

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0682

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 92035). The employer filed a timely request for hearing. On May 26, 2017, ALJ Wyatt conducted a hearing, and on June 2, 2017, issued Hearing Decision 17-UI-84814, affirming the administrative decision. On June 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Washington County Juvenile Department employed claimant from June 11, 2011 until January 4, 2017, last as a Juvenile Counselor 1. As a Juvenile Counselor 1, claimant's job duties included direct supervision and control of the daily living activities of juvenile residents of Harkins House. Harkins House was residential facility that was an alternative to juvenile detention, and all residents were placed in the facility by an order of the juvenile court.

(2) In May or June, 2016, the employer changed claimant's work assignment from swing to night shift. Claimant often found it difficult to stay awake during his shifts, at least in part because of medication he was taking depression and anxiety he was experiencing.

(3) Between September 8 and November 2, 2016, Harkins House staff and residents reported numerous instances of claimant sleeping on the job to the employer's managers. Transcript at 6. On November 8, 2016, claimant met with the employer's Director of Juvenile Services to discuss the reports he had been sleeping on the job, and to also discuss several instances of claimant's tardiness.

(4) On November 21, 2016, two Harkins House residents and a staff member told claimant's supervisor that they found claimant asleep two times during his November 13 shift – once between 11:30 p.m. and 12:00 a.m., and another time at approximately 4:30 in the morning. Also on November 21, a resident told claimant's supervisor that on November 20, at approximately 4:30 a.m., the resident had to wake claimant up to obtain permission to use the rest room. Exhibit 2.

(5) By letter dated November 22, 2016, the employer suspended claimant without pay for 40 hours for failing to adequately perform his assigned job duty of providing direct supervision to Harkins House residents due to multiple incidents of sleeping on the job and tardiness.¹ Exhibit 2.

(6) On December 13, 2016, claimant met with the employer's Director of Juvenile Services to discuss the November 21 reports that he had been found sleeping on the job.

(7) By letter dated January 4, 2017, the employer discharged claimant. The employer discharged claimant because by sleeping during his shifts on November 13 and 20, he failed to fulfill the employer's expectation that he "remain awake and alert" so that he could perform an essential function of his assignment – to supervise and control the activities of Harkins House residents. Exhibit 2.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer reasonably expected that claimant would remain awake during his nighttime work shifts so that he could perform the essential job function of supervising residents of Harkins House, a facility that provided an alternative to detention for juvenile offenders. Claimant knew about and understood the employer's expectation. The employer asserted that it discharged claimant for "multiple incidents" of sleeping on the job. Transcript at 6. The record shows, however, that the employer discharged claimant only after it received the November 21 reports that he had been found asleep during his November 13 and 20 work shifts. The November 13 and 20 incidents were therefore the proximate cause of the discharge and the appropriate focus of our misconduct analysis.

The testimony of the employer's witness at the hearing, claimant's supervisor, was based on hearsay, *i.e.* reports of Harkins House residents and staff that claimant had fallen asleep during his November 13 and 20 shifts. Claimant, however, testified that on November 13, a resident noticed that that he was very sleepy sometime between 11:30 p.m. and 12 a.m., but claimant was never actually asleep. In regard to the allegation that he was found to be asleep at 4:30 a.m. on November 13, claimant asserted that it was another staff member, and not claimant, who was asleep at the time. Transcript at 20-21. Claimant also denied that he slept during his November 20 shift. Transcript at 21. The evidence regarding claimant's conduct during his November 13 and 20 shifts is no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer therefore failed to meet its burden to demonstrate that claimant engaged in willful or wantonly negligent behavior by falling asleep on the job on November 13 and 20.

¹ Based on this record, it appears that the employer imposed the November 28 suspension for the incidents of sleeping on the job that occurred prior to November 13.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-84814 is affirmed.

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

DATE of Service: July 5, 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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