EO: 200
BYE: 201847

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

886
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0118

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131933). Claimant filed a timely request for hearing. On January 23, 2018, ALJ Frank conducted a hearing, and on January 26, 2018 issued Hearing Decision 18-UI-101865, concluding the employer discharged claimant, but not for misconduct. On February 5, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's and claimant's written arguments contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond that party's reasonable control prevented that party from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Landmark Ford, Inc. employed claimant from April 29, 1985 until November 21, 2017 as a service advisor.

(2) The employer prohibited employees from engaging in improper warranty practices including submitting claims for payment for work that was not performed by the employer's dealership. False claims may jeopardize the dealer's franchise license. Claimant understood the employer's expectations. The employer also expected claimant to refrain from rewriting the service summary originally written by the service technician.

(3) Some time before November 2017, a repair technician told claimant he would need to order a Ford hose to complete a repair for a customer who had an extended service policy. The next day, the technician told claimant that he could complete the repair using a different hose since the dealership did not have the particular hose in stock. Claimant told the technician to use a Ford hose so the part and labor would be covered by the customer's service policy. The technician completed the repair using "bulk hose" and not a Ford part. The technician told claimant he completed the repair. The repair was not covered by the customer's extended service policy, in part because the technician did not use a Ford

part. Claimant assumed the technician used a Ford part, and told the parts counterperson to submit a claim for the part and labor under the customer's service policy. The technician and the parts counterperson told claimant's supervisor, the service director, about the false claim.

(4) In November 2017, claimant erroneously wrote a customer's vehicle repair order as a recall repair that would be paid by the manufacturer. A repair technician diagnosed the vehicle and told claimant that the resulting repair code was not covered by the recall. Claimant rewrote the repair summary so that it would reflect repairs that were covered by warranty instead.

(5) On November 21, 2017, the employer discharged claimant for allegedly engaging in improper warranty practices.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The final incident prompting the employer to discharge claimant was when claimant violated the employer's expectation that he refrain from revising a technician's service summary so the repair would be covered by a warranty. Claimant argued at hearing that his act of rewriting the service summary was a good faith error because a manager had told him to close out service summaries if a customer was waiting for a vehicle and the technician was not available. Audio Record at 33:16 to 33:46. We reject that argument because claimant also acknowledged that the service director had told him not to rewrite service summaries, and because claimant's conduct in the final incident was not to merely close out a service summary, but rather, to rewrite the repair process on the vehicle so it would be covered by warranty. *Id.* Claimant did not show that he had a good faith belief that the employer would condone his changing a service summary as opposed to merely finalizing one. We conclude that claimant's act of rewriting the technician's work on the vehicle was a wantonly negligent disregard of the employer's reasonable expectations.

Although claimant's act of rewriting the service summary was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR

471-030-0038(1)(d)(A). To be excused, the behavior at issue also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

The only other incident in the record was the incident before November 2017 involving the hose repair. The employer's witness provided hearsay evidence that the repair technician told claimant he had used a "bulk hose," rather than a Ford part, to repair the vehicle. Audio Record at 7:19 to 7:37, 11:04 to 11:35. The employer also asserted that claimant knew the technician did not use a Ford hose because he knew the dealership did not have the correct hose in stock at the time of the repair. Audio Record at 11:04 to 11:35. However, claimant disagreed with the employer's account and asserted that he misunderstood the technician and did not know he used a bulk hose, and assumed after telling the technician to use a Ford part, that the technician used an alternate, available Ford part to complete the repair. Audio Record at 24:11 to 25:57. Claimant's testimony was plausible, and absent a basis for finding the testimony from one party more credible, the evidence about whether or not claimant knew the technician used bulk hose for the repair, and that the warranty claim was false, was equally balanced. Therefore, the employer did not meet its burden to show that claimant knew or should have known his conduct in submitting the claim would violate the employer's expectations regarding warranty practices.

Because we conclude that the hose repair incident was not willful or wantonly negligent, and the record fails to show that claimant been disciplined previously for other willful or wantonly negligent behavior, his conduct in rewriting the service summary for the purpose of obtaining warranty coverage was, therefore, a single or infrequent occurrence. We also conclude that claimant's conduct in the final incident did not exceed mere poor judgment. Claimant testified that he had previously checked with the technician regarding his work and thus knew the technician completed the repair he rewrote into the service summary. Audio Record at 34:34 to 34:48. Thus, on this record, the preponderance of the evidence does not show claimant knowingly submitted a claim containing a repair he knew had not been completed. Under these circumstances, an employer would not objectively conclude from claimant's behavior that it could not trust claimant to conform to its expectations in the future. Because it meets both prongs of the standard, claimant's behavior in rewriting the service summary, while it was wantonly negligent, is excused from being disqualifying misconduct as an isolated instance of poor judgment.

We conclude the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 18-UI-101865 is affirmed.

DATE of Service: <u>March 8, 2018</u>

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

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.