EO: 200
BYE: 202436

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
2024-EAB-0231

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 1, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective August 27, 2023 (decision # 70318). Claimant filed a timely request for hearing. On February 21, 2024, ALJ Amesbury conducted a hearing at which the employer failed to appear, and on February 26, 2024, issued Order No. 24-UI-248873, affirming decision # 70318. On March 1, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Junior Alvarado Trucking, Inc. employed claimant as a division manager from May 1, 2021, until August 30, 2023.

(2) The employer expected that their employees would not make harmful or offensive physical contact with another. Claimant understood this expectation.

(3) On August 23, 2023, claimant became involved in an argument with a subordinate employee who also was claimant's nephew. During the argument, claimant suggested that the employee "clock out and leave." Audio Record at 23:12. The employee then "balled up his fist and took a step toward [claimant]," causing claimant to believe the employee was "going to punch [him]." Audio Record at 23:19. Claimant "grabbed [the employee] by the throat to stop the altercation from going any further." Audio Record at 18:19. This ended the argument, and the employee left the worksite. Claimant reported the incident to his own supervisor the following day.

(4) On August 24, 2023, claimant's supervisor suspended claimant from work for five days for behavior that was "unacceptable and unprofessional" based on claimant's report of the incident. Exhibit 1 at 1. The suspension began immediately.

(5) On August 30, 2023, claimant returned to work following the suspension. A relative of the employer's owner spoke to claimant, claiming to be acting on the owner's behalf due to the owner's incapacitation and inability to communicate since before August 23, 2023. This relative told claimant that he was discharged for his use of force against the employee on August 23, 2023. Claimant's supervisor, who had imposed the suspension, disagreed with the decision to discharge claimant. Claimant left work and did not work for the employer thereafter. Both claimant and his supervisor later came to believe that the relative was not an owner or employee of the employer and did not have the authority to discharge claimant. However, neither claimant nor the employer attempted to clarify this or reestablish the employment relationship thereafter.

CONCLUSIONS AND REASONS: Claimant was discharged, 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. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "'[W]antonly negligent' means 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." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, the suggestion that the owner's relative who discharged claimant was not authorized by the employer to discharge him has no bearing on the characterization of the work separation as a discharge.[1] It can reasonably be inferred that claimant desired to continue working for the employer on and after August 30, 2023, since he reported for work immediately after the suspension ended, and that claimant stopped working for the employer that day only because a person with apparent authority to do so told claimant he was discharged. In the absence of evidence that the employer later sought to rescind claimant's discharge as having been unauthorized, it is reasonable to infer either that it had been authorized, or that the employer ultimately authorized the discharge by letting it stand. Further, the fact that claimant was suspended from work for the August 23, 2023, incident, then immediately discharged for the same reason upon expiration of the suspension, does not alter that the separation was a discharge, or that this incident is the proper subject of the misconduct analysis.

The employer discharged claimant for grabbing an employee by the throat to stop that employee from punching claimant. The order under review concluded that claimant willfully violated the employer's

[1] *See* OAR 471-030-0038(2)(a) and (b), which provide that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving, but if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge.

"reasonable" policy prohibiting workplace violence by grabbing the employee because "the evidence was not persuasive that claimant was reasonably in fear that [the employee] would attack or injure him." Order No. 24-UI-248873 at 3. However, the record does not support the conclusion that claimant willfully violated a reasonable expectation of the employer, nor does it support the conclusion that claimant's actions were not justifiable as self-defense. The employer expected that their employees would not make harmful or offensive physical contact with another. Claimant understood this expectation. However, whether this expectation was one that an employer has the right to expect of an employee is dependent on whether it allowed the use of lawful self-defense.[2] The employer has not met their burden of showing that claimant willfully or with wanton negligence violated a reasonable employer expectation by grabbing the employee.

Claimant does not dispute that he grabbed the employee by the throat during the argument. Audio record at 18:20. However, the record does not support that claimant did so to intentionally inflict violence on the employee. Claimant maintained that he grabbed the employee because the employee's actions of balling up his fist and stepping toward claimant caused claimant to believe the employee was about to punch him. Audio Record at 23:19. When asked why he did not retreat to another location, claimant testified, "At the time, I don't know. I wasn't thinking. I just wanted to stop the altercation from happening." Audio Record at 19:26. It is reasonable to infer from this testimony that claimant's act of grabbing the employee was likely reflexive rather than the result of a conscious decision to act. Further, even if claimant did act consciously in grabbing the employee, the record shows that claimant did so only because he reasonably believed that unlawful force would imminently be used against him based on the employee's stepping toward him with a balled-up fist. Claimant's act of self-defense was therefore legally justifiable.

While the record shows that claimant knew that grabbing an employee by the throat would, under most circumstances, violate the employer's expectation, the employer has not shown that claimant knew or should have known that using force to justifiably defend himself would violate a *reasonable* expectation. That claimant self-reported the incident to his supervisor supports that claimant believed that his use of force was justified. Moreover, without an exception for lawful self-defense, the employer has not shown that their expectation regarding workplace violence was reasonable, or that claimant knew or should have known that acting in self-defense would violate a standard of behavior an employer has the right to expect of an employee. As claimant either did not act consciously, or did not know or have reason to know that his conscious act would violate a reasonable expectation of the employer, he did not act with wanton negligence. Therefore, the employer has not shown by a preponderance of evidence that claimant willfully or with wanton negligence violated a reasonable expectation of the employer by justifiably using force ag the employee. Accordingly, claimant was not discharged for misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

[2] *See* ORS 161.209, which provides that, with exceptions inapplicable to these facts, "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."

DECISION: Order No. 24-UI-248873 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Serres, not participating.

DATE of Service: April 9, 2024

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。 如果您不明白本判決， 請立即聯繫就業上訴委員會。 如果您不同意此判決，您可以按照該判決結尾所寫的說明， 向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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