

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0247

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 144303). The employer filed a timely request for hearing. On February 26, 2015, ALJ Holmes-Swanson conducted a hearing, and on February 27, 2015, issued Hearing Decision 15-UI-34251, affirming the Department's decision. On March 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) YRC, Inc. employed claimant as a delivery driver from August 20, 1993 to October 22, 2014.

(2) The employer expected its employees to refrain from acts of violence in the workplace. The employer's expectation was contained in its collective bargaining agreement with claimant's union, a copy of which claimant received during his employment. Claimant was aware of the employer's expectation.

(3) On October 22, 2014, claimant drove his work truck on a work errand. After turning into a two-lane street from an intersection, claimant noticed a driver from another company who first tailgated and then passed claimant before pulling back in front of claimant and applying his brakes, causing claimant to have to abruptly slow down. Later, at a stop light, the two trucks were stopped side-by-side. The other driver made a gesture at claimant after which claimant shook his head and called him an "idiot." Audio Record ~ 42:00 to 43:00. The other driver exited his truck, approached claimant's truck and attempted to drag him out of the vehicle. Claimant resisted by hanging on to his steering wheel but his glasses fell off and out of the truck. Claimant exited his vehicle to retrieve his glasses and the other driver attempted to throw him to the ground, while threatening claimant. Claimant grabbed the other driver's

shirt to protect [him]self.” Audio Record at 36:00 to 36:30. After an unrelated driver yelled at them to stop, they discontinued their struggle and returned to their trucks.

(4) Claimant reported the other driver’s conduct to the other driver’s company, the police and his employer and reported to the employer that his neck had been injured. The other driver’s company told claimant they would take no action and the police declined to arrest or cite either driver although weeks later, the police issued a report identifying claimant as the “aggressor” based on the other driver’s statement.

(5) On November 5, 2014, the employer discharged claimant for violating the employer’s workplace rules against “violence” on October 22, 2014 based on the police officer’s report. Audio Record ~ 19:00 to 20:00. Claimant had no prior incidents of discipline with the employer. Claimant filed a union grievance against the employer and was reinstated to his job following a favorable decision after a hearing.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. 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. 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 conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The employer discharged claimant for engaging in “violence” in the workplace on October 22 in violation of its collective bargaining agreement with claimant’s union. At hearing, the employer provided only hearsay evidence regarding claimant’s conduct that day consisting primarily of testimony regarding the conclusions of the police report not offered into evidence. Audio Record ~ 11:00 to 20:00. Claimant disputed the officer’s apparent conclusion that he was the “aggressor” in the incident based solely on the other driver’s statement. Claimant asserted that after the other driver reached into his vehicle, tried to drag claimant out of his vehicle, and knocked claimant’s glasses off, claimant only “tried to protect [him]self.” No citations were issued to claimant, and after a grievance hearing contesting claimant’s discharge, claimant was reinstated based on a “lack of evidence.” Audio Record ~ 11:00 to 20:00. Absent a basis for concluding that claimant was not a credible witness, we gave his firsthand testimony under oath more weight than the employer’s hearsay evidence. At most, claimant engaged in an act of self-defense rather than an act of “violence” when the other driver attempted to pull him from and vehicle and threatened him. To the extent his act of self-defense violated the employer’s policy against workplace violence, that policy was unreasonable and a conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

In written argument, the employer argues the ALJ erred because claimant engaged in willful misconduct when he allegedly “pursued the other driver.” Written Argument at 1. However, that argument also is

based on hearsay and the employer's witness asserted it discharged claimant for violating employer rule against workplace "violence" rather than for pursuing the other driver. Audio Record ~ 19:00 to 20:00.

In a discharge case, the employer has the burden to establish that it discharged claimant for misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to meet its burden here. The employer discharged claimant, but not for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-34251 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: May 5, 2015

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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