

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0101

*Reversed
Disqualification*

PROCEDURAL HISTORY: On October 29, 2013 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act by violating the employer's reasonable drug and alcohol policy and by violating the reasonable terms of a reasonable last chance agreement (decision # 91510). Claimant filed a timely request for hearing. On January 7, 2014, ALJ Shoemake conducted a hearing, and on January 14, 2014 issued Hearing Decision 14-UI-08511, reversing the Department's decision. On January 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Kittridge and Fredrickson, Ltd. employed claimant in its shipping and receiving department from January 19, 2007 until October 4, 2013.

(2) The employer had a written drug and alcohol policy prohibiting its employees from reporting to work or remaining at work while under the influence of drugs or alcohol. Upon hire, the employer gave claimant a copy of this policy. Claimant was aware of the contents of the policy.

(3) In 2012, claimant voluntarily entered an outpatient alcohol and drug abuse treatment program. Sometime in approximately July or August 2013 claimant reported to work smelling of alcohol. When the employer spoke with claimant about this incident, claimant stated that he still had a problem with alcohol abuse. On August 9, 2013, claimant signed a written last chance agreement with the employer. The agreement stated that claimant was prohibited from reporting for work "smelling of alcohol" and, if he smelled of alcohol, he agreed to submit to an alcohol test and he would be discharged if he tested positive for alcohol. Transcript at 9-10.

(4) Sometime in approximately late September 2013, claimant had a relapse and started drinking alcohol again. During the night of October 1, 2013 until approximately 1:00 a.m. on October 2, 2013, claimant drank a large quantity of alcohol. On October 2, 2013, claimant reported for work at 9:00 a.m. Claimant had worked less than twenty minutes when, while trying to remove a roll of shrink wrap from a shelf, he pulled it down on his face and injured himself. After his injury, several employees noticed that claimant smelled of alcohol. The employer's human resources representative took claimant to an urgent care facility for treatment of his facial injury and for testing to determine if he had alcohol in his system. On October 2, 2013, the employer suspended claimant pending the results of the alcohol test.

(5) On October 4, 2013, the employer received a report from the laboratory which had analyzed the sample of claimant's blood taken on October 2, 2013. Claimant's blood alcohol was assessed at 0.243. The employer did not have a second laboratory confirm this test result. Claimant believed that his body had smelled of alcohol, and the positive laboratory test was "because it [the alcohol] was still in my system [from drinking the night before]." Transcript at 30.

(6) On October 4, 2013, the employer discharged claimant for violating the last chance agreement by reporting for work with alcohol in his system.

CONCLUSIONS AND REASONS: The employer discharged claimant for committing a disqualifying act by violating the terms of a reasonable last chance agreement.

The ALJ approached this case as if the employer discharged claimant under the general provisions of its alcohol and drug policy, and implicitly determined that the general provisions of the Department's drug and alcohol adjudication policy applied. Following this logic, the ALJ determined that the employer did not demonstrate that it discharged claimant for a disqualifying act because it did not have a second laboratory confirm the positive test result of its laboratory as required under OAR 471-030-0125(10)(a) before it discharged claimant. Hearing Decision 14-UI-08511 at 5. We disagree. A fair reading of the record shows that claimant was discharged not for violating the general provisions of the employer's alcohol and drug policy, but for violating the terms of the last chance agreement he entered into with the employer on August 9, 2013. *See* Transcript at 5, 7-10, 16, 21. The employer's discharge of claimant must therefore be analyzed under the provisions of the statutes and regulations specifically applicable to last chance agreements.

ORS 657.176(9)(a)(G) states that an individual is disqualified from receiving benefits if the employer discharged him for violating the terms of a last chance agreement. ORS 657.176(13)(c) states that a last chance agreement means a "reasonable agreement" that, among other things, may require the employee to abstain from alcohol use. A reasonable last chance agreement includes one that is entered into between the employee and the employer after the employee has "admitted to alcohol abuse." ORS 657.176(13)(c)(A). OAR 471-030-0125(7) (March 12, 2006) further defines a reasonable last chance agreement as one that is written and contains only reasonable conditions, including conditions that require the employee to remain alcohol free and to submit to testing to "demonstrate that the employee remains drug or alcohol free."

The last chance agreement between claimant and the employer was entered into after claimant admitted to the employer that he had an alcohol abuse problem. Transcript 11, 12, 21. The last chance agreement was apparently written since it was signed by claimant and its terms were read into the hearing record.

Transcript at 8, 9. Although the precise language of the last chance agreement prohibited claimant from reporting to work “smelling of alcohol” and provided for mandatory alcohol testing if he did, a reasonable interpretation of it is that claimant was prohibited from reporting for work with detectable levels of alcohol in his system or while under the influence of alcohol. Since this interpretation of the last chance agreement is less stringent than the complete abstinence from alcohol that is considered reasonable under ORS 657.176(13)(B)(i) and OAR 471-030-0125(7)(b), the substantive provisions of the agreement are reasonable. The circumstances of its formation, that it was in writing and the nature of its prohibitions, establish that the last chance agreement entered into between claimant and the employer was a valid and reasonable agreement under OAR 471-030-0125(7).

The statutes and regulations addressing last chance agreements are silent on how an employer may show that an employee violated them and do not require that the employer present corroborating medical test results to establish a violation. *See* ORS 657.176(9)(G), ORS 657.176(13)(c); OAR 471-030-0125(7). In this case, claimant conceded that he was in relapse and that he had consumed alcohol the night before reporting for work on October 2, 2013. Transcript at 27, 30. Claimant did not dispute the accuracy of the very high concentration of alcohol reported by the laboratory, but explained that the alcohol was “still in my system.” Transcript at 30. Moreover, claimant did not contend at hearing he thought he had consumed only a level of alcohol that would have allowed him to remain in compliance with the last chance agreement or that he was blindsided by the employer’s decision to discharge him on October 2, 2013 for reporting to work with alcohol in his system. Based on claimant’s admissions at hearing, the employer demonstrated, more likely than not, that claimant violated the last chance agreement.

Claimant committed a disqualifying act under ORS 657.176(9)(a)(G) by violating the August 9, 2013 last chance agreement. Claimant is therefore disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-08511 is set aside, as outlined above.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating

DATE of Service: February 18, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.