

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0695

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 123958). Claimant filed a timely request for hearing. On April 16, 2014, ALJ Vincent conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-16011, affirming the Department's decision. On April 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Southwest Airlines Company employed claimant, last as an operations agent, from July 2, 2001 to February 20, 2014.

(2) The employer had a written policy that prohibited employees from the use, sale, possession or effects of drugs at work. The employer published its policy and provided it to claimant.

(3) The employer's policy provided that ground security employees, which included operations agents, were subject to random drug testing. The policy provided, in pertinent part, "Employees **MUST** submit to the test if requested to do so. Failure to submit to the test or comply with all testing procedures and instructions will be deemed a refusal to submit to testing and will result in **termination.**" Exhibit 1 at 28 (emphasis in original). The employer used a third party administrator to randomly select employees for testing and to collect the testing samples.

(4) On January 10, 2014, the third party administrator notified claimant's supervisor that claimant had been selected for random testing. The supervisor notified claimant that his "number came up." Exhibit 1 at 12. Claimant replied, "drug test?" *Id.* The supervisor stated, "yes." *Id.* Claimant then told the supervisor that he was ill and needed to go home, and repeated that several times. The supervisor said, "you can't do this." *Id.* Claimant then clocked out and left work.

(5) Within 40 minutes of notifying claimant that he was required to submit to the drug test, and after claimant left the workplace, his supervisor called claimant and left a message asking him to call. Approximately 20 minutes later, another manager called claimant and told him to call and return to work immediately, and "if he didn't, he would be considered a refusal to test, and he'd be subject to termination." Transcript at 9. Claimant did not reply to either call.

(6) On February 20, 2014, the employer discharged claimant for refusing to submit to a random drug test.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if an individual committed a disqualifying act. A "disqualifying act" is defined to include failing or refusing to take a drug test as required by the employer's reasonable written policy. *See* ORS 657.176(9)(a)(B); OAR 471-030-0125(2)(b). A policy is "reasonable" if, in pertinent part, it is written, prohibits the use, sale possession or effects of drugs or alcohol in the workplace, the employer follows its policy, the policy is published and communicated to the individual or provided to the individual in writing, and, in this instance, the policy provides for random testing. OAR 471-030-0125(3).

The employer's policy was written, prohibited drug use and the effects of drugs in the workplace, was published and communicated to claimant, and provided for random testing. Claimant argued at the hearing that the employer's policy was not reasonable because the employer did not follow it. Specifically, claimant argued that the employer's policy provided that employees selected for random testing would be provided a written notice, and the employer failed to do so. *See* Transcript at 25; Exhibit 1 at 28. However, the employer's procedures setting forth the written notice requirement were not numbered, meaning there is no set time or order of events in which the policy designated the written notice had to have been given. Moreover, claimant left work almost immediately upon being told he was to submit to a drug test. Under the circumstances, the employer's failure to provide him with a written notice during the moments between when he was told of the drug test and when he left work does not mean the employer did not follow its own policy. The preponderance of the evidence shows that the employer followed its own policy with respect to selecting claimant for random drug testing, and, therefore, that the employer's policy was reasonable.

Claimant next argued that he did not refuse a random drug test, because he was unaware that he had been selected for drug testing on January 10th. *See* Transcript at 21. However, claimant's testimony on that point is not reliable. Claimant admitted that the supervisor's statement was accurate, except the part that was against claimant's self-interest. Transcript at 22. Claimant testified, contrarily, that he both did not understand that he was supposed to submit to a drug test, and that he did not think that leaving work due to illness would be considered a refusal to submit to a drug test. Transcript at 21. Claimant testified that his supervisor did not use clear and concise language to inform him that he was required to take a drug test on January 10th, alleging that he did not know what the supervisor meant when he said there would be consequences, because "I could have assumed, and did assume" that statement was in reference to the attendance policy. Transcript at 24. However, claimant did not explain any plausible reason why he might be subject to consequences for leaving work sick, nor did claimant ask the supervisor why he would be subject to consequences for leaving work due to illness, as one might

expect of an individual if the circumstances existed as claimant alleged. Nor did claimant's testimony address how his alleged ignorance that he was expected to take a drug test on January 10th lasted past the two phone messages left for him within an hour of leaving work, the second of which specifically instructed him to return to work immediately because his absence was being construed as a refusal to test. Finally, claimant had worked for the employer for almost 13 years at the time of the events in question. It is implausible given the length of his employment, and the statements the supervisor made to claimant on January 10th that his "number was up," and he was to be drug tested, that claimant could have left work on January 10th without understanding that he was supposed to submit to a test that day, or that he could receive the phone messages he received that afternoon without understanding that he had to return to take the drug test or be subject to termination for refusing to take a drug test. The preponderance of the evidence shows that claimant was told he was to take a drug test, and either failed or refused to do so.

Finally, to any extent claimant alleged his illness should excuse him from having to submit to drug testing on the day in question, the record fails to support that claim. While claimant testified that he was ill, and the record supports that assertion insofar as claimant was subsequently on medical leave for approximately a month due to his own serious medical condition, claimant did not identify his medical condition, or, in the alternative, since he did not want to disclose that information, describe which symptom(s), if any, that were such that he had to leave work when he did rather than take a drug test, or prevented him from returning to submit to testing when instructed to do so. Moreover, even if he had provided such details, neither the employer's drug testing policy nor the applicable administrative rules excuse an individual from submitting to drug testing due to illness.

In sum, the employer instructed claimant to submit to drug testing pursuant to its reasonable written policy. Claimant's failure or refusal to submit to the drug test was, therefore, a disqualifying act. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 14-UI-16011 is affirmed.

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

**DATE of Service:** May 29, 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.