

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0211

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 27, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95246). Claimant filed a timely request for hearing. On January 3, 2014, ALJ Vincent conducted a hearing at which both parties waived objection to proceeding under the Department's drug and alcohol adjudication policy. On January 29, 2014, ALJ Vincent issued Hearing Decision 14-UI-09343, concluding claimant committed a disqualifying act. On January 31, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Manheim Remarketing, Inc. employed claimant as a driver from January 14, 2008 until September 6, 2013. The employer operated an automobile auction. Claimant drove the employer's vehicles to deliver them to various locations.

(2) The employer had a written drug and alcohol policy that required employees to submit to drug and alcohol tests if they were involved in accidents while working. The policy stated that an employee's "refusal to cooperate in any way" with the required post-accident testing was grounds for discharge. Transcript at 29. At hire, claimant was given a copy of the policy and was aware it. The employer followed the drug and alcohol policy when its employees were involved in accidents.

(3) On August 7, 2013, claimant was assigned to drive one of the employer's vehicles, a Jeep Cherokee, to a dealership. At approximately 4:00 p.m., when preparing to turn into the dealership, claimant was involved in accident with a van. Claimant called the employer to report the accident and waited at the scene for a tow truck to take the Jeep back to the employer's premises. Claimant was ultimately transported back to the workplace by a driver for the employer. The cost to repair the van with which claimant had collided was \$6,791. As a result of the accident, the employer sold the damaged Jeep claimant had driven for a \$2,000 loss.

(4) When claimant arrived back at the employer's premises, the administrative assistant told claimant that she needed to take a post-accident drug and alcohol test. No managers were on the premises at that time, and the administrative assistant told claimant she had spoken with claimant's supervisor, the operations manager, to make arrangements for the testing. The operations manager needed to contact another manager to transport claimant to a clinic for the test and he also needed to make an appointment for the test and to complete the paperwork for the test. Sometime between approximately 5:00 p.m. and 5:30 p.m., claimant told the administrative assistant that she was going home and left the employer's premises. When the operations manager called the administrative assistant to update her on his progress in arranging for the drug and alcohol test, the administrative assistant told him that claimant was gone.

(5) On September 6, 2013, the employer discharged claimant because she failed to cooperate with the employer's efforts to arrange for the required drug and alcohol test on August 7, 2013.

CONCLUSIONS AND REASONS: Claimant committed a disqualifying act by failing to cooperate with the required drug and alcohol test on August 7, 2013.

ORS 657.176(2)(h) and ORS 657.176(9)(a)(C) state that an individual is disqualified from benefits if the individual was discharged for failing to cooperate with a drug or alcohol test required by an employer's reasonable written drug or alcohol policy. An employer's written drug and alcohol policy is reasonable if it prohibits the effects of drugs or alcohol in the workplace, it has been provided to the individual in writing, the employer follows its policy and, if the policy provides for drug and alcohol testing, the employer had probable cause for requiring the individual to submit to the test. OAR 371-030-0125(3) (March 12, 2006).

Although the accident involving claimant took place away from the employer's premises, "workplace," for purposes of ORS 657.176(9)(a)(A), is defined as including any place at which an individual performs services for the employer. *See* OAR 471-030-00125(2)(a). The employer's policy reasonably covered claimant's behavior when she was driving for the employer off its premises since she was providing services to the employer. The employer's policy was obviously intended to prohibit the effects of drugs or alcohol wherever claimant was working, and claimant did not dispute she was given a copy of the employer's written policy or that she was aware of its provisions. Transcript at 14. A drug and alcohol policy that requires an individual to submit to testing after an accident is considered reasonable if the accident caused injury or substantial damage to property. OAR 471-030-0125(4)(a). Here, the accident in which claimant was involved caused at least \$8,791 in damage to both vehicles. The dollar value of the damage was "substantial" and was reasonable probable cause for the employer to require claimant's testing.

As to the final factor in determining the reasonableness of the employer's post-accident drug and alcohol policy, OAR 471-030-0125(3)(b) requires that the employer must have followed its own policy in requiring claimant to submit to a test. The employer's operations manager testified that the employer required all employees involved in accidents to submit to testing. Transcript at 8, 31. Claimant contended, however, that the employer often did not require post-accident testing of the employees involved in accidents and that this part of the employer's policy was selectively applied to her. Transcript at 15. Although claimant testified she "knew of several incidents" in which employees were not tested, she was generally unable to provide specific information about these accidents, how she

learned of them or how she knew that the employer did not enforce its testing requirement in those cases. Transcript at 14; *see also* Transcript at 14-18. In light of the certainty with which the employer's witness testified, the plausibility of his testimony that the employer uniformly conducted post-accident tests and claimant's inability to corroborate her much of her claim with specific evidence, it is not likely that the employer did not follow its own policy across-the-board. In sum, the employer demonstrated that its drug and alcohol policy met all the requirements for a reasonable written policy. As applied to claimant, the requirement that she submit to drug and alcohol testing after the vehicle accident on September 6, 2013 was also reasonable.

It was reasonable for the employer's drug and alcohol policy to require that claimant cooperate in any post-accident testing. At the time claimant left the workplace on September 6, 2013 rather than stay to take the drug and alcohol test once it could be arranged, approximately only an hour to an hour and a half had elapsed since the accident. Transcript at 25. Claimant testified that there was no pressing reason that required her to leave the workplace, and she could readily have waited longer to take the test. Transcript at 25. Claimant conceded she was aware that the employer intended for her to take a test and, before she left the workplace and she did not call her manager to ask him if she was permitted to leave. Transcript at 20, 21, 24. On these facts, claimant's behavior in leaving the workplace so soon after the accident and before a drug and alcohol test could be scheduled for her was not reasonable. By leaving the workplace before she took a drug and alcohol test, claimant violated the employer's reasonable, written drug and alcohol policy that required her to cooperate with post-accident testing.

Claimant committed a disqualifying act by failing to cooperate with the employer and waiting to take a drug and alcohol test. Claimant is disqualified from unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-09343 is affirmed.

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

DATE of Service: March 5, 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.