EO: 200
BYE: 201910

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0828

Reversed
Disqualification

PROCEDURAL HISTORY: On April 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 73308). The employer filed a timely request for hearing. On May 22, 2018 and June 5, 2018, ALJ Meerdink conducted a hearing, and on June 7, 2018 issued Order No. 18-UI-110843, concluding claimant's discharge was not for misconduct. On June 12, 2018, the employer filed an application for review with the Employment Appeals Board (EAB). On July 12, 2018, EAB issued Appeals Board Decision 2018-EAB-0593, reversing Order No. 18-UI-110843 and remanding the matter to the Office of Administrative Hearings (OAH). On August 14, 2018, ALJ Meerdink conducted a hearing, and on August 21, 2018 issued Order No. 18-UI-115333, re-affirming the Department's decision. On August 24, 2018, the employer filed an application for review of Order No. 18-UI-115333 with EAB.

EAB considered the parties' arguments when reaching this decision.

FINDINGS OF FACT: (1) Jackson County Juvenile Justice employed claimant, last as a juvenile justice specialist, from February 9, 2007 to March 13, 2018.

(2) The employer had policies that regulated employees' use of force against the incarcerated youth under their care. The policies required that "staff will use reasonable and appropriate physical interventions within the scope of their job as necessary," and that "staff will assess each individual situation and use the least restrictive means necessary to diffuse the situation." Exhibit 1, March 6, 2018 letter. Claimant understood the employer's policies related to use of force.

(3) On February 23, 2018, claimant had experienced youth making threats of physical and sexual violence against his wife and daughter. Claimant maintained his composure in the face of the threats, but felt affected by the experience.

(4) During claimant's February 23, 2018 shift, claimant and two other employees were tasked with escorting a youth within the secure facility. Claimant and the others were walking the youth towards an elevator. The youth was physically compliant, moving in the direction claimant and the other employees wanted him to move, but was making verbally defiant statements and moving faster than claimant and the others instructed him to move. Because they were in a secure hallway with all entries and egresses controlled by central command, there was nowhere for the youth to go other than toward the elevator, and claimant and the other two employees did not speed up their pace or try to catch up with the youth in response to his walking speed.

(5) While entering the elevator, claimant thought the youth tensed up, and he felt concerned that the youth might turn around toward him. Claimant reacted by pushing the youth into the elevator wall and applying a restraint hold on the youth's hand that would allow claimant to quickly apply painful pressure in order to control the youth if needed. One of the other employees with claimant, as required by the employer's policy, joined claimant in restraining the youth. The third employee did not restrain the youth or back up claimant in restraining the youth.

(6) The employee who had joined claimant in restraining the youth subsequently reported the incident to a lead, and reported that he did not think use of force against the youth had been justified by the circumstances. The employer reviewed video surveillance of the incident, observed no objective movements by the youth that justified use of physical force, and concluded that claimant had used excessive force against the youth. On March 13, 2018, the employer discharged claimant for excessive use of force.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant's discharge was 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) (January 11, 2018) 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.

The ALJ concluded that claimant's discharge was not for misconduct, reasoning that claimant's first-hand testimony that the youth "tensed up and appeared to be ready to turn around quickly" outweighed the employer's hearsay evidence about the incident, which "did not contradict claimant's assertion that the youth tensed up as if to confront claimant." Order No. 18-UI-115333 at 3. The ALJ also found fault with the employer's failure to provide a copy of the video surveillance tape of the incident into evidence, despite the employer never having been asked or compelled by the ALJ to submit one as evidence, and reasoned, "Based upon the persuasive evidence adduced at hearing, claimant utilized an escort restraint on a youth that claimant perceived to be threatening. This is within the employer's policies regarding acceptable use of force." *Id.* We disagree.

As we stated in Appeals Board Decision 2018-EAB-0593, under the employer's policy, the mere fact that claimant "perceived" a threat does not alone establish that his use of force complied with the employer's policies. Rather, claimant's use of force must also have been, objectively, reasonable, appropriate, and the least restrictive means of diffusing the situation. In this case, the two employees accompanying claimant and the youth apparently did not perceive a threat, as neither of them reacted to the youth's behavior by applying force to the youth, nor did the supervisor who reviewed the video surveillance tape of the incident.[1]

Next, on this record, claimant could not articulate why he though the youth might turn around quickly, much less what "threat" he perceived based on his suspicion that the youth was going to turn around quickly. The youth was in a secured area of a secured facility, and the record does not suggest that he had possession of any weapons. The fact that claimant perceived the youth was about to turn around quickly, in and of itself, does not support an inference that the youth's possible act of turning around quickly posed a threat to claimant, much less the level of threat that would make pushing the youth into an elevator wall and applying a potentially painful hold to his hand objectively reasonable or the least restrictive means of diffusing the situation.

Additionally, from claimant's testimony, there were other, less restrictive, less painful holds he might have applied, but he chose the escalated hold because doing so would make it easier to control the youth if the youth had done anything. Claimant's testimony about selecting the hold he selected does not indicate he selected that hold because it was the least restrictive response he could make based on his supposition that the youth was about to quickly turn around, he selected the hold because it would make his job of controlling the youth easier to do, which is not consistent with the employer's policies respecting use of force.

Claimant chose to use force against a youth in his custody and place him in a potentially painful escort hold in violation of the employer's use of force policies. Claimant knew the employer's policies, and knew or should have known that using force against a youth under the circumstances would violate the employer's policy. His decision to use force under the circumstances, where he could not articulate the threat the youth posed to him, where his threat assessment was not objectively reasonable, and where he chose to use an escalated restraint hold for his own ease in controlling the youth and not because the youth's behavior necessitated such a hold, demonstrated his indifference to the consequences of his conduct. As such, his use of force under the circumstances amounted to a wantonly negligent violation of the standards of behavior the employer had the right to expect of him.

In Order No. 18-UI-115333, the ALJ also stated that claimant's conduct nevertheless "would be excused as a good faith error" because he "genuinely believed that his conduct fell within the acceptable uses of force with juveniles and was appropriate for the very dynamic and exigent situation he faced." *Id.* We disagree. Although we are aware of the unique dangers and exigencies law enforcement personnel face in the conduct of their duties, which often require law enforcement to make and act upon quick judgments to protect their own or others' safety, the evidence in this case – in which claimant could not articulate what about the youth's behavior suggested there might be a threat and did not articulate what he thought that threat might be – claimant could not have reasonably, genuinely believed that pushing a

[1] Although one employee also applied a restraint hold, he did so pursuant to policy requiring him to back up claimant in his decision to use force; the same employee later reported claimant's conduct to the employer as having amounted to an excessive use of force, suggesting that he did not agree with claimant that the youth's conduct warranted use of force.

youth into an elevator wall and applying a potentially painful hold to his hand because he thought the youth might turn around quickly was compliant with the employer's use of force policies or would be excused or condoned by the employer. He therefore did not act in good faith.

Nor was claimant's conduct excusable as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(D) provides that some conduct exceeds mere poor judgment, including conduct that causes a breach of trust in the employment relationship or makes a continued employment relationship impossible. Objectively considered, no reasonable employer whose business is caring for incarcerated youth could trust or continue to employ someone who engaged in the excessive use of force against a youth in their custody under the circumstances described at the hearing and in this decision. Claimant's conduct therefore exceeded mere poor judgment and cannot be excused.

The employer discharged claimant for misconduct. Claimant must therefore be disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-115333 is set aside, as outlined above.

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

DATE of Service: <u>September 26, 2018</u>

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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