

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0865

*Reversed
Disqualification*

PROCEDURAL HISTORY: On March 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 144924). Claimant filed a timely request for hearing. On May 5, 2014, ALJ Vincent conducted a hearing, and on May 13, 2014 issued Hearing Decision 14-UI-17486, concluding claimant's discharge was not for a disqualifying act. On May 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Roth's IGA Foodliner employed claimant as a deli worker from May 11, 2013 to January 29, 2014.

(2) The employer has a policy that prohibits the use or being under the influence of drugs on the premises. The policy provided for random drug testing. The employer provided its policy to claimant in writing.

(3) On January 12, 2014, claimant and a friend traveled to Washington to purchase and consume marijuana.

(4) On January 13, 2014, claimant was randomly selected to undergo drug testing. Claimant knew the employer performed random drug testing of its employees. He also knew the employer prohibited marijuana use, and would not have used marijuana when he did had he realized he would be randomly tested the next day because he knew that he could be discharged if the results of the test were positive for marijuana.

(5) Claimant's drug test results were positive. On January 29, 2014, the employer discharged claimant for testing positive for marijuana.

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

ORS 657.176(2)(h) provides that an individual discharged for committing a disqualifying act is disqualified from receiving unemployment insurance benefits. ORS 657.176(9)(a)(F) defines a “disqualifying act” to include testing positive for an unlawful drug in connection with employment.

In Hearing Decision 14-UI-17486, the ALJ concluded that claimant’s discharge was not for a disqualifying act because the employer failed to show, as required under OAR 471-030-0125(10)(a), that claimant’s positive test for marijuana had been subject to confirmatory testing in a federal or state licensed laboratory. We agree with the ALJ that the employer failed to prove that the confirmatory testing occurred as required.

However, the ALJ’s decision failed to consider the applicability of OAR 471-030-0125(9)(a), which provides:

- (9) The employee is discharged or suspended for committing a disqualifying act if:
 - (a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, marijuana, or alcohol in the workplace, unless in the case of drugs, other than marijuana, the employee can show that the violation did not result from unlawful drug use.

Claimant testified that he knew the employer’s policy prohibited him from working having used marijuana. Audio recording at ~27:49. He testified that he nevertheless intentionally used marijuana on January 12, 2014. Audio recording at ~27:10. Claimant further testified that, had he known he would be subject to drug testing on January 13, 2014, he would not have used marijuana the day before, thereby admitting that he knew using marijuana the day before reporting to work would violate the employer’s policy. *Id.* In this case, the employer’s policy prohibited employees from being under the influence of unlawful drugs, and there is no dispute that the policy was reasonable under OAR 471-030-0125(3). In Oregon, marijuana is considered an unlawful drug. As such, claimant’s admission that he violated the employer’s reasonable written policy prohibiting unlawful drug use is considered a disqualifying act, and he must be disqualified from receiving unemployment insurance benefits because of his discharge.

DECISION: Hearing Decision 14-UI-17486 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 27, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On

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