

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1026**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 160115). Claimant filed a timely request for hearing. On August 7, 2017, ALJ Janzen conducted a hearing, and on August 10, 2017 issued Hearing Decision 17-UI-90089, reversing the Department's decision. On August 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Washington County employed claimant in the Sheriff's Office from October 1996 until January 27, 2017, last as corporal.

(2) The employer expected employees to conduct themselves in a professional manner and to refrain from unbecoming behavior or behavior that brought discredit on the employer. The employer also expected employees to report any information they obtained about criminal offenses to their commanding officers or supervisors, as well as to report any information they obtained about coworkers' violations of the employer's policies. The employer further expected employees to give truthful written and verbal reports in the course of their duties or upon the employer's inquiry and not to withhold or conceal information. Claimant was aware of the employer's expectations.

(3) Between 2012 and 2014, a female deputy disclosed to claimant on multiple occasions that a male corporal in the Sheriff's Office was routinely following her when he was on duty and she was not, stalking her, stopping by her house at all hours of the day and night and investigating men she was dating using the employer's resources. Claimant did not report the male corporal's likely criminal behavior or policy violations to his commanding officer or his supervisor. Exhibit 1 at 5.

(4) On February 22, 2014, claimant, his wife and many of his coworkers stayed overnight at a hotel during a social function sponsored by the union to which claimant belonged. At that function, claimant recorded a video of his wife and a female evidence technician, who was claimant's coworker, having an intimate sexual encounter in a hotel room. Exhibit 1 at 9. Claimant's wife and the evidence technician were not aware that their encounter was being recorded and did not consent to the recording. *Id.*

(5) Sometime in approximately 2014 or early 2015, claimant became aware that a male corporal in the Sheriff's Office with whom he was friendly was frequently engaging in sexual intercourse while on duty, sometimes in the employer's work vehicles. In early 2015, during a personal visit, claimant commented to a coworker that the corporal was having sexual relations while on duty. Although the corporal's behavior was unbecoming of a Sheriff's Office employee, claimant did not report information about this policy violation to his commanding officer or a supervisor. Exhibit 1 at 5-6.

(6) On February 21, 2015, claimant, his wife and the evidence technician with whom claimant's wife had the sexual encounter in 2014 attended another union function and were staying overnight in a motel. Sometime during the evening, claimant went to the evidence technician's room and his wife discovered him there hiding in the bathroom. A physical brawl then ensued in which claimant's wife struck claimant several times, including on the face, with enough force to split his lip. Claimant's wife also struck the evidence technician with enough force to bruise her shoulder. Exhibit 1 at 7. Claimant did not report information about this assault to his commanding officer or his supervisor.

(7) Sometime before April 2015, claimant was in contact with a third-party who was not one of the employer's employees and collaborated with that party to investigate and publicly expose various types of ongoing misconduct in the Sheriff's Office, principally misconduct involving sexual behavior. On April 11, 2015, claimant learned from that third-party that the female deputy who had confided in claimant about her relationship with the corporal had been choked by the corporal when she ended their relationship. Exhibit 1 at 5. Claimant did not report information about the assault to his commanding officer or his supervisor. Claimant met with the third-party on April 15 and 17, 2017 to provide information to that party and to review documents she had drafted about misconduct in the Sheriff's Office. Claimant advised the third-party to send what she had drafted to media outlets for public dissemination.

(8) On April 17, 2015, the employer and various media outlets received an anonymous email detailing multiple alleged incidents of misconduct that had occurred in their Sheriff's Office. The email was authored by the third-party with claimant's assistance and most of the incidents described in it were based on information that claimant provided. Exhibit 1 at 8-9. The third-party sent the email to the media at claimant's suggestion. Upon receiving this email, the employer commenced an investigation to learn who had disseminated the email and what was the source of the information it contained.

(9) On May 9, 2015, an employer representative interviewed claimant about the April 17, 2017 email. In that interview, claimant denied he had any role in drafting the email, that he was aware of its contents before it was sent, or that he had known to whom the third-party was going to send it. In subsequent interviews in July 2015 and September 28, 2015, claimant stated that he had asked the third-party to send the email to the employer and media outlets, that he had provided much of the information in it and assisted in its drafting, and that he had reviewed a draft of it before its dissemination. Exhibit 1 at 8-9.

(10) In March 2016, claimant learned from the evidence technician with whom he was friendly that a male deputy in the Sheriff's Office had groped her breasts while she and he were at work in the employer's evidence bay. Claimant did not report this policy violation for unbecoming behavior until an employer's representative interviewed him on January 12, 2017. Exhibit 1 at 6.

(11) On January 27, 2017, the employer discharged claimant for, among other things, failing to report information he had received about criminal offenses committed by his coworkers to his commanding officer or his supervisor; failing to report policy violations committed by coworkers; and being untruthful or not fully disclosing information during the employer's investigation.

**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 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. The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant appeared at the hearing, he did not dispute any of the employer's contentions. Based on the employer's uncontested account, claimant failed to report behavior by a coworker between 2012 and 2014 that likely constituted the crime of stalking or harassment, he failed to report behavior by his wife on February 21, 2015 that likely constituted the crime of assault, and he failed to report behavior by a coworker of which he became aware in March 2016 that likely also constituted the crime of assault. *See* ORS 163.160 (assault in the fourth degree); ORS 163.732 (stalking); ORS 166.065 (harassment). Since claimant was employed in law enforcement, it is highly unlikely that he was not aware that the information he obtained about the incidents at issue was, at a minimum, information about likely crimes that had been committed. In addition, claimant could only have been aware that, to the extent these possible crimes involved coworkers, they also involved the coworkers' violations of the employer's policy prohibiting unbecoming behaviors as did the behavior of claimant's coworker who had sex while on duty. By failing to report to his commanding officer or a supervisor the information he had obtained about likely crimes and policy violations committed by his coworkers, claimant willfully violated the employer's expectations. In addition, by initially obfuscating his role in the drafting and dissemination of the April 17, 2016 email during an interview with an employer representative about that email, when claimant could only have known the employer expected him to be candid and forthcoming in an official investigation into it, claimant willfully violated the employer's expectation that he be honest.

Claimant's behavior in willful violation of the employer's expectations may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). An isolated instance of poor judgment means, among other things, 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). In this case, there were many occurrences of claimant's willful violations of the employer's expectations over a protracted period of time. Because claimant's behavior was neither single nor infrequent, it may not be excused as an isolated instance of poor judgment.

Claimant's willful behavior in violation of the employer's expectations may also be excused from constituting misconduct if it was a good faith error under OAR 471-030-0038(3)(b). In this case, there was no contention that claimant engaged in the ostensible violations of policy that the employer contended due to his having misunderstood those policies. In addition, it is implausible that a professional in public law enforcement, like claimant, would think either that his conduct was consistent with the employer's policies and expectations, or that the employer would condone his failing to report the suspected or possible crimes or policy violations of his coworkers, particularly when the circumstances would likely impugn the public reputation of the employer. For these reasons, claimant's behavior also may not be excused from constituting misconduct as a good faith error.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-90089 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** September 29, 2017

**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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