

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0380

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 95631). This decision stated that a request for hearing needed to be filed on or before November 19, 2014 to be timely. On December 18, 2014, the employer filed an untimely request for hearing. On January 29, 2015 and March 4, 2015, ALJ Frank conducted hearings, and on March 12, 2014 issued Hearing Decision 15-UI-35042, allowing the employer's late request for hearing and reversing the Department's decision on the merits. On April 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lane Forest Products, Inc. employed claimant as a blower crew operator from December 12, 2012 until September 8, 2014.

(2) The employer expected claimant to immediately report to the employer any accidents in which he was involved that resulted in any injury to people or damage to the employer's property or the property of third parties. The employer also expected that when claimant made business-related reports to the employer he would refrain from supplying dishonest or misleading information or concealing the correct facts. Claimant was aware of the employer's expectations.

(3) Early in the day on September 5, 2014, the blower crew supervisor received a call from claimant at a jobsite where he was working. Claimant told the supervisor that the plow on his truck was not functioning correctly and would not move mulch. The supervisor went to the jobsite and explained to claimant how to resolve the problem. When the supervisor left, the truck and plow were running correctly and were not damaged. Later that day, claimant again called the supervisor and told him that the plow was not working. The supervisor gave claimant instructions over the phone, and claimant informed him that the plow was again functioning as intended.

(4) Sometime later on September 5, 2014, after claimant made the second call to the blower crew supervisor, claimant was backing his truck down a narrow driveway on a jobsite and struck the control panel on the truck against a tree. The impact either ripped three switches off the control panel or significantly damaged them. Claimant became aware of the damage to the switches as he proceeded down the driveway. At that time, claimant did not attempt to call the blower crew supervisor or any other employer representatives to report this accident or the damage to the switches or the control panel.

(5) When claimant arrived back at the employer's yard, he took the truck to one of the mechanics in the employer's shop. Claimant told the mechanic that the plow switch on the truck, one of the three switches on the control panel, was not working and he thought that it was defective. The mechanic inspected the truck and it appeared to him that the damage to the truck was far more extensive than a single defective plow switch, and included three switches on the control panel that were damaged as well as the control panel itself. Claimant then asked the mechanic not to report that he had caused the damage to the truck. Claimant left the truck and went to the employer's lunchroom to eat lunch. At around that same time, the mechanic went to the shop operations manager, told him what claimant had stated to him about the truck, and told him that he thought there was more damage than claimant had represented. The operations manager inspected the truck and agreed with the mechanic. The operations manager then went to the blower crew supervisor and explained what claimant had told the mechanic about the damage, what his visual inspection revealed and that it appeared to him that the truck had been in an accident and that three control switches and the control panel were damaged.

(6) Shortly after the operations manager spoke to the blower crew supervisor, claimant entered the blower crew supervisor's office and told him that the truck plow was not functioning correctly and that the mechanic had told him that the plow switch was defective. The supervisor asked claimant if that was all that was wrong with the truck and claimant said yes. At that time, the blower crew supervisor asked claimant to go with him to the shop to inspect the truck. After they reached the truck, the supervisor showed claimant that three switches had been damaged. Claimant then told the blower crew supervisor that he had backed the truck into a tree. Claimant insisted, however, that the mechanic had told him that the truck switches were defective before he backed into the tree.

(7) On September 8, 2014, the employer discharged claimant for failing to immediately report to the employer the damage to the truck caused on September 5, 2014 and attempting to conceal the full extent of the damage, and the source of it, from the blower crew supervisor and the employer.

(8) On November 3, 2014, the employer received a mailed copy of administrative decision # 95631. On that same day, staff in the employer's human resources department faxed a request for hearing on the administrative decision to the Office of Administrative Hearings (OAH). Although it was not the practice of staff to generate a fax confirmation receipt after transmitting a fax, it was their practice to remain by the fax machine until its screen display showed that the transmission was successful and to re-send a fax if the display indicated that the transmission had failed. For unknown reasons, the request for hearing was not received by OAH on or after November 3, 2014. On December 18, 2014, staff in the employer's human resources department contacted OAH to learn when a hearing was scheduled on administrative decision # 95631. At that time, the employer learned that OAH had no record of receiving a faxed request for hearing from the employer on November 3, 2014 or at any later time. On December 18, 2014, the employer faxed a second request for hearing on the administrative decision to OAH.

CONCLUSIONS AND REASONS: The employer's late request for hearing is allowed. The employer discharged claimant for misconduct.

Late Request for Hearing. ORS 657.269 states that a request for hearing must be filed within 20 days after the date the administrative decision is mailed, or in this case, on or before November 19, 2014. ORS 657.875 states that the 20 day time limit for filing hearing request may be extended a reasonable time if the requesting party shows good cause. OAR 471-040-0010(1) (February 10, 2012) states that "good cause" for a late filing exists when the delay arises from an excusable mistake or other factors beyond the applicant's control. OAR 471-040-0010(3) states that "a reasonable time" is seven days after the circumstance that prevented a timely filing have ceased to exist.

Here, the employer's witness testified that the employer faxed the request for hearing to OAH on November 3, 2014, within the required time. While the witness did not have a fax confirmation receipt to corroborate the timely fax transmission, she did provide testimony about the employer's usual business practices when its staff transmitted faxes and there was no reason to suspect that the fax was not transmitted on that day or that the employee operating the fax machine did not verify its successful transmission by observing the display on the fax machine. Absent evidence to the contrary, the employer attempted to file its request for hearing in a timely manner and for some unknown reason that fax either did not reach OAH or was not recorded by OAH as having been received. In either case, these factors were beyond the control of the employer. Since the employer acted on the same day it learned OAH had not recorded its request for hearing as having been received and faxed a second request for hearing to OAH, the employer acted within seven days, which is a reasonable period. For these reasons, the employer has shown good cause for filing its late request for hearing and that late request is allowed.

The Merits (Claimant's Discharge). 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 carries 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).

At hearing, claimant agreed that he was aware of the employer's policy that required the immediate reporting of all accidents and the employer's policy requiring accurate reporting work-related matters and refraining from active concealment of the correct facts. Transcript at 17-18. However, claimant contended that he did not immediately report the accident he had with the truck on September 5, 2014 because he intended to make that report when he returned to the employer's shop. Transcript at 20. When claimant returned to the shop, he contended that the blower supervisor was not available and he then took the truck to the employer's mechanic and told the mechanic what had happened to the truck. Transcript at 22. Claimant also contended that, after lunch, when the blower supervisor was available, he went to him and immediately volunteered correct information about what had happened to the truck and the full extent of the damage. Transcript at 20, 24. Claimant and the employer's account of the information claimant provided about the accident are clearly contradictory. Claimant stated that the testimony of the blower supervisor about his initial failure to disclose the accident, his statement to the blower supervisor that the extent of the damage was a defective plow switch and his failure to disclose

the full damage to the truck was all fabricated, although claimant had "no clue" why the blower supervisor would lie. Transcript at 20. Claimant did not dispute that the mechanic had told the employer that claimant asked him not to report the damage to the employer or its cause, but contended that the mechanic's statement was also fabricated, although claimant stated that he and the mechanic were "pretty good friends" and that the mechanic would make such a statement was "crazy." Transcript at 21, 22. It is implausible that the employer's mechanic, its shop operations manager and the blower supervisor would all conspire together for no apparent reason to create a fabricated account of what claimant said after he returned to the shop and what he concealed until he was pressed by the blower supervisor. Given that the accounts of the employer's representatives were consistent, and there was no reason to doubt their credibility, it is more likely than not, that claimant asked the mechanic to conceal the full extent of the damage to the truck and how it occurred, and that claimant also did not volunteer the correct information to the blower supervisor but admitted it only after the blower supervisor pressured claimant and showed him that he knew the full extent of the damage. At a minimum, claimant's initial statement to the mechanic that the plow switch was defective, rather than disclosing the damage to the three switches on the truck, and his request to the mechanic to conceal the extent of the damage to the truck and what caused it, were both active attempts to hide information from the employer about the accident when claimant was aware of it and its damage. The only logical inference that can be drawn from these facts is that claimant purposefully intended to deceive the employer. Claimant's behavior on September 5, 2014 was a willful violation of the employer's standards.

Claimant's willful behavior on September 5, 2014 may be excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Acts may be excused as an isolated instance of poor judgment if, among other things, they are not the type that exceed "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A). EAB has consistently held that lies to the employer when making work-related reports or other acts of dishonesty exceed mere poor judgment because honesty is fundamental to the employment relationship. 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). Here, claimant knew what he had

done, knew what had caused it, and knew the full extent of the damage to the truck, and lied about it, actively attempted to induce the mechanic to not report it to the employer and continued to try to conceal it from the blower supervisor until the supervisor made it clear to claimant that he was aware of the true facts. A reasonable employer would objectively conclude that, by this dishonest behavior, claimant had fundamentally ruptured the employment relationship and made a continued employment relationship impossible. On these facts, claimant's behavior exceeded mere poor judgment and is not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior on September 5, 2014 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present evidence showing that he subjectively believed that the employer would condone his lies about the accident with the truck and the damage to it, and his attempts to conceal both of them. There is no evidence in the record to support that claimant's conduct on September 5, 2014 was attributable to a good faith error or that it is excusable on that ground.

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

DECISION: Hearing Decision 15-UI-35048 is affirmed.

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

DATE of Service: May 21, 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.