

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0343

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 26, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant is disqualified from the receipt of benefits (decision # 103421). Claimant filed a timely request for hearing. On January 24, 2014, ALJ Sime conducted a hearing, and on January 29, 2014 issued Hearing Decision 14-UI-09364, reversing the Department's decision. On February 13, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

FINDINGS OF FACT: (1) Schnitzer Steel Industries Inc. employed claimant as a welder at its scrap yard from March 21, 2012 to November 1, 2013.

(2) The employer had a written policy that governed the use, sale, possession and effects of drugs in the workplace. The policy provided for drug testing based on reasonable suspicion that an employee was under the influence of drugs at work.

(3) In late October 29, 2013, claimant's supervisor found a marijuana pipe on the employer's property. The supervisor reviewed several prior hours of video surveillance footage of the area where he found the pipe. The supervisor observed claimant and four other employees working in that area during that time.

(4) Based on the supervisor's review of the video surveillance footage, the employer required claimant and the other four employees to submit urine samples for drug testing. Claimant's urine sample tested positive for marijuana. The employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: Claimant is not disqualified from receiving benefits based on his work separation from the employer.

ORS 657.176(2)(h) provides that an individual is disqualified from receiving benefits if the individual has committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(F) provides that an individual commits a disqualifying act when the individual tests positive for an unlawful drug in connection with employment. An individual "tests positive" for an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy and, at the time of the test, the individual has any detectable level of drugs present in the individual's system if the policy does not specify a cut off level. OAR 471-030-0125(2)(e) (March 12, 2006). OAR 471-030-0125(3) provides, in relevant part, that an employer policy is not reasonable if, when the policy provides for drug testing, the employer does not have probable cause for requiring the individual to submit to the test. OAR 471-030-0125(4) provides in relevant part, that an employer has probable cause to require an employee to submit to a test for drugs if the employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs in the workplace. OAR 471-030-0125(4)(a). Such evidence may include, but is not limited to, bizarre behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property. *Id.*

In the present case, the employer tested claimant because he was one of five employees who had been working in the area where his supervisor found the marijuana pipe. The employer did not assert that claimant exhibited bizarre behavior, that his productivity changed, or that he caused an on-the-job injury or substantial property damage. Without more, claimant's general proximity to the marijuana pipe did not give the employer a reasonable basis to suspect that he may have been impaired or affected by drugs in the workplace. The employer therefore did not have probable cause to require claimant to submit to a test for drugs.

The employer's policy therefore was not "reasonable" as that term is defined under OAR 471-030-0125(3). Claimant therefore did not "test positive" for drugs as that phrase is defined under OAR 471-030-0125(2)(e). Claimant therefore did not commit a disqualifying act under ORS 657.176(9)(a)(F), and is not disqualified from receiving benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 14-UI-09364 is affirmed.

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

DATE of Service: March 11, 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.