

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0508

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 15012). Claimant filed a timely request for hearing. On March 25, 2014, ALJ Seideman conducted a hearing at which the employer did not appear, and on March 28, 2014 issued Hearing Decision 14-UI-13780, concluding both that claimant committed a disqualifying act and that claimant also was discharged for misconduct. On April 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Mountain View Rehab, LLC employed claimant as a registered nurse (RN) from March 1, 2006 until February 16, 2013. The employer operated a skilled nursing and long-term care facility.

(2) As a condition of her employment, the employer required claimant to have and maintain an active RN license issued by the Oregon State Board of Nursing (OSBN). Claimant was aware of the employer's expectations.

(3) Since approximately 1983, claimant was a licensed RN. Sometime after 1983, claimant developed an addiction to illegal drugs. In approximately 2003, claimant began taking methadone and overcame her addiction. Claimant maintained her nursing license.

(4) Sometime in approximately 2010, claimant relapsed back into illegal drug use. In approximately September 2010, claimant reported her relapse to the OSBN. At that time, OSBN changed the status claimant's nursing license to probationary and required claimant to submit to random urine tests as a condition of maintaining her license. Thereafter, claimant was notified approximately two times per month that she needed to provide a urine sample. Claimant continued working for the employer as an RN.

(5) Sometime in December 2013, one of claimant's teeth broke off and claimant experienced pain. Claimant did not make an appointment with a dentist. To ease the pain, claimant applied to her gums topical medicine gels designed for dental problems. Claimant purchased the gels over-the-counter. These gels contained Benzocaine and Lidocaine as active ingredients. Around the end of December 2013, claimant was given two loaves of bread that contained different types of seeds, including poppy seeds. After claimant received the bread, she ate it. Around this time and after, claimant was not using cocaine, morphine or any other illegal drugs. Claimant was not aware that ingesting poppy seeds, Benzocaine or Lidocaine could lead to false positive results on drug tests.

(6) On December 30, 2013, OSBN required claimant to submit a urine sample for drug testing. Claimant did so. The urine sample claimant gave tested positive for cocaine and morphine. On January 7, 2014, the OSBN notified claimant of the result of the urinalysis and suspended claimant's RN license. On January 7, 2014, claimant provided another urine sample to the OSBN and that sample tested negative for drugs. Claimant did not work for the employer after January 7, 2014 because her RN license was suspended. On January 17, 2014, the employer suspended claimant from work because of the suspension of her RN license. After her positive drug test on December 30, 2013, claimant learned for the first time that poppy seeds in the bread she had consumed could lead to a false positive result on a drug test, and she stopped eating that bread.

(7) After the positive drug test result on December 30, 2013, the OSBN referred claimant to an addiction treatment program for an evaluation. On January 29, 2014, as part of its evaluation, the addiction program required claimant to submit a urine sample for drug testing. The sample tested negative for illegal drugs. On February 5, 2014, the OSBN again had claimant submit a urine sample for drug testing. This urine sample tested positive for illegal drugs. Between the first positive drug test on December 30, 2013 and the positive test on February 5, 2014, claimant did not use cocaine, morphine or any other illegal drugs. Although claimant had stopped eating the bread that contained poppy seeds, claimant continued using, as needed, the oral gels for her dental pain. Claimant later learned that the Benzocaine and Lidocaine in the oral gels could yield false positive results on a drug test.

(8) Shortly after February 5, 2014, the OSBN told claimant it intended to permanently revoke her RN license if she did not agree to surrender it for three years, after which claimant could petition to have the license reinstated. The OSBN communicated its decision to the employer. On February 16, 2014, the employer discharged claimant because she no longer had an RN license. Around this time, claimant surrendered her nursing license to the OSBN for three years.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(c) (August 3, 2011) defines misconduct, in relevant part, as the willful or wantonly negligent failure to maintain a license, certification, or other similar authority necessary to perform the occupation involved, so long as such failure is reasonably attributable to claimant. ORS 657.176(2)(h) and ORS 657.176(9)(a)(A) state that claimant is disqualified from benefits if claimant failed to comply with the terms and conditions of a reasonable written drug and alcohol policy established by the employer.

In Hearing Decision 14-UI-13780, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that the OSBN suspended claimant's authority to perform work duties as an RN, that the employer had discharged claimant because she could no longer lawfully perform the work for which the employer had hired her and that failing the drug tests was reasonably attributable to claimant. Hearing Decision 14-UI-13780 at 3. The ALJ also concluded claimant was disqualified from benefits under ORS 657.176(2)(h) and ORS 657.176(9)(a)(A) because she had tested positive for illegal drugs in a drug test performed under the auspices of the OSBN. The ALJ reasoned that the employer's drug and alcohol policy was therefore apparently violated. Hearing Decision 14-UI-13780 at 4. We disagree.

With respect to the employer's drug and alcohol policy, there was no evidence at hearing that the employer even had one. If it did, there was no evidence as to the contours of the employer's policy, its prohibitions and whether it met the requirements of ORS 657.176(9)(a)(A) or OAR 471-030-0125(3)(a) (March 12, 2006). Nor was there any evidence that the drug tests administered to claimant met the strict requirements of OAR 471-030-0038(10)(a), which must be satisfied before the failure of a test can be considered a disqualifying act. There was no evidence that the drug tests that claimant had failed were administered under the authority of the employer's drug and alcohol policy. In addition, the evidence elicited at hearing showed that the precipitating cause for claimant's discharge was not that she had failed the OSBN's drug tests, but that she had lost her RN license. See Audio at ~13:16, ~19:51, ~22:15. Because the proximate cause of claimant's discharge was claimant's loss of her RN license, and there was no evidence to support that the employer's drug and alcohol policy met statutory and regulatory standards, it was error for the ALJ to conclude that by failing the OSBN's drug tests claimant committed a disqualifying act under the employer's drug and alcohol policy.

With respect to claimant's loss of her nursing license, the ALJ neglected to analyze whether it was due to claimant's willful or wantonly negligent behavior, as he should have under OAR 471-030-0038(3)(c), before concluding claimant was disqualified from benefits. Throughout the hearing, claimant tearfully contended she had not taken any illegal drugs before the administration of the drug tests that led to the loss of her nursing license. Audio at ~8:03, ~10:02, ~13:48, ~20:02, ~24:40. The differing results of the drug tests administered to claimant between December 30, 2013 and February 5, 2014 suggest an issue with their reliability. Claimant speculated that her positive results on some of the drug tests might have been a result of consuming the bread with poppy seeds or sporadic use of the oral gels containing Benzocaine and Lidocaine. Audio at ~8:03, ~10:55, ~14:26, ~20:53, ~25:03. Claimant is correct that inadvertent consumption of poppy seeds can yield a false positive for morphine on drug tests using urine samples. See e.g., <http://www.med.nyu.edu/content?ChunkIID=1387>. Claimant is also correct that use of over-the-counter topical solutions containing Benzocaine or Lidocaine can yield false positive results for cocaine on drug test. See e.g., <http://www.keytosaferschools.com/drug-testing/drug-testing-false-positives-for-urine-testing>. Claimant contended that she was not aware before giving the urine samples that ingesting these substances might lead to false positive test results. Audio at ~8:03, ~10:55~14:44, ~15:08, ~15:44, ~20:53, ~25:03. Without additional reliable evidence, of which there is none in this record, it cannot be concluded that, more likely than not, claimant used the illegal substances of cocaine or morphine before taking the drug tests, or that claimant should have known that eating bread containing poppy seeds or using topical solutions containing Benzocaine or Lidocaine before taking the drug tests could give yield false positive results. Moreover, claimant's claim that she had not used any illegal drugs before the failed drug tests is supported by many reputable sources which estimate that between five and thirty percent of positive results on commonly used drug tests are false positives

arising either from the ingestion of substances similar in chemical structure to illegal substances or errors in the testing or analysis procedures. See <http://www.cbsnews.com/news/drug-tests-not-immune-from-false-positives>; <http://www.workrights.us/?products=drug-testing-in-the-workplace>; <http://blogs.scientificamerican.com/molecules-to-medicine/2013/02/19/drug-screens-any-more-than-theater>. Claimant's denial that use of illegal drugs caused the positive test results is therefore not so utterly implausible that it should be rejected out of hand. Viewed as a whole, the record does not show, more likely than not, that claimant's failure on the drug tests and the resulting loss of her RN license was due to her willful or wantonly negligent behavior

Nor was claimant's agreement to surrender her RN license for at least three years to the OSBN a willful or wantonly negligent loss of that license. The OSBN had told claimant it intended to revoke her license permanently if she did not voluntarily agree to surrender it for at least three years. Audio at ~20:01. Under such circumstances, claimant had no realistic choice if she wanted to try to reinstate her RN license after three years because the OSBN would not accept that the drug test results were inaccurate. A voluntary surrender of an RN license after the OSBN has informed an RN that it will otherwise suspend or revoke the license is not, in and of itself, a wantonly negligent loss of that license. See *Anne B. Christofferson* (Employment Appeals Board, 08-AB-1520, August 25, 2008). The issue for purposes of determining whether claimant's loss of her RN license was misconduct is whether the events that initially placed her license in jeopardy, i.e. failing the drug tests, were due to claimant's willful or wantonly negligent behavior. As discussed above, the evidence at hearing does not establish that they were.

The record does not show that claimant's failure to maintain her RN license after February 16, 2014, was caused by claimant's willful or wantonly negligent behavior. The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-13780 is set aside, as outlined above.

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

DATE of Service: April 24, 2014

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks 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 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.