

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0211

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101214). Claimant filed a timely request for hearing. On February 10, 2015, ALJ Seideman conducted a hearing, and on February 24, 2014 issued Hearing Decision 15-UI-33496, affirming the Department's decision. On February 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he contended that some of the evidence presented at hearing by the employer's witnesses was fabricated and requested an "opportunity to face my accusers to disprove these allegations." However, claimant had an opportunity at hearing to cross-examine those witnesses and to otherwise challenge the truth of their testimony by presenting his own evidence in rebuttal. Audio at ~23:27, ~29:50. Because claimant did not present any evidence showing that factors or circumstances beyond his reasonable control prevented him from trying to disprove the witness's testimony during the hearing as required under OAR 471-041-0091(2) (October 29, 2006), claimant's request is denied. EAB considered only information received into the record when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Oregon Cherry Growers employed claimant as a forklift driver from September 26, 2014 until December 19, 2014.

(2) The employer expected claimant to refrain from dishonesty when responding to job-related inquiries. Claimant was aware of the employer's expectations as a matter of common sense.

(3) In 1987, claimant was convicted in the state of Arizona of the crime Burglary in the third degree, a felony crime in that jurisdiction. Claimant was sentenced to a prison term of one year. In 1988, claimant was released from prison.

(4) On September 15, 2014, claimant completed a written employment application for the employer. One of the questions on the application asked, "Have you ever been convicted of a felony?" Exhibit 10 at 1. In response, claimant checked a box stating, "No." *Id.* Claimant signed the application, which included a certification that the information he had provided on the application was true and complete to the best of his knowledge and that he was aware that he was subject to discharge if he falsified any information on the application. Exhibit 10 at 2. When the employer's process sanitation manager conducted an interview of claimant before he was hired, claimant did not mention anything about his felony conviction in Arizona.

(5) Sometime on or before December 17, 2014, the process sanitation manager received information from claimant's supervisor that claimant had been discussing a prison term he had served with his coworkers. The manager did not recall claimant ever mentioning a felony conviction to her during the interview process. She retrieved claimant's job application from his personnel file and confirmed that he had not disclosed any felony convictions. On that day, the manager contacted a company to perform a background check on claimant and that company issued a report to the employer showing claimant's 1988 felony conviction in Arizona. Exhibit 7 at 3.

(6) On December 17, 2014, some employer representatives met with claimant to discuss the background report that the employer had received and what claimant had stated on his employment application. Claimant told the representatives that he had intended to bring up the conviction during his pre-employment interview. Claimant also stated to them that the Arizona conviction had taken place in the distant past and that it was for a misdemeanor crime. Claimant then characterized the Arizona conviction as a "little felony." Audio at ~21:24, ~30:23. On that day, the employer suspended claimant from employment.

(7) On December 19, 2014, the employer discharged claimant for dishonesty in completing his employment application.

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. Isolated instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate 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 that he was aware that the employer expected him to fill out his employment application honestly or contend that he did not understand that he was certifying that his responses to its questions were accurate. Claimant did not contend that he filled out the part of the application that inquired about felony convictions as he did because he made an error, was under a mistaken belief that the conviction was removed from his record or that he somehow forgot about the conviction. Under these circumstances, the only reasonable inference is that claimant intended to mislead the employer his

past felony record, perhaps to enhance the likelihood of being hired. Audio at ~ 33:40. Claimant's principal justification for answering that he had no prior felony convictions was that the Arizona conviction happened many years before he applied to work for the employer and prior background investigations had not revealed its existence. Audio at ~32:32, ~33:05. In essence, claimant's justification is simple: he did not think his dishonesty was going to be revealed if the employer actually performed a background check. However, because claimant was aware of his prior felony conviction when he completed the employer's employment application and affirmatively denied on that application that he had any such conviction, his dishonesty on that application was a deliberate and willful violation of the employer's expectations of honesty in the workplace.

Claimant's willful dishonesty in filling out his application for employment is not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To constitute an "isolated instance of poor judgment," claimant's behavior must, among other things, not have exceeded "mere poor judgment" by being the type of behavior that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). EAB has consistently held that honesty in workplace matters is fundamental to the employment relationship, and that even a single instance of willful dishonesty may exceed the type of behavior that is appropriately excused as an isolated instance of poor judgment. *See Patricia M. Jensen* (Employment Appeals Board, 2013-EAB-2464, January 17, 2014) (dishonesty exceeded mere poor judgment when lied in order to use another employee's greater employee discount and arranged for other employee to purchase merchandise 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). In this case, a reasonable employer would objectively conclude that by his willful dishonesty in answering questions on his employment application, claimant's honesty in other workplace matters could no longer be trusted.

Nor was claimant's behavior in willfully supplying dishonest information on his employment application excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that he sincerely believed that the employer would condone his dishonesty in supplying the information requested on its employment application. Even if claimant had made such an assertion, it would have been implausible.

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

DECISION: Hearing Decision 15-UI-33496 is affirmed.

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

DATE of Service: April 13, 2015

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.