

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1010**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 171556). The decision stated that, to be timely, a request for hearing needed to be filed on or before March 23, 2015. On July 9, 2015, the employer filed an untimely request for hearing. On August 14, 2015, ALJ R. Davis conducted a hearing at which claimant did not appear, and on August 15, 2015 issued Hearing Decision 15-UI-43050, allowing the employer's late request for hearing and affirming decision # 171556. On August 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

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

Because no adversely affected party sought review of that portion of Hearing Decision 15-UI-43050 that allowed the employer's late request for hearing, EAB limited its review the merits of claimant's work separation.

**FINDINGS OF FACT:** (1) Roseburg Forest Products Co employed claimant as a floorman from August 12, 2013 until January 16, 2015.

(2) The employer expected claimant to give honest information when making reports to the employer or responding to its inquiries. As a matter of common sense, claimant understood the employer's expectation.

(3) On January 12, 2015 at 1:30 a.m., Roseburg police officers stopped claimant while in his car with a passenger. During a search, the police found methamphetamine in the car as well as on the persons of claimant and the passenger. The methamphetamine in the car and on claimant belonged to claimant. The police arrested claimant on the charge of unlawful possession of methamphetamine and he was incarcerated. Exhibit 3 at 7.

(4) On January 12, 2015, claimant called the receptionist at work and left a message stating that he was unable to report for work because his son had experienced a seizure and he needed to transport his son to a medical facility. Exhibit 3 at 10; Audio at ~34:27. Claimant was actually incarcerated when he placed that call. Later that day, some of claimant's coworkers visited a website showing the photographs of individuals recently detained at the local jail and listing the crimes for which they had been incarcerated. The coworkers saw that claimant had been jailed for methamphetamine possession. The employer's management was informed of what the coworkers had learned.

(5) On January 13, 2015, claimant arrived for work at his usually scheduled time and punched in at the time clock. After he reported for work, claimant did not seek out a supervisor or a member of management to report the correct reason for his absence from work on January 12, 2015. Sometime later, claimant was asked to report to an office. Claimant's supervisor, the employer's human resources representative and another employer representative were in that office. The human resources representative asked claimant the reason that he had been absent from work the previous day. Claimant said the absence was caused by his incarceration for a crime that he did not commit. Claimant stated that on January 12, 2015, he had given a ride in his car to an individual who had just purchased a ferret from him. When the car was stopped by police, claimant said the police found methamphetamine on his passenger and in the car. Claimant told them that the methamphetamine did not belong to him and he had not known about its presence, and he attributed his arrest to the fact that he owned the car in which the methamphetamine had been found. The human resources representative then told claimant it might help his situation if he took a drug test. Claimant said he would do so, he was not a drug user and the test would be "no problem" for him. Exhibit 3 at 9; Audio at ~36:38, ~37:24. The discussion continued for some time until claimant stated that he would not be able to pass the drug test. The human resources representative asked claimant if he meant that he could not pass the drug test because he had methamphetamine in his system at that time and claimant said "Yes." Exhibit 3 at 9, Audio at ~38:21. The employer suspended claimant from work that day.

(6) On January 16, 2015, the employer discharged claimant for providing dishonest information about the reason for his absence when he spoke with the receptionist on January 12, 2015, and continuing to provide dishonest information in the initial phase of his interview on January 13, 2015.

**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 instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means that, among other things, that to be excused under this exception, the behavior must not have created an irreparable breach of trust in the employment relationship or otherwise have made a continued employment relationship impossible. OAR 471-030-0039(1)(d)(D). 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).

In Hearing Decision 15-UI-43050, although the ALJ concluded that claimant's dishonesty in initially supplying information about his absence from work on January 12, 2015 was a willful violation of the employer's expectations, it was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The ALJ reasoned that claimant, while claimant's statements to the employer were "clearly dishonest," he "did not have a position of trust with the employer" and "a fabricated excuse for missing one day of work, while serious, does not objectively make a continued employment relationship impossible." Hearing Decision 15-UI-43050 at 4. We disagree.

At the outset, we agree with the ALJ that claimant was willfully dishonest when he initially provided false information to the employer about his absence on January 12, 2015. Claimant surely knew that he missed work because of his arrest and incarceration, and not because his son had a seizure or because he was unwittingly duped into methamphetamine possession by the passenger in his car. The only evidence in the record about the correct facts underlying claimant's arrest was that he ultimately admitted to the employer's representatives that at least some of the methamphetamine in his possession and in his car belonged to him. As a matter of common sense, claimant understood that the employer expected him to refrain from intentional deception in giving information to the employer about matters affecting the workplace, including his work attendance or non-attendance. On these facts, the only reasonable inference is that in the initial phase of his contacts with the employer claimant was intentionally concealing the true reason for his absence and was fabricating a story to explain it. The conclusion that claimant willfully violated the employer's standards for honest communications in the workplace is inescapable.

We disagree with the ALJ's analysis finding that claimant's intentionally deceptive behavior was excused from constituting misconduct as an isolated instance of poor judgment. EAB has consistently held that, under appropriate circumstances, a single act of willful dishonesty may exceed "mere poor judgment" and is not excusable since honest reporting of work-related information is fundamental to the employment relationship.<sup>1</sup> While claimant may not have held a position of special trust in the employer's organization, such as a supervisory one, the ALJ was incorrect in his reasoning that, by virtue of his subordinate position, the employer did not have a right to expect that claimant would refrain from concealing the true information from it or willfully deceiving it in matters affecting his work. Here, it appears that claimant only disclosed the correct information to the employer when he was aware

---

<sup>1</sup> 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 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).

his deception would be uncovered if the employer insisted that he take the drug test to which he had agreed. If the situation were otherwise, and claimant had decided voluntarily to be candid with the employer, it would be expected that he would have sought out an employer representative immediately on his arrival at work on January 13, 2015 and not waited until he was summoned to a meeting with the employer's representatives where his deceptions started to unravel. Based on claimant's dishonest behavior and his likely state of mind, the employer could not rely on claimant's essential integrity in the workplace or in providing honest information about the workplace or his performance when he thought such honesty might jeopardize his work prospects. Given these facts, a reasonable employer would objectively conclude that claimant's dishonest accounts of what led to his absence from work on January 12, 2015 caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship with him impossible. Nor were claimant's deceptions excused as a good faith error under OAR 471-030-0038(3)(b). The excuse of a good faith error is not applicable to the behavior for which claimant was discharged because no evidence in the record demonstrates that he thought the employer would condone his dishonesty or that he provided deceptive information as a result of a sincere misunderstanding of the employer's standards for honesty.

The employer discharged claimant for behavior that was not excused from constituting misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-43050 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell, participating.

**DATE of Service:** September 25, 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](http://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.