

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0647**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 26, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 74203). Claimant filed a timely request for hearing. On January 22, 2014, ALJ Shoemake conducted a hearing at which the employer failed to appear, and on January 24, 2014 issued Hearing Decision 14-UI-09137, reversing the Department's decision. On January 27, 2014, the employer filed a request to reopen the hearing. On March 28, 2014, ALJ Holmes-Swanson conducted a hearing and on March 31, 2014 issued Hearing Decision 14-UI-13842, allowing the employer's request to reopen and concluding that claimant committed a disqualifying act. On April 21, 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) The Salvation Army employed claimant as a closing lead worker in one of its stores from September 7, 2010 until October 30, 2013.

(2) The employer had a written alcohol and drug policy that prohibited employees from, among other things, unlawfully distributing and transferring drugs while on duty or on the employer's premises. Exhibit 2 at 12. The policy also stated that "[e]mployees taking physician-prescribed medications, which impair job performance, should advise their supervisors" and "[e]mployees taking physician-prescribed medications which will not impair their job performance may be required to present a statement [to that effect] from the prescribing physician." Exhibit 2 at 12. Claimant received a copy of the employer's policy when she was hired and was aware of its prohibitions.

(3) On two occasions before October 21, 2013, claimant gave a coworker one pill of a prescription medicine claimant was taking because the coworker needed to obtain a refill of the same prescription. Both times claimant gave the coworker a prescription pill, it was away from the employer's premises.

Claimant and the coworker did not discuss whether the coworker was going to return the two pills to claimant after the coworker obtained a refill of her prescription.

(4) Claimant never reported to the employer that she was taking the pills she gave to her coworker since she had never experienced side effects from them and they did not impair her job performance. Claimant had been taking these pills for eight years, since approximately 2005 and they were prescribed for her by a physician. The warnings on the prescription, as listed on the package insert, included "use caution in operating machinery until you know how this medication affects you" and also that the medication could cause dizziness and sleeplessness. Transcript at 22, 23; *see also* Transcript at 13-14.

(5) On October 21, 2013, claimant was ill and not at work. On that day, one of claimant's coworkers found a small, folded piece of paper containing two pills at a work station used by claimant and other coworkers. On the paper was a note that stated that the pills were intended for claimant and were intended to replace pills that claimant had given to the author of the note. On October 23, 2013, the employer spoke to claimant about the pills. Claimant stated that she had given two pills to a coworker and that coworker must have left the pills for her to replace them. Claimant told the employer that she had given the two pills to the coworker when she was off the employer's premises and when she was not on duty.

(6) On October 30, 2013, the employer discharged claimant under its drug and alcohol policy for allegedly loaning prescription drugs to her coworker and for not reporting to her supervisor that she was taking a prescription drug.

(7) On January 14, 2014, the employer received a notice that a hearing was scheduled on January 22, 2014 at 1:30 p.m. to consider claimant's discharge. It was the employer's practice to have its human resources manager represent it at such hearings and to testify. In advance of the scheduled hearing, the human resources manager investigated the facts surrounding claimant's discharge and conducted various employee interviews to enable her to provide at hearing a complete account of claimant's discharge.

(8) On the morning of January 22, 2014, the employer's human resources manager awakened very ill with a serious inner ear infection. She work up vomiting and had "extreme vertigo." Transcript at 4. She was unable to leave her bed and tried to sleep. She did not think to call the employer to arrange for someone else to appear at the hearing on the employer's behalf because of her illness. She finally went to sleep and slept through the scheduled hearing.

**CONCLUSIONS AND REASONS:** The employer has shown good cause, and its request to reopen is allowed. Claimant did not commit a disqualifying act.

**Request to Reopen.** A hearing maybe reopened at the request of a party who failed to appear if that party files a written request within 20 days of the date of mailing of the hearing decision and shows good cause for failing to appear at the hearing. OAR 471-040-0040(1) (February 10, 2013). "Good cause" to reopen a hearing exists when the party's failure to appear at the hearing arose from the party's excusable mistake or factors beyond the party's reasonable control. OAR 471-040-0040(2). In this case the employer filed its request to reopen on January 27, 2013, which was fewer than 20 days after the January 24, 2014 date that the hearing decision was mailed. From the undisputed testimony of the human resources manager, it appears that she was too ill to participate in the hearing on January 22,

2014, and that the onset of her illness on the day of the hearing was sudden. It also appears that the human resources manager was an essential witness on the employer's behalf at any hearing since she had conducted all of the employer's investigation. The human resources manager's illness was a factor beyond the employer's reasonable control. Although the human resources manager might have sought to have the hearing postponed due to her illness, or might have contacted the employer to report that she was unable to appear at the hearing and someone else needed to do so in her stead, her lapse in doing so was an excusable mistake that was likely attributable to her illness. The employer showed good cause to reopen the hearing, and the ALJ was correct in allowing the employer's request to reopen.

**The Work Separation.** The employer discharged claimant for allegedly violating its written drug and alcohol policy. Cases that involve discharges under an employer's drug and alcohol policy are adjudicated under the specific provisions of ORS 657.176(9)-(13) and OAR 471-030-0125 (March 12, 2006) and not the general discharge provisions of ORS 657.176(2)(a) and OAR 471-030-0038 (August 3, 2011). *See* OAR 471-030-0125(1).

ORS 657.176(2)(h) and ORS 657.176(9)(a)(A), read together provide that an individual is disqualified from benefits if the individual committed a disqualifying act by violating the terms and condition of an employer's reasonable drug and alcohol policy. Under OAR 471-030-0125(3), and employer's drug and alcohol policy is reasonable if it prohibits the effects of drugs or alcohol in the workplace, it was provided in writing to the individual and the employer followed its own policy.

In Hearing Decision 14-UI-13842, the ALJ concluded, and we agree for the reasons stated, that the employer's drug and alcohol policy was reasonable and its terms were enforceable against claimant. Hearing Decision 14-UI-13842 at 5-6. The ALJ further concluded claimant violated that policy, and committed a disqualifying act, when she failed to report to the employer that she was taking a prescription drug. The ALJ reasoned that, "[a]lthough the claimant has never experienced any side-effects while taking this medication, the mere possibility that she could be impaired by the prescription obligated her to provide the information about that prescription under its [the employer's] policy." Hearing Decision 14-UI-13482 at 6. We disagree.

The ALJ's interpretation of the employer's drug and alcohol policy places an overlay on it that goes well beyond the plain meaning of the language in the policy. The actual language of the policy requires an employee to report the use of any prescription medications only if they actually "impair job performance." Exhibit 2 at 12. Claimant began taking the prescription medication several years before the employer ever hired her. Based on claimant's undisputed testimony, the prescription medication that she took neither affected nor impaired her behavior at any time during the eight years she had taken it and never affected or impaired her job performance for the employer. Transcript at 22, 23. Although claimant testified to warnings that she received with the prescription that she should use caution when operating machinery, the employer presented no evidence that claimant ever manifested impaired behavior in the workplace. There also was no evidence in the record that claimant operated machinery when she was working and, therefore, there was no evidence that the prescription might even theoretically impair claimant in performing her actual job functions. Based on a reasonable construction of the employer's drug and alcohol policy as it was actually written, and on the undisputed facts in this record, claimant did not violate the terms and conditions of the employer's drug and alcohol policy, and did not commit a disqualifying act, by failing to report to the employer that she was taking a prescription

drug that, in her experience, did not impair her job performance. We might not reach this result if the language used in the employer's policy were different and broader in scope.

The employer also contended at hearing that claimant violated its drug and alcohol policy on October 21, 2013 when her coworker left the two prescription pills for her in the workplace. Transcript at 14. However, the scope of the employer's drug and alcohol policy was limited to an employee's own behavior in the workplace or when driving vehicles owned or leased by the employer. Exhibit 2 at 10, 12-14. To the extent claimant was not lawfully permitted to transfer some of her prescription to the coworker, it is undisputed that claimant's behavior did not take place in the workplace. Claimant's behavior in giving these pills to her coworker was therefore beyond the ambit of the employer's policy as written. Transcript at 14, 19. Because it is undisputed that claimant did not arrange for her coworker to return any prescription pills to her in the workplace, and she was unaware the coworker was going to do so, claimant cannot be held responsible for that coworker's violation of the employer's alcohol and drug policy. Transcript at 14, 19, 21. Claimant did not commit a disqualifying act when the coworker tried to return the pills to claimant in the workplace.

Claimant did not commit a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-13842 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;  
D. E. Larson and J. S. Cromwell, *pro tempore*, 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>.

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