

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0660

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 26, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision #154140). Claimant filed a timely request for hearing. On March 20, 2014, ALJ Monroe conducted a hearing, and on April 2, 2014 issued Hearing Decision 14-UI-14052, reversing the Department's decision. On April 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer failed to certify that it provided a copy of its 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) Interstate Group, LLC employed claimant from December 15, 2011 to December 3, 2013 as a sales consultant.

(2) The employer had a written drug and alcohol policy that prohibited employees from possessing illegal or un-prescribed drugs on company premises. Exhibit 1. The employer provided claimant the policy in writing on January 17, 2012.

(3) On November 26, 2013, claimant engaged in a telephone conversation with a customer, during which she agreed that a customer could leave pills that he had prepared for her at her workplace. The customer did not identify the content of the pills during the conversation.

(4) The employer recorded its telephone calls. The regional operations manager listened to the recorded conversation claimant had with the customer about the pills. The manager telephoned the customer and told him he could not bring the pills onto the employer's premises. The customer did not bring the pills to claimant at work.

(5) Claimant was absent from work due to illness until December 3, 2013, when the employer discharged claimant for allegedly violating its drug policy by possessing an illegal drug on company premises.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant is not disqualified from receiving benefits based on her 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)(E) provides that an individual commits a disqualifying act when the individual possesses a drug unlawfully or in violation of the employer's reasonable written policy during work. A "reasonable" written policy is defined, in relevant part, as a policy that prohibits the effects of drugs in the workplace, is followed by the employer, and has been provided to the individual in writing. OAR 471-030-0125(3).

The employer discharged claimant because she allegedly possessed an illegal drug in the workplace. 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 and there is no evidence in the record that the employer did not follow its policy. However, the record does not establish that claimant violated the employer's drug policy by possessing an illegal drug on the employer's premises. The employer provided hearsay evidence that the customer said the "pills" contained marijuana, but claimant testified she believed the pills contained herbs. Transcript at 15, 26. Thus, the preponderance of the evidence does not establish that the pills contained marijuana. Moreover, even if we assume the pills contained marijuana, claimant testified at hearing that she never received the pills or any illegal drugs from the customer, or possessed an illegal drug in the workplace. Transcript at 24 to 25, 30. The recorded telephone conversation shows claimant intended to receive the pills from the customer at work, but does not show claimant possessed them while at work. *See* Transcript at 9 to 15. The employer intervened before the customer left the pills at the workplace. Thus, the employer did not show, by a preponderance of the evidence, that claimant possessed illegal drugs in the workplace.

We conclude claimant did not commit a disqualifying act as described in ORS 657.176(9), and is not disqualified from the receipt of unemployment insurance benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 14-UI-14052 is affirmed.

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

DATE of Service: May 22, 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.