

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0455

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant committed a disqualifying act (decision #103825). Claimant filed a timely request for hearing. On March 5, 2014, ALJ Monroe conducted a hearing, and on March 17, 2014 issued Hearing Decision 14-UI-12593, affirming the Department's decision. On March 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Madden Industrial Craftsmen, Inc. employed claimant from June 16, 2010 to December 30, 2013 as a stacker and scaler in its production department.

(2) The employer had a written policy that governed the effects of drugs in the workplace, and prohibited employees from having any drugs present in the body. The employer's policy provided for "probable cause" testing of any employee involved in a work-related accident that resulted in an injury requiring outside medical attention. A positive test result for any drugs, including marijuana, violated the employer's policy. The policy did not specify that a particular level of drugs had to be present in an employee's body for a test to be considered positive. In June 2010, claimant received a copy of the policy.

(3) On December 24, 2013, claimant smoked marijuana.

(4) On December 26, 2013, claimant accidentally dropped a bucket of frozen blueberries on his foot at work, and injured his foot. Claimant received medical treatment including X-rays, diagnosis and medication at a medical center that day. Claimant submitted a urine sample for a post-accident drug test the same day. Claimant was not required to pay for the test.

(5) On December 30, 2013, the employer received claimant's drug test results. Claimant tested positive for marijuana. The initial test was confirmed by a test conducted in a federal or state licensed clinical laboratory.

(6) The employer discharged claimant because he tested positive for marijuana.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude claimant is disqualified from receiving benefits.

ORS 657.176(2)(h) provides that an individual is disqualified from receiving unemployment insurance benefits if he committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(F) provides that an individual has committed a disqualifying act if he tests positive for an unlawful drug in connection with employment. Under OAR 471-030-0125(2)(e)(B) (March 12, 2006), 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, there is any detectable level of drugs present in the individual's system where, as here, the policy does not specify a cut off level. To determine whether an individual tests positive for drugs for purposes of ORS 657.176(9)(a) and OAR 471-030-0125, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a). A "reasonable" written policy is defined, in relevant part, as one that prohibits the effects of drugs in the workplace, is followed by the employer, has been provided to the individual in writing, and, where the policy provides for drug testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3). No employer policy is reasonable if the employee is required to pay for the test. OAR 471-030-0125(6). An employer has probable cause to require an employee to submit to a test if the employee's behavior causes an on-the-job injury. OAR 471-030-0125(4)(a).

The employer discharged claimant because he tested positive for marijuana in violation of the employer's drug policy. The employer's drug policy was reasonable as defined by OAR 471-030-0125. The policy prohibited the effects of drugs in the workplace, was provided to claimant at hire, and there is no evidence in the record that the employer does not follow its policy. The employer's policy provided for "probable cause" testing of any employee involved in a work-related accident that resulted in an injury requiring outside medical attention. It is undisputed that claimant's behavior at work caused an on-the-job injury that required outside medical attention. Thus, the employer followed its policy, and had probable cause to require claimant to submit to a drug test. It is also undisputed that claimant tested positive for marijuana, an unlawful drug, after the workplace injury on December 26, 2013. The initial test was confirmed by a test in a federal or state licensed clinical laboratory. The employer met its burden to show claimant committed a disqualifying act under ORS 657.176(9)(a)(F).

Thus, because claimant committed a disqualifying act under ORS 657.176(9)(a)(F) by testing positive for marijuana, he is disqualified from the receipt of unemployment insurance benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 14-UI-12593 is affirmed.

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

DATE of Service: April 9, 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.