

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0640

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying under the employer's drug and alcohol policy (decision # 154926). Claimant filed a timely request for hearing. On April 14, 2014, ALJ Kirkwood conducted a hearing, and on April 16, 2014 issued Hearing Decision 14-UI-15263, affirming the Department's decision. On April 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

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

Because claimant did not file a written objection to the admission into evidence of Exhibit 1 within time specified in Hearing Decision 14-UI-15263, that exhibit will remain in the record.

FINDINGS OF FACT: (1) Umpqua Homes for the Handicapped employed claimant from August 4, 2009 until February 13, 2014. Claimant was last employed as a program manager

(2) The employer had a written policy prohibiting employees from working when they were under the influence of drugs or alcohol, or possessing illicit drugs or alcohol in the workplace. Exhibit 1 at 4, 5. The policy stated that if an employee was "suspected" of being at work while under the influence of alcohol or drugs, the employer required the employee to take an appropriate test at a local lab to determine the employee's condition. Exhibit 1 at 5. At hire, the employer gave claimant a copy of its alcohol and drug policy and each year thereafter claimant signed an acknowledgement of the policy. On

February 11, 2014, claimant signed her most recent acknowledgement of the employer's drug and alcohol policy.

(3) Before February 11, 2014, the employer had received reports that claimant sometimes spent up to twenty minutes in the restroom of the group home, and then left the restroom after spraying it with deodorizer but not flushing the toilet. The employer also received reports that, after spending a lengthy time in the restroom, claimant sometimes emptied the trash in the restroom even though that trash receptacle had been very recently emptied.

(4) On February 11 or 12, 2014, a staff member at the group home reported to a supervisor that a makeup bag was discovered in the group home bathroom on the upper ledge in the shower the evening before, February 10, 2014, when claimant was on duty. That staff member reported that she and another staff member had looked in the bag and they thought that it contained drug paraphernalia and methamphetamines. The two staff members did not remove the bag because they did not know what actions they should take. Later, after claimant was off and had left work, the staff members went to retrieve the bag and it was gone. The staff members concluded that the bag was claimant's and claimant had taken it with her when she left the workplace.

(5) On February 12, 2014, the supervisor reported what the staff member had told her to the employer's human resources department and the employer's executive director. They concluded that, based on the staff member's report, there was probable cause to require claimant to submit to a drug testing under the employer's alcohol and drug policy. On February 12, 2014, the executive director telephoned claimant to ask her to take a drug test and claimant agreed to do so. Also on February 12, 2014, claimant went to a laboratory accompanied by her supervisor, but she was not able to give a urine specimen of sufficient volume for testing after three attempts. Claimant attributed her inability to produce sufficient urine the first two times she tried to a bladder infection. Claimant attributed her inability to produce an acceptable urine specimen the third time she tried to an inadvertent bowel movement that caused her to spill the urine receptacle after she had voided into it. Claimant refused to stay at the laboratory to try to produce a fourth urine specimen and went home.

(6) On February 13, 2014, the employer discharged claimant for violating its alcohol and drug policy by failing to produce a suitable urine specimen for drug testing on February 12, 2014.

CONCLUSIONS AND REASONS: Claimant did not commit a disqualifying act under the employer's drug and alcohol policy.

ORS 657.176(2)(h) and ORS 657.176(9)(a), read together, state that an individual is disqualified from benefits if the individual, among other things, violates the terms and conditions of a reasonable drug and alcohol policy or if the individual refuses to cooperate with or attempts to subvert a drug test required under an employer's reasonable written drug or alcohol policy. An alcohol or drug policy is considered reasonable if it prohibits the effects of alcohol or drugs in the workplace, the policy was provided to the individual in writing and, when the policy provides for alcohol or drug testing, the employer had probable cause for requiring the individual to submit to testing. OAR 471-030-0125(3)(a) through (d) (March 12, 2006). "Probable cause" for testing means, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee might be impaired or affected by drugs or alcohol in the workplace, including bizarre behavior, a change in productivity,

repeated tardiness or absences or behavior that causes an on-the job injury or damage to property. OAR 471-030-0125(4)(a). "Probable cause" also means circumstances in which the employer has received credible information that the individual uses or may be affected by drugs or alcohol in the workplace. OAR 471-030-0125(4)(b). The employer has the burden to demonstrate that a claimant was discharged for a disqualifying act. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-15263, the ALJ concluded that the employer had probable cause to require claimant to submit to a drug test based on the coworkers' report of observing the makeup bag and its contents in the restroom and past reports that claimant had spent lengthy periods of time in that restroom. Hearing Decision 14-UI-15263 at 6. Based on this conclusion, the ALJ further concluded that claimant's refusal to try a fourth time to produce a urine specimen for testing was a disqualifying act because it constituted refusal to take reasonably required drug test within the meaning of ORS 657.176(9)(a)(B). Hearing Decision 14-UI-15263 at 6. We disagree.

Before ever reaching the issue of whether claimant's behavior during the drug test was a disqualifying act, a threshold issue is whether the employer had probable cause to require claimant to submit to the drug test. The coworkers' reported discovery of the makeup bag was insufficient to show the type of observable, objective evidence that claimant might have been impaired or affected by drugs in the workplace that is needed to establish probable cause for her testing. Claimant denied the makeup bag was hers, and the employer failed to present any evidence directly associating claimant with that makeup bag. Transcript at 18. The employer did not present any evidence ruling out, more likely than not, that other employees had access to the restroom on February 10, 2014 and that they, and not claimant, had left the makeup bag in the shower. The employer also failed to present specific evidence underlying the coworkers' assertions that the makeup bag contained illegal contents, including the basis on which they identified the alleged methamphetamines and a description of the alleged drug "paraphernalia." Transcript at 8. Although the employer had received past reports that, on occasion, claimant spent unusually long period of time in the workplace restroom, the employer did not present any evidence ruling out, more likely than not, innocent explanations for this behavior, including claimant's urinary tract infection and irritable bowel syndrome. Transcript at 18, 21. Finally, the employer presented absolutely no evidence that any other employees or anyone else had ever observed claimant behaving in a way that was consistent with being affected by or under the influence of drugs or that claimant had ever admitted to them that she used illegal drugs. On this record, the employer failed to meet its burden to demonstrate that, under OAR 471-030-0125(4), it had observable, objective evidence or credible information of drug use to support the drug test it required claimant to take. Absent grounds to require the drug test, claimant's refusal to continue with a fourth attempt to produce an acceptable urine sample for testing, was not a disqualifying act.

The employer discharged claimant but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment.

DECISION: Hearing Decision 14-UI-15263 is set aside, as outlined above.

Susan Rossiter and J.S. Cromwell, *pro tempore*;
Tony Corcoran and D.E. Larson, not participating.

DATE of Service: May 23, 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.