

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0772-R

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 155623). The employer filed a timely request for hearing. On June 14, 2016, ALJ Monroe conducted a hearing, and on June 22, 2016, issued Hearing Decision 16-UI-62290, concluding that the employer discharged claimant for misconduct. On June 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

On July 22, 2016, EAB issued Appeals Board Decision 2016-EAB-0772, reversing Hearing Decision 16-UI-62290 and remanding it to the Office of Administrative Hearings for completion of the evidentiary record. On July 26, 2016, OAH submitted to EAB the documents necessary to complete the record.

Claimant's written argument included information that was not offered into evidence at the hearing – a copy of a writ of review claimant filed against the employer in the Columbia County Circuit Court, and copies of claimant's performance evaluations prepared by the employer. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if the information is relevant and material to EAB's determination and the party providing the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. The information claimant wants EAB to consider is not relevant or material to our decision regarding his qualifications for unemployment benefits, and claimant failed to show any factors or circumstances that prevented him from offering the information at the hearing. We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) The city of Clatskanie (City) employed claimant as a police officer in its police department from October 6, 2007 until March 10, 2016.

(2) The employer's policies prohibited a police officer from behaving in a discourteous, disrespectful or discriminatory manner toward members of the public, prohibited "unwelcome solicitation of a personal or sexual nature while on duty" and also prohibited any on- or off-duty conduct that an officer knew or should have known was "unbecoming a member of the [police] department" or which reflected unfavorably on the police department. 6/14/16 Transcript at 7. The law enforcement officer code of ethics required that an officer demonstrate "honesty in thought and deed" in the officer's personal and professional life. Exhibit 1 at 2. Claimant received copies of these policies and the code of ethics when he was hired, and signed an acknowledgement that he had read and understood them. Exhibit 1.

(3) In January 2011, a young woman complained to the employer that claimant had behaved improperly toward her. The Oregon Department of Justice investigated this complaint and concluded that claimant had not engaged in any official misconduct. By letter dated June 8, 2011, the City reprimanded claimant for making "errors of judgment with your conduct involving the young woman in question." The errors cited by the employer included claimant's decision to give the woman his personal cell phone number and his exchange of text messages with the woman. Exhibit 10.

(4) In February 2012, the City reprimanded claimant for making discourteous remarks to a member of the public. Exhibits 11 and 18.

(5) When he worked for the City, claimant maintained friendly and professional relationships with the Clatskanie Rural Fire Protection District (CRFD) firefighters and emergency medical technicians. In addition to working with the firefighters in responding to mutual calls for assistance, claimant periodically visited the main Clatskanie station to wash his patrol vehicle, or share a meal with the firefighters who worked there. In approximately May 2015, claimant became acquainted with B¹, a 22-year old female college student and intern with the fire district, who was interested in a possible career in law enforcement. B and claimant both had the Snapchat application on their phones; this smartphone based application allows those who have the application to send messages, including photographs, between smartphones. Messages and images sent through Snapchat are automatically deleted within several seconds after they are viewed. Claimant and B began to regularly exchange messages and photographs through Snapchat.

(6) Sometime after claimant and B connected through Snapchat, claimant sent B a photo depicting his body from the waistband of the shorts or pajamas he was wearing to the mid-thigh area. The picture was captioned "Look no hands." Exhibit 5 at 4. B was startled by the picture.

(7) From May through October 2015, B and claimant exchanged approximately 300 to 500 Snapchat messages. Claimant believed that B enjoyed the humorous messages and photos he sent her, and they often teased one another in their Snapchat messages.

(8) Beginning in October 2015, B began to feel uncomfortable about some of the text messages and images claimant was sending her. She was apprehensive about asking claimant to stop sending them,

¹ "B" is a pseudonym.

however. B was worried that if she broke off communication with claimant, he might use his authority and position as a police officer to create problems for her in her career. In addition, B was living alone at the Quincy RFD fire station, which was quite isolated; she had some concern that claimant might visit her there and did not want to be alone with him. Exhibit 5 at 5.

(9) In early October 2015, B was driving from Quincy to Clatskanie and saw claimant parked alongside the road. B sent claimant a text message, asking him if he was setting up a speed trap, and telling him she was glad she was not speeding. Claimant responded with a text message indicating that if he caught B speeding, they could “take care of it alongside the road.” B interpreted this message as suggesting claimant would expect her to give him some type of sexual favor to avoid a ticket. Exhibit 5 at 22. Sometime after this text message exchange with claimant, B left the Quincy fire station and moved into the main fire station in Clatskanie.

(10) Sometime in October 2015, claimant visited the main fire station and saw that all the firefighters, including B, were wearing pink t-shirts. He asked why, and was told that the pink t-shirts were worn to commemorate October as breast cancer awareness month. Claimant then made a remark that he could give claimant a breast exam, but it would not take very long; as he spoke, he gestured toward claimant’s breasts. Claimant and two firefighters who were present for the conversation and overheard claimant’s remark understood that claimant was inferring that B’s breasts were very small. Exhibit 5 at 6.

(11) Also in October 2015, at approximately 10 p.m., B sent claimant a text message, telling him that she was going to bed. (B slept downstairs in the main fire station; the other firefighters were watching a movie on the second floor of the station). Claimant then responded with a text message stating “Hey sexy beast come open the door for big papa.” This message made claimant nervous because she did not want to be alone downstairs with claimant. B responded by sending claimant a text message telling him to knock loudly at the door so that the other firefighters would hear him and let him into the station. Claimant arrived at the fire station, knocked loudly on the door and was let in by the firefighters. Claimant then joined the firefighters in watching the movie. Exhibit 5 at 7, 9 and 15.

(12) B mentioned her discomfort about her interactions with claimant to a firefighter with whom she worked. The firefighter told his supervisor about B’s concerns, who then discussed them with the fire chief. The fire chief reported the situation to the acting chief of the City Police Department. On October 22, 2016, the acting chief placed claimant on administrative leave, pending an investigation into his conduct.

(13) At the request of the City, an Oregon State Police officer interviewed B and other CRFD employees. On November 4, 2015, the officer issued a report in which he concluded that claimant had not engaged in any criminal conduct. Exhibit 3.

(14) The City hired a private investigator to conduct an investigation to determine whether claimant committed non-criminal violations of the employer’s policies. On November 18, 2015, the investigator interviewed B, another firefighter/EMT intern, and two firefighters/EMTs who worked at the main station. B told the investigator about some interactions and numerous Snapchat exchanges with claimant that made her uncomfortable because she believed they involved sexual innuendos. Among the incidents B described to the investigator was the photo claimant sent her of his crotch area, the text messages in which claimant offered to take care of a potential speeding ticket by the side of a road,

asked her to open the fire station door for “big papa,” and his comment that he wanted to give B a breast exam. Exhibit 5 at 5-8.

(15) On November 24, 2015, the investigator interviewed claimant and questioned him extensively about his interactions with B. When asked if he ever sent B a photo of his crotch area, claimant said that he had not. Claimant stated that he had sent a photo in which he was wearing shorts and did so to tease claimant about a belt buckle she wore. Exhibit 5 at 17. When asked if claimant had ever sent B a text message that they could take care of a possible speeding ticket roadside, he stated that he could not remember if he had sent such a message, but remembered that he had once engaged in friendly conversation in which he bantered with and teased a group of firefighter/ EMTs about the excessive rate of speed at which they were traveling in an ambulance. Exhibit 5 at 18. He denied that he ever told B he could give her a breast exam, and told the investigator he could not remember sending B a text message in which he asked that she let him into the fire station. Exhibit 5 at 19.

(16) The police chief reviewed the investigator’s report and in a memorandum to the city manager dated January 13, 2016, described the evidence accumulated during the investigation and told the city manager that he had concluded that the majority of allegations against claimant were “sustained.” Exhibit 8.

(17) By letter to claimant dated January 22, 2016, the city manager summarized the allegations against claimant that the police chief determined were “sustained,” and told claimant that he was “contemplating suspension or termination of your employment” because of his inappropriate conduct with B and lack of truthfulness during the investigation into this conduct. Exhibit 12 at 3. The city manager told claimant that before he made a decision regarding claimant’s employment, claimant and his representative would have the opportunity to meet with him and the police chief to respond to the allegations and present mitigating information. *Id.*

(18) On February 19, 2016, claimant and his attorney met with the city manager, the police chief and the attorney representing the city. At this meeting, claimant responded to and denied numerous allegations of inappropriate communications to and interactions with B. Claimant denied that he sent B a photo of his crotch area and said the only similar photo he could remember was one of him relaxing in a reclining chair which he posted on his Snapchat Storyline. Claimant explained that photos posted on Storyline could be viewed by anyone with a Snapchat application. Exhibit 28, Audio recording at 11:48, 12:54. Regarding the allegation that he had responded to B’s text message about a speed trap by telling her he would take care of any speeding ticket beside the road, claimant stated that this allegation resulted from the “merging” of two occasions. Claimant said that on one occasion he had a conversation in which he bantered with and teased a group of firefighter/EMTs about the speed at which they had been traveling in an ambulance, and that B had been a member of this group. Claimant stated that on another occasion he saw a CRFD ambulance speeding. Because he knew that that B was among the firefighter/EMTs in the ambulance, he sent her a picture of his radar, which showed that the ambulance was traveling at 75-76 miles per hour, and included a text message in which he said “let’s take care of this roadside right now.” Exhibit 13 at 6-7. Claimant denied that he ever offered to give claimant a breast exam,² and also denied that he ever sent claimant a text message asking that she let him into the

² Exhibit 13 at 11-12.

fire station.³ Claimant explained that it would be unnecessary for him to ask anyone to let him into the fire station because he had the entry code that would allow him to open the front door, and he also knew that he could enter the fire station through the washroom door, which was always open. Exhibit 13 at 13.

(19) By letter dated March 10, 2016, the city manager informed claimant that the city was terminating his employment because he violated city policies by “making inappropriate comments of a sexual nature and sending inappropriate pictures of a sexual nature to [B]” and because he had violated the law enforcement code of ethics by making false statements during the investigation into his conduct. Exhibit 14. In the letter, the city manager specified the following occasions on which claimant made inappropriate comments or sent inappropriate picture to B:

- Sending [B] a photo of your crotch with the caption ‘Look no hands’;
- Asking [B] to send you a photo of her wearing only a belt buckle;
- Telling [B] that you were good at making love and that you could be her ‘fluffer’⁴;
- In response to [B’s] text message asking if you were setting up a speed trap on the road when she drove past you and stating that she was glad she wasn’t speeding, sending her a reply that ‘we could take care of it alongside the road,’ which she interpreted as suggestion that she could get out of a ticket by giving a sexual favor;
- Stating that you could give [B] a breast exam and that it would not take very long, alluding to the small size of her breasts; and
- Asking [B] the color of the bra she was wearing. Exhibit 14 at 2.

CONCLUSION AND REASONS: We agree with the ALJ and conclude 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. 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer’s policies prohibited police officers from making sexually suggestive or otherwise inappropriate remarks to members of the public, and the law enforcement officer’s code of ethics

³ Exhibit 13 at 16.

⁴ A “fluffer” is a person who provides oral sex to actors in the pornographic film industry. See www.urbandictionary.com

required that a police officer exhibit honesty in his or her personal or professional life. Claimant knew about and understood these employer policies and the code of ethics which he was expected to follow because he received and read copies of these policies when he was hired. In addition, he was reprimanded for behaving improperly with a young woman in 2011 and for making discourteous remarks to a member of the public in 2012. The City discharged claimant because it alleged that he disregarded these warnings and violated these policies by engaging in numerous inappropriate interactions with B, a young⁵ college student and CRFD intern, and then provided false information about his conduct during an investigation. In a discharge case, the employer has the burden of persuasion. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). We therefore begin our analysis by determining whether the employer met this burden to prove the incidents cited in its March 10 letter.

The employer's findings that claimant sent B text messages asking that B send him a photo of her "only" wearing a belt buckle, telling her that he was "good" at making love, and questioning her about the color of the bra she was wearing were based on information B provided to the OSP and private investigators. Claimant denied sending any of these text messages. No other individual provided first hand testimony to corroborate either claimant or B's version of these events, and the text messages claimant allegedly sent B were deleted under the Snapchat application and are no longer available. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party that carries the burden of persuasion in a discharge case. We therefore find that the employer failed to meet its burden to demonstrate that claimant sent B the text messages listed above.

In regard to B's allegation that claimant told her he could give her a breast examination, claimant also denied that he made any such statement. Two CRFD firefighters were present when claimant made this remark and overheard it, however. Exhibits 20 at 4 and 22 at 2. Based on the corroboration to B's testimony provided by these witnesses, we find it more likely than not that claimant did make the statement about giving B a breast examination.

In regard to other incidents of inappropriate communications to B cited in the March 10 letter discharging claimant, claimant and B provided the only firsthand testimony regarding these incidents, and their accounts differed markedly. B told the private investigator that claimant sent her a photo of his crotch area with the caption "Look no hands." Exhibit 5 at 4. Claimant denied sending any such photo during his interview with the private investigator, and asserted that the photo to which B had referred was one he sent her which showed claimant wearing pants or shorts. Claimant explained that he sent the photo to tease claimant about a belt buckle she wore. Exhibit 5 at 17. At the February 19 pre-dismissal hearing, claimant provided a different description of the photo to which B referred – he said it was one which showed him relaxing in a recliner and that he had posted it on his Snapchat Storyline, where the photo could be viewed by anyone with the Snapchat application. Exhibit 28, Audio recording at 11:48, 12:54.

B told the private investigator that after she observed claimant parked alongside the road on which she was traveling and texted him about a possible speed trap, claimant responded that they

⁵ Although the record does not specify claimant's age, we infer that he was older (and clearly had substantially more professional experience) than B.

could take care of a speeding ticket by the side of the road. Claimant told the private investigator that he did not remember sending any such text message, but did remember a conversation with B and other firefighters in which he joked with them about the high rate of speed at which they were traveling in an ambulance. Exhibit 5 at 18. At the February 19 due process hearing, claimant apparently remembered that in addition to a joking conversation with the CRFD firefighters about speeding, he had, on another occasion, observed a speeding CRFD ambulance and sent B a text message in which he joked about the ambulance's speed. Exhibit 13 at 7. At the June 16, 2016 hearing, claimant presented a contradictory account of the text message he sent about the speeding CRFD ambulance. Claimant initially testified that on one occasion, when he observed the CRFD ambulance traveling at a high rate of speed, he sent CRFD firefighter G⁶ (and not B) a text about the ambulance's speed. 6/16/16 Hearing Transcript at 42, 44. When questioned further about this incident, he then testified that he sent B the text message regarding the speeding ambulance. 6/16/16 Hearing Transcript at 69. The City's attorney then questioned claimant:

Q [City's attorney] And how do you explain the earlier testimony today that you sent the text message to [G] and you never sent a text to [B] about taking care of it alongside the road?

A [Claimant] Well, it's the last sentence in there. It says so – so it was two separate instances that are merged together. There was the incident with [G] and then there was an incident after that incident. There's two separate incidents. 6/16/16 Hearing Transcript at 69.

During the investigation and at the hearing, claimant provided inconsistent explanations of his actions in response to B's allegations regarding the photo of his crotch area and the text message offering to take care of any speeding ticket roadside he sent her. At the hearing, he could provide no plausible explanation about his contradictory testimony regarding to whom he sent the text message. For these reason, we find B's description of these incidents more credible than claimant's, and have based our findings on her account of these events.

For the foregoing reasons, we find that the City met its burden and demonstrated it more likely than not that offered to give B a breast exam, sent her a photo of his crotch area with the caption "Look no hands," and sent her a text message offering to take care of any possible speeding ticket by the side of the road. The record also shows that during the investigation into his interactions with B, claimant did not provide truthful information about these actions to the private investigator at his November 24, 2015 interview or the acting chief of police and City manager at the February 19, 2016 pre-dismissal meeting. At both the November 24 interview and the February 19 meeting, claimant falsely claimed that he never told claimant he could give her a breast exam, and provided differing (and untruthful) accounts of the photo and text message he sent B about taking care of a potential speeding ticket. These repeated acts of dishonesty constituted knowing and conscious violations of the employer's expectation that he exhibit honesty in his professional and personal life. Claimant's conduct was at least wantonly negligent.

⁶ "G" is a pseudonym.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). For an instance of poor judgment to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. An act that creates an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible also does not constitute an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(D). Claimant provided untruthful information on more than one occasion by giving the private investigator and the City officials false information about his interactions with B. Claimant's exercise of poor judgment was therefore neither a single nor infrequent occurrence. In addition, claimant's actions created an irreparable breach of trust in the employment relationship. As a result of the false information claimant provided to the private investigator and City officials, a reasonable employer could no longer trust that claimant would be able to continue performing his job duties as a police officer because it could no longer have confidence that he would provide truthful information in his dealings with members of the public, and his interactions with coworkers and superiors.

Nor can claimant's actions be excused as a good faith error. Claimant could not have sincerely believed that the employer would excuse his failure to provide truthful information during the investigation into his activities.

The employer discharged claimant for misconduct.⁷ He is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-62290 is affirmed.

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

DATE of Service: August 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. 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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⁷ Because we conclude that the employer met its burden to demonstrate that it discharged claimant for his wantonly negligent behavior in violating the employer's expectation that he exhibit honesty in his professional and personal life, it is unnecessary for us to determine whether he also violated the employer's policies regarding appropriate behavior on- and off-duty.