EO: 200
BYE: 201924

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-0839

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 152143). Claimant filed a timely request for hearing. On August 7, 2018, ALJ Shoemake conducted a hearing, and on August 15, 2018, issued Order No. 18-UI-114944, concluding that the employer discharged claimant, but not for misconduct. On August 23, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer presented a written argument. However, the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The written argument also included four witness statements from individuals the employer asserted were witnesses to the final incident that caused claimant's termination which the employer requested that we consider. That request is construed as a request to have EAB consider the new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The record shows that OAH mailed notice of the hearing to the employer at its address of record with the Department on July 26, 2018. The employer did not explain why, with sufficient notice of the hearing, it failed to present testimony from the asserted witnesses at the hearing, which would have allowed claimant a fair and reasonable opportunity to cross examine them for truth or bias. For these reasons, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Fabform Industries Inc. employed claimant as a full-time employee in its steel processing section from March 19, 2018 to June 12, 2018.

(2) The employer had a written policy that prohibited its employees from fighting on the employer's premises. The policy also stated that if an employee came to the employer and reported what the employee considered threatening work behavior, the employer would promptly act and attempt to

resolve it. Claimant received a copy of the employer's policy at hire and understood the employer's expectations.

(3) During the week of June 3 through 9, 2018, claimant and a coworker (JT) had a disagreement over work issues that went on for days. An employer vice-president (BI) became aware of the disagreement and on Wednesday, June 6, discussed it with both claimant and JT on the shop floor, after which both coworkers agreed the issues were resolved and shook hands.

(4) However, on Monday, June 11, 2018, the disagreement between claimant and JT not only continued, but escalated to the point where claimant approached BI just before the end of his shift and told him that "things still weren't resolved in his mind . . . [and] . . . [h]e feared it may turn into a fight." Audio Record ~ 33:00 to 36:40. BI, who was preparing for an inspection at that time, took no action to diffuse or resolve the continuing disagreement between claimant and JT. Shortly thereafter, claimant's shift ended and he left the employer's shop.

(5) Claimant walked through the employer's parking lot to his car, shortly after which he saw JT, who also had just exited the shop, walk through the parking lot and approach claimant as he stood near his car. JT yelled something at claimant and walked "right up to his face" in such a way that claimant thought that JT was going to take a swing at him. At that point, claimant swung at JT, but did not hit him, and JT then punched claimant several times which claimant summarized as, "he kicked my butt." Audio Record ~ 23:00 to 26:00. Other coworkers intervened and the fight ended after which claimant and JT went home. Later, a coworker contacted BI and reported to the vice president what he had observed.

(6) On June 12, 2018, when claimant and JT reported for their shift, claimant approached JT, said a few words to him after which they both shook hands and began to work. Shortly thereafter, BI called the two of them along with some coworkers who had observed the fight into BI's office, where he asked who had thrown the first punch to determine who had started the fight. Claimant admitted to doing that, although he had not struck JT. Later that day, the employer discharged claimant for fighting on the employer's premises.

(7) Prior to his discharge, claimant had never been warned or disciplined by the employer.

CONCLUSIONS AND REASONS: We agree with the 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 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. In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, claimant's firsthand testimony about the facts relating to the June 11 confrontation that led to his discharge differed from the testimony of the employer's vice president, which was based on hearsay reports received by the employer after the incident. 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, which suggested that claimant had been responsible for the fight, and for that reason found facts in accordance with claimant's testimony on matters in dispute regarding the June 11 incident.

The ALJ concluded that claimant's discharge was for an isolated instance of poor judgment and not misconduct, reasoning that although claimant's participation in the fight was at least wantonly negligent, his participation appeared to be a matter of self-defense and claimant had not been warned or disciplined previously. Order No. 18-UI-114944 at 1-2. We agree.

Claimant admitted that he understood that the employer's policy prohibited fighting on the employer's premises and his discussion with BI just before he left work on June 11 showed that he believed a fight was about to occur. Audio Record ~ 18:00 to 20:00. Accordingly, claimant's participation in the fight a short time later in the employer's parking lot, more likely than not demonstrated conscious indifference to the employer's policy and for that reason was at least wantonly negligent.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. There was no dispute that prior to June 11, claimant had never been warned or disciplined for violating an employer policy, so claimant's conduct on June 11 was isolated. However, OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, exceeds mere poor judgment and may not be excused, such as conduct that is unlawful, tantamount to unlawful conduct, causes a breach of trust in the employment relationship or otherwise makes a future employment relationship impossible.

Viewing the record as a whole, claimant's conduct did not rise to the level of an unlawful assault on a coworker. In claimant's words, "[JT] approached [me] in such way that I thought that he was going to swing . . .. [H]e came up to me right in my face." Audio Record ~ 23:00 to 24:00. That description, which we accept as credible, justified claimant's initial swing at JT and later participation in the fight, a use of force which claimant reasonably believed was necessary under the circumstances and justified as self-defense under ORS 161.209.[1] Moreover, it was undisputed that claimant asked BI to intervene to resolve the dispute immediately before the fight, and that the following morning, claimant and JT discussed the matter on their own, after which they shook hands and returned to work. Considering those

[1] ORS 161.209. Use of physical force in defense of a person. Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose. [1971 c.743 §22]

additional facts, claimant's conduct was not of the sort that would *objectively* cause an employer to be unable to trust claimant to work without incident with JT or other coworkers in the future.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 18-UI-114944 is affirmed.

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

DATE of Service: September 26, 2018

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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