

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0754

Affirmed ~ No Disqualification
Afirmado ~ No Descalificación

PROCEDURAL HISTORY: On May 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 151840). The employer filed a timely request for hearing. On June 9, 2017, ALJ Lohr conducted a hearing, and on June 13, 2017 issued Hearing Decision 17-UI-85609, affirming the Department's decision. On June 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Beginright Inc. employed claimant from October 7, 2011 to April 21, 2017. The employer was a temporary employment agency, and assigned claimant to work for its client.

(2) The employer prohibited employees from fighting. Claimant understood the prohibition.

(3) On April 21, 2017, claimant and a coworker disagreed about a task. The coworker "threw himself on me and grabbed my shirt," "started to hit me," and "would not let go of my shirt." Transcript at 10. The coworker "was the first one to attack me," and claimant hit his coworker in the face to "defend[] myself from all the punches he was throwing at me." *Id.* at 11-12. After the fight, claimant was injured on his side and chin but was not bruised; claimant's coworker had a black eye. Claimant reported the fight to the employer, alleging his coworker had attacked him and claimant hit the coworker in self-defense. The coworker reported the fight to the employer's client, alleging claimant was the aggressor.

(4) Because claimant's coworker reported the fight to the client and showed signs of injury, and claimant did not, the employer believed the coworker's report that claimant started the fight. The employer then discharged claimant on April 21, 2017 for instigating the fight with his coworker.

CONCLUSIONS AND REASONS: Claimant's discharge was not 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. A conscious violation of an unreasonable expectation is not misconduct. OAR 471-030-0038(1)(d)(C). To disqualify claimant from benefits because of a discharge, the burden of persuasion is on the employer to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In this case, that means that the employer must prove that it was more likely than not that when claimant fought with his coworker he was not doing so in self-defense.

The employer alleged that claimant instigated the fight with his coworker. The employer's allegation was based upon the coworker's report to the employer's client that the client subsequently reported to the employer. The employer did not describe with any detail where or why the fight happened or how it progressed. Claimant, on the other hand, was present at the fight, described the reason his coworker became upset with him, and described the coworker's actions toward him and his response. It is at least as likely as not that claimant's version of the events of April 21st occurred as he described as it is that events occurred as the employer's witness described. The employer has, therefore, not proven by a preponderance of the evidence that claimant was the aggressor in the April 21st fight with his coworker.

Even though he was not the aggressor, there is no dispute that claimant violated the employer's prohibition against fighting on April 21, 2017 by punching his coworker in the face. Although it is generally reasonable for an employer to prohibit fighting, however, it is not reasonable for an employer to expect an individual who is physically assaulted at work not to defend himself from the attack. Therefore, to any extent claimant willfully or consciously violated the employer's prohibition against fighting when he punched his coworker in self-defense, his violation was not misconduct, and he may not be disqualified from receiving benefits because of it.

DECISION: Hearing Decision 17-UI-85609 is affirmed. *Decisión de la Audiencia 17-UI-85609 queda confirmada.*

DATE of Service: July 17, 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. 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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NOTA: *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records)*

Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.