

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0688**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113550). Claimant filed a timely request for hearing. On June 14, 2018, ALJ Scott conducted a hearing, and on June 21, 2018 issued Order No. 18-UI-111824, concluding claimant's discharge was not for misconduct. On July 11, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) Lithia Nissan of Eugene employed claimant as a lube technician from November 25, 2014 to May 1, 2018.

(2) The employer had an integrity policy that required employees to conduct themselves "with the highest level of integrity at all times," and stated that employees were "never allowed" to "[m]islead[] a customer in any way" or to "[m]islead[]" the employer "in any way." Exhibit 1. By signing for the policy, claimant agreed that "a portion of any business relationship is based on trust, and I will never knowingly damage that relationship with anyone during the course of my job function." *Id.* The employer provided claimant with a copy of the policy, and, on September 15, 2017, claimant signed that he had received the policy and was responsible for abiding by it.

(3) On April 28, 2018, the employer assigned claimant to work on a customer's vehicle. Claimant understood that he was required to change the oil, rotate the tires, and check the air pressure in the tires and adjust the pressure if needed. Claimant worked on the vehicle, but did not rotate the tires or check the tire pressure. Claimant reported to the employer that he had completed those services.

(4) The customer reported to the employer that claimant had not rotated the tires or checked the tire pressure, and provided evidence proving that those services were not performed on his vehicle. The employer asked claimant if he had done the services, and claimant admitted that he had not.

(5) On April 28, 2018, the employer suspended claimant to review his conduct. The employer understood that the customer had previously had concerns that the services he ordered had not been performed, and concluded that claimant's "actions have negatively impacted shop profitability and severely damaged our reputation with customers," and that "flagging hours for work that you did not perform can be considered theft of time." Exhibit 1. On May 1, 2018, the employer discharged claimant for being dishonest about the services he performed on April 28, 2018.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that claimant's discharge was 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) (January 11, 2018) 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 ALJ concluded that the "employer established that claimant's conduct violated its reasonable standards of behavior," that claimant gave "implausible, weak excuses as to why he represented to his employer that he had performed the services when he had not actually done so," and that his "conduct was, at the very least, wantonly negligent." Order No. 18-UI-111824 at 3. The ALJ also concluded that claimant's conduct amounted to only a single incident of poor judgment in the employment relationship. *Id.* We agree with the ALJ that claimant knowingly failed to perform services he knew he was required to perform, then falsely reported to the employer that he had, in fact, performed those services, and that his conduct was at least wantonly negligent. We also agree with the ALJ that the record establishes that claimant engaged in that conduct on only one occasion, making the conduct isolated.

However, the ALJ also concluded that claimant's conduct was excusable as an "isolated instance of poor judgment" because "[t]here was no evidence that claimant's conduct exceeded mere poor judgment as defined at OAR 471-030-0038(1)(d)(D)." *Id.* We disagree with the ALJ that claimant's conduct did not exceed mere poor judgment.

OAR 471-030-0038(1)(d)(D) states, "Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3)."

The record does not show that claimant's false report to the employer about performing the tire rotation or checking tire pressure violated the law or was tantamount to a violation of the law. However, the evidence shows that the employer had an "integrity" policy under which claimant was required to

conduct himself with the highest level of integrity at all times, was prohibited from misleading a customer or the employer in any way, and agreed that his relationship with the employer and customers were based upon trust and that he would “never knowingly damage that relationship.” Claimant did in fact fail to conduct himself with integrity with respect to the April 28<sup>th</sup> customer’s vehicle, misled the customer about the services performed on his vehicle, misled the employer about the services he performed by “flagging hours for work [he] did not perform,” and, in so doing, damaged his relationship with both the employer and the employer’s customer. The employer submitted evidence suggesting that claimant’s conduct was tantamount to theft of time, and that claimant’s dishonesty with respect to the customer’s vehicle “severely damaged our reputation with customers.”

In sum, contrary to the ALJ’s finding that there was “no evidence” that claimant’s conduct exceeded mere poor judgment, the preponderance of the evidence in the record suggests that claimant’s dishonesty with respect to the April 28<sup>th</sup> vehicle service damaged the employer’s business and reputation to the extent that the employer could no longer trust claimant to continue working, as the employer could not trust that claimant would perform his assigned duties, complete the work, and accurately report completion of his work to the employer. No reasonable employer would continue to employ an employee who had engaged in such dishonesty. Claimant’s conduct therefore exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship, and his conduct cannot be excused as an isolated instance of poor judgment.

Nor can claimant’s conduct be excused as a good faith error. Claimant did not sincerely believe, or have a factual basis for believing, the employer would excuse or condone his failure to perform assigned services, or dishonesty with respect to reporting that he had. Nor did claimant believe in good faith that he had, in fact, completed the tire rotation or tire pressure check tasks, or even that he planned to complete those tasks, at the time he reported to the employer that he had done so. Claimant did not act in good faith with respect to his conduct on April 28<sup>th</sup>.

The employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of his work separation until he requalifies for benefits by earning four times his weekly benefit amount from work in subject employment.

**DECISION:** Order No. 18-UI-111824 is set aside, as outlined above.

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

**DATE of Service:** August 8, 2018

**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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