

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0753

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On March 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144124). Claimant filed a timely request for hearing. On April 11, 2014, ALJ Wyatt conducted a hearing, and on April 15, 2014 issued Hearing Decision 14-UI-15144, affirming the Department's decision. On May 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Oregon Tool & Supply Inc. employed claimant from May 16, 2000 to February 24, 2014.

(2) Prior to January 14, 2014, claimant and other employees who worked a full shift typically recorded on their time cards that they started work 30 minutes before the employer opened for business, and stopped work 30 minutes after it closed. On January 17, 2014, the employer notified claimant and the other employees in writing that they were expected to start work when the employer opened for business and finish their work by the time it closed unless they worked later assisting a customer with a large purchase. The employer also stated that employees were expected to accurately record on their time cards the times they started and stopped work, and the hours they worked. Claimant understood the employer's expectations.

(3) On February 15, 2014, claimant was scheduled to work from 9:00 a.m. to 3:00 p.m. When claimant reported for work, he recorded on his time card that he started work at 9:00 a.m., stopped work at 3:00 p.m., and worked six hours. However, claimant left work early at 2:09 p.m. with the employer's permission due to a family emergency. Claimant understood the employer expected him to correct his time card to indicate that he left work early and worked less than six hours. Claimant did not do so.

(4) On February 18, 2014, claimant recorded on his time card the times he started and stopped work, and the hours he worked that day, directly beneath his entry for February 15. Claimant did not correct his time card entry for February 15. On February 19, 2014, claimant recorded on his time card the times he

started and stopped work, and the hours he worked that day, directly beneath his entries for February 15 and 18. Claimant did not correct his time card entry for February 15. On February 20, 2014, claimant recorded on his time card the times he started and stopped work, and the hours he worked that day, directly beneath his entries for February 15, 18 and 19. Claimant did not correct his time card entry for February 15. On February 21, 2014, claimant recorded on his time card the times he started and stopped work, and the hours he worked that day, directly beneath his entries for February 15, 18, 19 and 20. Claimant did not correct his time card entry for February 15.

(5) Claimant deliberately neglected to correct his time card entry for February 15 in order to receive pay for time he did not work. The employer discharged claimant for failing to correct his time card entry for February 15, 2014.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ 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. 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to correct his time card to indicate that he left work early and worked less than six hours on February 15, 2014. It is undisputed that claimant understood and violated that expectation. At hearing, claimant asserted that he forgot to correct his time card. Audio Record at 23:10-24:30. In Hearing Decision 14-UI-15144, however, the ALJ determined that claimant's testimony was "inconsistent and unreliable."<sup>1</sup> In support of that determination the ALJ noted that claimant first asserted he typically recorded his anticipated stop time and hours worked on his time card when he reported for work each day, but then asserted that he did so on February 15, but not on other days.<sup>2</sup> The ALJ also noted that claimant first testified that his time card had been faxed to the employer's main office before he had a chance to correct it, and asserted that he forgot to correct the time card only after it was shown that his time card had not been faxed to the main office for another week.<sup>3</sup> We have reviewed the record in its entirety, and agree with the ALJ's characterization of claimant's testimony as inconsistent and unreliable. See Audio Record at 23:10-24:30. We also find it unlikely that claimant edited his time card on at least four occasions over a period of six days without remembering to correct the entry for February 15. More likely than not, claimant deliberately neglected to correct his time card to indicate that he left work early and worked less than six hours. In doing so,

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<sup>1</sup> Hearing Decision 14-UI-15144 at 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

claimant consciously engaged in conduct he knew violated the employers' expectations, and therefore willfully violated those expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that create irreparable breaches of trust in the employment relationship exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Absent a credible alternative explanation for claimant's willful failure to correct his time card, we find it likely that he neglected to do so in order to receive pay for time he did not work. Claimant's intentional act of dishonesty was sufficient to create an irreparable breach of trust in the employment relationship. Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor can claimant's conduct be excused as a good faith error. Claimant understood the employer expected him to correct his time card to indicate that he left work early and worked less than six hours on February 15, 2014. His failure to do so therefore was not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-15144 is affirmed.

Tony Corcoran and J. S. Cromwell;  
Susan Rossiter, not participating.

**DATE of Service:** June 9, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.