

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1086**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 92833). The employer filed a timely request for hearing. On September 6, 2017, ALJ Jarry conducted a hearing and issued Hearing Decision 17-UI-91948, affirming the Department's decision. On September 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Main Building Maintenance employed claimant as a housekeeper from December 3, 2016 to July 7, 2017.

(2) The employer prohibited employees from sleeping on duty. The employer's policy provided that anyone sleeping on duty would be immediately discharged. Claimant knew or should have known that sleeping on duty violated the employer's expectations.

(3) On July 2, 2017, two employees looked for but could not find claimant. They knocked on a supply closet door and claimant then opened the door. The two employees thought claimant looked as though she had been sleeping, and concluded based upon her appearance and their earlier inability to find her that she had been sleeping.

(4) On July 7, 2017, the employer discharged claimant for allegedly sleeping on duty.

**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.

The employer had the right to expect claimant not to sleep while on the job, and alleged that claimant violated that expectation. Notably, however, the employer did not suggest that anyone observed claimant actually asleep while on duty, but rather suggested that employees had trouble finding claimant, and when they did find her thought she looked as though she had been sleeping. Claimant denied having slept while on duty.

In a discharge case, the employer has the burden of proving that it is more likely than not that claimant willfully or with wantonly negligence violated its expectations. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In this case, that would mean that the employer had to show not only that claimant was actually asleep while on duty, but also that she did so on purpose or with a conscious indifference to the employer's expectation that she not sleep on duty. Where, as here, the employer has only circumstantial hearsay evidence suggesting that claimant might have been asleep, but lacks sufficient evidence to show that she actually slept on duty, the employer has not met its burden to establish misconduct by a preponderance of evidence.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-91948 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 9, 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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