

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1178**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 165852). The employer filed a timely request for hearing. On September 26, 2017, ALJ Griffin conducted a hearing, and on September 28, 2017 issued Hearing Decision 17-UI-93464, concluding the employer discharged claimant for misconduct. On October 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Clackamas County employed claimant as a wastewater treatment operator from March 21, 1994 to May 26, 2017.

(2) The employer had a written policy regarding its work rules which conveyed that its employees were expected to interact with other employees at all times in a courteous and professional manner. Exhibit 1. The employer also had a written policy regarding harassment that prohibited inappropriate behavior toward other employees in the workplace. That policy specifically prohibited “[v]erbal or physical conduct that is derogatory...towards an employee...because of ...sex...and...has the purpose or effect of creating an intimidating, hostile or offensive work environment...” including conduct that “unreasonably interferes with the affected person’s work performance...” Exhibit 1 at 5. The employer trained its employees, including claimant, regarding its work rules and harassment policy, and claimant acknowledged reading and understanding them. They were also available for review online. Exhibit 1. Claimant also was aware, as a matter of common sense that he was to refrain from any verbal or physical conduct that was unprofessional, sexually suggestive and potentially offensive to coworkers. Claimant understood the employer’s expectations regarding workplace behavior.

(3) Around 2008, claimant underwent brain surgery, as a consequence of which he suffered cognitive side effects, primarily difficulty with his short-term memory. He also experienced a decline in his ability to control his impulses and sometimes said things which, before the surgery, he would have kept to himself.

(4) Sometime between May 2015 and fall 2016, claimant made the comment to a female coworker (A) regarding her attire, “Whoa, look at you. I feel like I should give you a dollar”, which offended (A) who interpreted it as implying that she looked like a stripper. Transcript at 10-11. During that same period, after seeing (A) and a male coworker return from a work location drenched after cleaning up a mess, he said to (A) “Oh, what have you two been doing? You’re both out of breath. You and [male coworker] have been gone a long, awfully long time and you’re out of breath.” *Id.* After (A) told claimant that she did not appreciate his comment, and claimant apologized.

(5) In the fall 2016, claimant approached (A) from behind, while she was standing at a copier, and placed his hands on her shoulders which she considered an unwelcome physical contact resulting in a complaint. Claimant’s supervisor told claimant his conduct was inappropriate, would not be tolerated in the future and communicated the expectation that claimant was to act professionally at all times with coworkers.

(6) Around January 6, 2017, a male coworker told claimant that his work pants had been in the laundry with (A)’s pants, after which claimant made the comment, in front of (A), that the coworker had “tried to get into [(A)]’s pants”, which offended her. Transcript at 9, 21. She reported claimant’s comment to a supervisor who forwarded it to management. The employer’s HR Department then conducted a preliminary inquiry, concluded that further investigation was warranted, and on January 24, 2017, placed claimant on administrative leave while it conducted a full investigation into claimant’s workplace behaviors.

(7) After completing its investigation, the employer concluded that claimant’s conduct constituted “inappropriate, unprofessional, and harassing communications and actions” in violation of its work rules and harassment policy, and on May 26, 2017, terminated claimant’s employment for that reason. Exhibit 1.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. 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. In a discharge case, 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 employer met its burden.

The employer had the right to expect claimant to abide by its work rules and anti-harassment policy. Claimant acknowledged reading and understanding the employer’s policies prior to 2015 and was admonished by both (A) and his supervisor prior to January 2017 that his sexually suggestive comments or behavior was unprofessional and offensive. Claimant last violated those expectations on January 6,

2017, when he stated that a male coworker had “tried to get into [(A)]’s pants” while at work, which understandably offended (A). Claimant made the statement as an attempt at humor but apologized thereafter. Transcript at 21. However, based on (A)’s comments to claimant from 2015 to 2017 regarding claimant’s prior statements to her, also attempts at humor, and conduct which she considered offensive, all of which he also apologized for, in addition to his supervisor’s admonishment in the fall of 2016, more likely than not, claimant’s knew or should have known that his comment to claimant on January 6, 2017 probably violated standards of behavior the employer had the right to expect of him, and was at least wantonly negligent.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant’s wantonly negligent conduct on January 6, 2017 was not isolated. His unwelcome physical contact in fall 2016 in approaching (A) from behind and placing his hands on her shoulders also demonstrated conscious indifference to the employer’s work rules regarding professional workplace behavior, particularly considering (A)’s previous admonitions to him regarding his conduct and statements toward her that she considered offensive.

Nor can claimant’s conduct be excused as a good faith error. Claimant told the employer during its investigation that he had apologized to (A) each and every time she complained about his conduct, demonstrating he was aware that his actions towards her were probably offensive and unprofessional. Exhibit 1-3. Accordingly, claimant did not assert or show that he reasonably believed, or had a factual basis for believing the employer would condone his conduct, particularly after being warned about unprofessional workplace behavior in 2016.

Finally, claimant’s suggestion that his brain injury and cognitive deficits somehow played a role in his behavior was not persuasive. Transcript at 29-32. Claimant explained that the interactions with (A) in question were all attempts at humor, i.e. conscious conduct, rather than the product of uncontrollable impulses. Transcript at 29. Moreover, given his supervisor’s admonition to him in the fall of 2016 regarding his behavior, claimant could have reviewed the employer’s policies and standards of conduct online if he was concerned about what the employer’s policies in that regard stated and felt he needed a review in light of his memory difficulties.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Hearing Decision 17-UI-93464 is affirmed.

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

**DATE of Service:** November 8, 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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