to the graveyard shift that identified the benefits of the graveyard shift including being able to nap between calls. While the employer's witness was not aware of that flyer or its contents, she did not assert that she would necessarily have been aware of it had it existed. Based on the conflicting evidence, and absent a reason to disbelieve either claimant or the employer's witness, the evidence about whether or not claimant was permitted to sleep while on duty is, at best, equally balanced, and the employer has not established that it is more likely than not that claimant was aware when he slept on duty on February 16<sup>th</sup> that he might be violating the employer's expectation.

Finally, regardless that the employer did not prove he ignored them because he was sleeping, to any extent that the employer discharged claimant for ignoring calls the employer did not establish by a preponderance of the evidence that claimant was aware that he was ignoring calls at the time he failed to answer them. Claimant alleged that a system error disconnected the employer's phone system and prevented the phone from ringing. Although it is somewhat implausible that the employer's witness would have been unaware of such a system error, claimant testified, as noted above, that he had personally discussed the matter with at least three other workers from two shifts and they had all experienced the same type of problem. He also explained that, after the waking from his February 16<sup>th</sup> nap, his attempt to place an outbound call failed due to a system error. Absent a basis in this record to disbelieve claimant, we find that it is as likely as it is not that he failed to answer the phone on February 16<sup>th</sup> because of a system error as it is that he failed to answer the phone because he was ignoring calls.

For each of those reasons, we conclude that the employer did not establish by a preponderance of the evidence that claimant engaged in misconduct when he failed to answer inbound calls. Claimant is, therefore, not disqualified from receiving benefits because of his work separation.

**DECISION:** Hearing Decision 17-UI-82800 is affirmed.

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

**DATE of Service:** June 2, 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](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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