

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0968

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but that claimant's benefit rights based on wages earned prior to the discharge date were not canceled (decision # 901149). Claimant filed a timely request for hearing. On May 8, 2014, ALJ Frank conducted a hearing, and on May 16, 2014 issued Hearing Decision 14-UI-17817, affirming the Department's decision. On June 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Since no adversely affected party sought review of that portion of decision # 901149 that concluded claimant's benefit rights based on wages earned prior to the discharge were not canceled, EAB has confined its review to claimant's work separation.

**FINDINGS OF FACT:** (1) Ventura Foods, LLC employed claimant as a forklift driver from March 5, 2012 until March 19, 2014.

(2) The employer expected claimant to accurately record his work time, take no more than a thirty minute lunch break and refrain from dishonesty in recording his time or in oral and written communications to the employer. Claimant was aware of the employer's expectations.

(3) On March 11, 2014, one of claimant's coworkers reported to the employer that claimant had taken an extended lunch break on March 10, 2014. The employer reviewed its Kronos timekeeping records for March 10, 2014 and determined that claimant had punched out for lunch at 8:12 p.m., but had never punched back in after lunch. Instead, claimant had completed a handwritten Kronos missed punch and exception sheet on March 10, 2014. On the exception sheet, claimant wrote that he had inadvertently missed punching back in from lunch on March 10, 2014 and that his time in the Kronos records should be adjusted to show that he returned from lunch at 8:42 p.m., for a total lunch break of thirty minutes.

(4) On March 11, 2014, the employer's operations manager reviewed the employer's video surveillance records to determine the actual length of the lunch break that claimant had taken on March 10, 2014. In the course of his investigation, the manager discovered that the time stamps on the employer's surveillance videos were six minutes behind the times shown in the employer's Kronos timekeeping system. Adjusting the times shown on the videos to the Kronos times, the manager observed that, on the surveillance videos, claimant clocked out for lunch and left the workplace through the main employee entrance at 8:12 p.m. on March 10, 2014. The only employee time clock was located at this entrance. From key activation records, the manager determined that claimant entered the workplace after his lunch using a side entrance door, where a time clock was not located. The manager viewed the surveillance videos of this side door and observed claimant entering the workplace at this door at 9:09 p.m., again adjusting the time shown on the video to Kronos times. The main entrance and the side door were the only ways to enter the workplace other than to climb up and enter through elevated loading dock doors in the warehouse. The video record showed that claimant had taken a fifty seven minute lunch break on March 10, 2014, from 8:12 p.m. until 9:09 p.m.

(5) On March 11, 2014, the employer told claimant it was investigating the time he had reported for his March 10, 2014 lunch break. The employer asked claimant to write a statement explaining how he had reported the time he was gone for his lunch on March 10, 2014. Claimant first wrote in the statement that he had become very ill during his lunch break, "lost track of time" and did not punch back in after his lunch because he was "rushed" in order to return to work on time. Transcript at 12. At a later point in the statement, claimant wrote that he had "looked at [the] punch out," apparently a reference to the time clock at the main entrance, when he returned from lunch and "I thought I was within three – two or three minutes [over the] time allowed [for the lunch break when I returned]." Transcript at 12. Claimant did not refer in the statement to which entrance he had used to enter the workplace after his lunch break, nor did he attempt to explain the discrepancy between the time he had reported for his lunch and the time he was shown to have been away from the workplace on the surveillance videos. On March 10, 2014, claimant never told a supervisor he was ill.

(6) Sometime on or after March 11, 2014, the employer concluded that claimant had been deliberately dishonest when he did not punch in after his lunch break on March 10, 2014 and that he had failed to punch back in to conceal that he had been gone for more than the thirty minutes allowed for that break. The employer also concluded that claimant had been deliberately dishonest when he wrote the time he had returned from lunch on the timekeeping exception sheet and when he gave the written statement to the employer on March 11, 2014. On March 19, 2014, the employer discharged claimant for dishonesty.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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. The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute his understanding of the employer's expectations, nor did he dispute that if he was dishonest in his timekeeping or in his written statement to the employer that he violated the employer's standards. Transcript at 20. Claimant also did not challenge the reliability of the video and timekeeping evidence that the employer presented at hearing. *See* Transcript at 24. The manager's testimony about the detailed examination he made of the surveillance videos and the care that he took to adjust the time stamped on the videos to the Kronos time is strong assurance to us that his conclusions were reliable. Transcript at 7-11. There appears to be only one contested issue: whether claimant's error in reporting the time he was gone for lunch on March 10, 2014 was, more likely than not, an act of deliberate dishonesty.

The time claimant took for his lunch of March 10, 2014 was almost twice as long as the thirty minutes allowed. Claimant's failure to clock back in after that lunch break by entering the workplace by a side door where there was no time clock, combined with the time that claimant reported himself back on the handwritten exception sheet, strongly suggests intentional deception. It is unlikely that, even if claimant was ill, he would not have been aware he had taken much longer for lunch than permitted when he arrived back at the workplace. In addition, claimant's contention of serious illness is badly undercut by his failure to report an illness to a supervisor and the fact that he was able to continue his shift that day and report for work the next day. Transcript at 18, 27. On these bare facts, absent a plausible rebuttal from claimant explaining the discrepancy between his times and the employer's times, there is a strong inference that claimant's behavior was intentionally dishonest.

At hearing, claimant provided no reliable, innocent explanations for why or how the times he reported for his lunch on March 10, 2014 could be so discrepant from the times shown by the employer's videos. Most conspicuously, claimant's testimony was evasive in response to the ALJ's and the employer's pointed and simple questions, often inconsistent and, at times, nearly incoherent. For example, while first insisting that he took only thirty minutes for lunch on March 10, 2014, claimant then started testifying about his "misjudgment" of the time he was gone on his lunch break, refused to explain what he meant by a "misjudgment" and then reversed himself and insisted that he had taken only a thirty lunch break on March 10, 2014. Transcript at 21, 22, 23, 24, 25. Although claimant told the ALJ that he did not challenge the accuracy of the employer's evidence, which appeared to clearly indicate he had been gone for far longer than thirty minutes for his lunch on March 10, 2014, he evaded all attempts to pin down whether he was conceding that had been gone for more than thirty minutes during his lunch break. Transcript at 21, 22, 24. In his written statement to the employer, claimant said he looked at the time clock when he returned from lunch and thought he was more or less on time. At hearing, however, claimant testified he never looked at the time clock and never told the employer he had done so. Transcript at 24, 25, 26, 26-27. Claimant never explained why he wrote what he did in the statement. Despite claimant's contention at hearing that he never looked at the time clock when he returned from lunch and had not done so on March 10, 2014, he testified that he was certain that he had written the correct time that he returned from lunch on the Kronos exception sheet because he was "usually right on time," "very good at punctuality" and that day, despite his prior testimony about misjudging time, he had been "mentally aware of the time I would normally take." Transcript at 24, 25, 26, 28. However, it was not clear from claimant's testimony how he had estimated the time he returned from lunch other than merely adding thirty minutes to the time he clocked out regardless of when he had actually returned. Viewed in sum, claimant's testimony did not begin to dispel the logical inferences from the employer's evidence. More likely than not, claimant knew he had taken approximately thirty minutes longer than the time allowed for his lunch break on March 10, 2014 and, with knowledge and a

consciously dishonest intention, did not punch back in after lunch, which would have revealed the true length of time he had been gone. More likely than not, claimant intended to and did fill out the Kronos exception sheet dishonestly, indicating he was at lunch only for thirty minutes, in order to conceal that he was gone from the workplace for far longer than the break that the employer allowed. This explanation is the one most consistent with the evidence in the record, including claimant's evidence, and the one most likely to underlie claimant's behavior. By his behavior, claimant willfully violated the employer's expectation that he refrain from knowing dishonesty in reporting his time and in other communications to the employer.

Claimant's dishonesty in violating the employer's expectations, is not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is an act that is single or infrequent occurrence rather than a repeated act or pattern of willful or wantonly negligent behavior and an act that, by its nature, does not exceed mere poor judgment because it causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). EAB has consistently held that even single instances of intentional dishonesty may exceed mere poor judgment because an employer relies on the fundamental honesty and integrity of its employees in the workplace. *See e.g., Patricia M. Jensen* (Employment Appeals Board, 2013-EAB-2464, January 17, 2014) (dishonesty exceeded mere poor judgment when lied in order to take advantage of another employee's greater employee discount and arranged for the other employee to present payment for the purchase when it was intended for claimant); *Morgan J. Wichman* (Employment Appeals Board, 13-AB-1101, July 26, 2013) (dishonesty exceeded mere poor judgment when lied about internet searches); *Brenda D. Barnes* (Employment Appeals Board, 11-AB-0651, March 11, 2011) (dishonesty exceeded mere poor judgment when falsified a time card entry); *Joseph A. Brucken* (Employment Appeals Board, 11-AB-0614, March 9, 2011) (dishonesty exceeded mere poor judgment when falsified a computer record); *Tara R. Pape* (Employment Appeals Board, 10-AB-3851, December 30, 2010) (dishonesty exceeded mere poor judgment when falsified a certification card and lied that card was stolen); *Rhonda M. Gosso* (Employment Appeals Board, 10-AB-1294, June 7, 2010) (dishonesty exceeded mere poor judgment when lied during an investigation); *Robert M. Bien* (Employment Appeals Board, 09-AB-0319, February 23, 2009) (dishonesty exceeded mere poor judgment when falsified job application); *Romaldo G. Munoz* (Employment Appeals Board, 08-AB-2007, November 3, 2008) (dishonesty exceeded mere poor judgment when lied about whether work was performed); *Richard T. Christie* (Employment Appeals Board, 08-AB-1566, August 28, 2008) (dishonesty exceeded mere poor judgment when falsified job application); *Jacob W. Smith* (Employment Appeals Board, 08-AB-1586, August 27, 2008), *Oregon Court of Appeals aff'd w/o opinion September 9, 2009* (dishonesty exceeded mere poor judgment when lied about whether work was performed). It was reasonable for the employer to conclude that, by the nature of claimant's intentional and consciously planned deception in reporting his time on March 10, 2014 it could no longer trust claimant to act with honesty in the workplace. Claimant's violation of the employer's expectations cannot be excused as an isolated instance of poor judgment since his dishonesty exceeded mere poor judgment.

Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that he misreported his time on March 10, 2014 as a result of some misunderstanding of the employer's expectations, or that he thought the employer would condone any such misrepresentation. There is no evidence in the record to support that claimant's behavior on March 10, 2014 was a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-17817 is affirmed.

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

**DATE of Service:** July 22, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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