

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0737

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82245). Claimant filed a timely request for hearing. On July 6, 2018, ALJ Griffin conducted a hearing and issued Order No. 18-UI-112690, concluding claimant's discharge was not for misconduct. On July 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Wackenhut/G4S Security employed claimant as a uniformed security specialist from November 29, 2017 to March 15, 2018.

(2) The employer prohibited claimant from sleeping while on duty. In approximately March 2018, the employer issued claimant a warning after concluding he had been asleep on duty. Claimant understood that he was prohibited from sleeping while on duty.

(3) Claimant had sleep apnea and used a CPAP machine while sleeping. When claimant obtained inadequate amounts of sleep he felt fatigued and tended to unexpectedly fall asleep. Claimant notified the employer that he had sleep apnea and how it affected him.

(4) On March 10, 2018, claimant worked until 10:30 p.m. He was scheduled to return to work on March 11, 2018 at 6:00 a.m. Considering the length of his commute and need for time to eat, unwind from work, and prepare for work the next day, his work schedule left him only approximately three and one-half hours to sleep between shifts.

(5) On March 11, 2018, claimant reported to work after having had inadequate sleep. Although he was initially assigned to a roving patrol that would allow him to walk around and stay awake throughout his shift, the employer changed his assignment to a sedentary gatehouse assignment. Claimant told his

supervisor he had inadequate sleep and asked to be reassigned to the active roving duty, but the supervisor needed claimant to work at the gatehouse and refused claimant's request to be reassigned. Claimant was concerned about working the sedentary gatehouse duty, but did not have accrued leave to cover an absence and could not afford to miss a shift of work without pay.

(6) During his shift on March 11, 2018, claimant tried to stay awake. He made a cup of coffee to keep him awake, and did not feel particularly drowsy. He nevertheless unexpectedly fell asleep while on duty; he did not realize at the time that he had closed his eyes or fallen asleep. Another employee discovered claimant asleep while on duty.

(7) On March 15, 2018, the employer discharged claimant for sleeping while 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) (January 11, 2018) 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.

There is no dispute on this record that claimant violated the employer's expectation that he not sleep while on duty on March 11, 2018. For claimant's conduct to be considered "misconduct" and disqualify him from receiving unemployment insurance benefits, however, the conduct must have been either willful or wantonly negligent. On this record, it was not. Claimant had a medical condition that caused him to have a tendency to unexpectedly fall asleep when he had inadequate sleep the night before. He had inadequate sleep the night before his March 11th shift, was assigned to a sedentary post, was concerned he might fall asleep on duty, discussed the concern with his supervisor, and made every effort to stay awake while on duty. Despite claimant's concern and effort, he fell asleep without realizing that he had done so. On this record, he did not fall asleep intentionally, nor was he conscious of his conduct or indifferent to the consequences of falling asleep on duty. His conduct therefore was not willful or wantonly negligent, and was not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his discharge.

DECISION: Order No. 18-UI-112690 is affirmed.

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

DATE of Service: August 24, 2018

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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