

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0438**

*Application for Review Allowed*  
*Hearing Decision 16-UI-54420 Affirmed - Disqualification*

**PROCEDURAL HISTORY:** On January 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 82654). Claimant filed a timely request for hearing. On February 29, 2016, ALJ Vincent conducted a hearing, and on March 4, 2016 issued Hearing Decision 16-UI-54420, reversing the Department's decision. On March 24, 2016, claimant attempted to file an application for review, was not forwarded to the Employment Appeals Board (EAB). On April 15, 2016, claimant re-filed an application for review with EAB.

**EVIDENTIARY MATTERS:** The ALJ admitted Exhibit 1 into evidence at the hearing. Audio at ~9:49; Hearing Decision 16-UI-54420 at 1. However, the ALJ failed to mark those documents. Since the ALJ described the content of Exhibit 1 during the hearing and the documents were readily identifiable, EAB marked the documents as a clerical matter.

Claimant's April 15, 2016 application for review referred to other documents she had submitted to the Department on "Mar 24, 2016" as an attempt to have the hearing decision reviewed. Department records include a packet of documents claimant directed to the "Hearing Department" on March 22, 2016, including partial copies of decision # 82654 and Hearing Decision 16-UI-54420 and a handwritten statement in which claimant expressed her disagreement with the ALJ's findings and conclusions in Hearing Decision 16-UI-54420. We have marked the March 22, 2016 packet of documents as "EAB Exhibit 1" and provisionally admitted them into the record. The information contained in EAB Exhibit 1 is part of Department records, relevant and material to a determination on the late application for review issue, and necessary to complete the record. EAB has, therefore, admitted EAB Exhibit 1 into evidence subject to the parties' right to notice and an opportunity to object to our having done so. *See generally* OAR 471-041-0090 (Additional Evidence). A copy of EAB Exhibit 1 is included with this decision. Any party that objects to EAB's admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

**WRITTEN ARGUMENT:** The employer submitted a written argument that contained information not offered during the hearing. The employer did not explain why it was unable to offer this new information at the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that employer sought to present. EAB considered only EAB Exhibit 1 and information received into the evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Rose Villa, Inc. employed claimant as a driver at its retirement community from April 3, 2009 until December 21, 2015.

(2) The employer expected claimant to respond truthfully when asked about the performance of her work duties. Claimant understood the employer's expectation as a matter of common sense.

(3) On December 16, 2015, claimant was the only driver on duty. At 11:00 a.m., claimant was scheduled to drive one community resident to a nearby athletic club and another to a grocery store in a shared ride. At 11:00 a.m., claimant drove the one resident to the club but neglected to pick up the other resident. The club was located a six to ten minute drive from the retirement community. Sometime after claimant had departed, the transportation coordinator noticed claimant was still away from the community when sufficient time had elapsed for her to have completed the transports. The transportation coordinator called claimant and asked her where she was and why she had not yet reported back. Claimant told the transportation coordinator she was getting gasoline for the car. Drivers typically purchased gasoline for the employer's cars by charging it at a particular gas station.

(4) On December 16, 2015 at 11:40 a.m., claimant returned to the retirement community. At 11:45 a.m., the resident whom claimant had not picked up called the transportation coordinator inquiring about her ride. The transportation coordinator asked claimant why she had not picked up that resident at 11:00 a.m. as planned, and claimant stated she had forgotten. The transportation coordinator told claimant she would transport the resident to the grocery store using the vehicle claimant had been driving earlier that day. When the transportation coordinator entered the vehicle, she noticed that the level of the gasoline gauge did not show that the gas tank in the car had recently been filled.

(5) On December 16, 2015, after the transportation coordinator returned the car to claimant, claimant took the car to the nearby gas station. At 1:18 p.m., nine gallons of gas, for which the employer was charged \$20.60, was pumped into the car. Claimant signed the receipt for this gasoline purchase. Audio at ~21:08; Exhibit 1 at 28. After receiving the receipt from the gas station, the employer concluded claimant had been dishonest when she explained to the transportation coordinator shortly before 11:40 a.m. on December 16, 2015 that she had not returned to the community because she was having the car filled with gas.

(6) On December 21, 2015, the employer discharged claimant principally because she gave a dishonest account of her whereabouts on December 16, 2015 between 11:00 a.m. and 11:40 a.m. Audio at ~20:18. The employer also detailed other reasons for discharging claimant in a termination notice that claimant signed on December 21, 2015. Exhibit 1 at 29. At an exit interview, claimant offered a different explanation for her whereabouts between when she dropped off the resident shortly after 11:00 a.m. and 11:40 a.m. on December 16, 2015, stating that she was getting lunch.

**CONCLUSIONS AND REASONS:** Claimant's application for review is allowed. The employer discharged claimant for misconduct.

**Application for Review.** ORS 657.275(1) states that the Department or any interested party may have a hearing decision reviewed upon the filing of a timely application for review. OAR 471-041-0070(1) and (2) (March 20, 2012) state an application for review is timely if it is filed within 20 days of the date that OAH mailed the hearing decision, and that this time may be extended if good cause is shown. OAR 471-041-0060(1) (January 8, 2008) provides that an application for review need not be filed on any particular form, provided the party expresses an intention to appeal a particular hearing decision.

On March 22, 2016, claimant faxed a copy of administrative decision # 82654, notes protesting Hearing Decision 16-UI-54420 and a copy of Hearing Decision 16-UI-54420 on which she included a statement disagreeing with some of the findings of fact in the hearing decision. EAB Exhibit 1. For unknown reasons, the documents were not forwarded to EAB upon receipt. Although claimant did not include a cover sheet explaining the purpose for which she was faxing the documents or use the application for review form that OAH usually includes when it mails its hearing decisions, an application for review need not be written on a particular form or even request review of a specific decision, so long as it "otherwise expresses an intent to appeal a specific hearing decision." OAR 471-0410-0060(1). Claimant's application was written on a hearing decision and included statements indicating her disagreement with its findings and outcome. It is reasonably inferable claimant's intent to seek review of the hearing decision based on the faxed documents in EAB Exhibit 1. Since the documents claimant faxed to OAH were filed before the deadline for a timely application for review and expressed her intent to appeal Hearing Decision 16-UI-54420, the faxed documents were sufficient to constitute a timely application for review upon their receipt by OAH. Based on evidence of claimant's attempted timely filing, claimant's application for review is allowed.

**The 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. In a discharge case, the employer carries the burden to show 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 her awareness of the employer's expectation that she would provide honest answers when questioned about work activities. Rather, claimant contended that she gave only truthful information on December 16, 2016 when asked about her absence from the workplace between approximately 11:00 a.m. and 11:40 a.m. Claimant specifically denied she justified her absence to the transportation coordinator by stating she was obtaining gasoline for her car, or that she contradicted this statement during her exit interview when she explained her absence by stating she had been getting her lunch. Audio at ~42:26, ~45:54, ~46:33. However, claimant's credibility was seriously undercut by other aspects of her hearing testimony.

Throughout her testimony, claimant sighed deeply, laughed, evaded the plain intention of questions and her answers were replete with lengthy pauses followed by halting responses. Audio at ~ 45:54, ~46:33, ~48:50, ~49:30, ~50:50, 52:08, ~55:06. As well, apparently to excuse her failure to pick up the second

resident on December 16, 2015, claimant suggested that there was no formal appointment for her to do so, yet that resident's pick-up time appeared in the employer's calendar of pick-ups for that day and was provided to claimant. Audio at ~39:58, Exhibit 1 at 25. Claimant also contended that she ultimately did not drive the second resident to her appointment on December 16, 2015 because the employer's other driver did, yet she did not dispute and appeared to later accept the employer's testimony that the other driver was not at work on December 16, 2015. Audio at ~41:13, ~43:50, ~53:32, ~56:36, ~57:32. Claimant's testimony that her absence from the workplace after she dropped off the resident she had picked up on December 16, 2015 was explained by her need to travel to her home in Oregon City to pick up her driver's license was a confusing mélange of revised time and travel estimates to account for her absence from shortly after 11:00 a.m. until 11:40 a.m., and no longer. Audio at ~43:02, ~52:32. In sum, based on claimant's demeanor when testifying, the contradictions in her testimony and her hesitations and revisions, the accuracy of her testimony is doubtful. In contrast, the testimony of the employer's witness was straightforward, careful, detailed and focused. Audio at ~14:23, ~15:23, ~16:05, ~18:46, ~19:48, ~31:17. As such, where the evidence was in dispute, we found facts in accordance with the employer's evidence.

The employer had a right to expect that claimant would honestly state what she was doing on December 16, 2015 between 11:00 a.m. and 11:40 a.m., and not fabricate an explanation that accounted for her absence. Claimant was aware of this expectation as a matter of common sense. Given that claimant told the transportation coordinator she had been getting gas and a receipt from the gas station with claimant's signature showed she had not filled up the car with gasoline until 1:18 p.m., it is more likely than not that claimant did not tell the truth to the employer on December 16, 2015 or later. Exhibit 1 at 18. Because claimant was questioned so shortly in time after the events, it is doubtful she was confused or did not recollect what she had been doing and at what time. The most reasonable inference to be drawn is that claimant knew where she was between 11:00 a.m. and 11:40 a.m., but chose to conceal it from the employer and to fabricate an account of her actions. By her willful dishonesty, claimant willfully violated the employer's expectations.

Claimant's willful violation of the employer's standards on December 16, 2015 may be excused from constituting misconduct if it was an isolated act of poor judgment under OAR 471-030-0038(3)(b). Behavior may qualify as an isolated instance of poor judgment if, among other things, it did not exceed "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Putting it frankly, claimant lied to the employer when she was asked to account for her activities between 11:00 a.m. and 11:40 a.m. on December 16, 2015. The expectation that an employee will be honest when questioned about work-related matters is fundamental to the employment relationship, particularly where, as here, claimant's duties required that she be away from the employer's supervision for substantial periods of time during the work day when driving residents to and from their activities. By her willful dishonesty to the employer and her continuation of that dishonesty, without apparent remorse, after December 16, 2015, a reasonable employer would objectively conclude it could not trust claimant to give honest accounts of her work-related behavior in the future. Claimant's willful deception when questioned by the employer therefore exceeded mere poor judgment and falls outside the type of behavior that may be excused as an isolated instance of poor judgment.

Claimant's behavior in deceiving the employer the employer is also not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Here, claimant did not contend that

she thought the employer would condone her fabrication of a story to account for her absence from the workplace on December 16, 2015. As previously noted, claimant was not sincerely mistaken about what she was doing during the absence and did not misunderstand the employer's standards with respect to honesty. Claimant's behavior on December 16, 2015 was not excusable as a good faith error.

The employer met its burden to show it discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-54420 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** May 24, 2016

**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.

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