

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1686

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for committing a disqualifying act (decision # 112349). Claimant filed a timely request for hearing. On October 13, 2014, ALJ Shoemake conducted a hearing, and on October 14, 2014, issued Hearing Decision 14-UI-26845, concluding claimant's discharge was not for a disqualifying act. On October 18, 2014, the employer filed an application for review with the Employment Appeals Board (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). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing, as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Denali Logging Company, LLC employed claimant as a chaser from May 6, 2013 to August 19, 2014.

(2) The employer had a written drug and alcohol policy that required employees to report for work in a physical condition that permitted them to perform their work duties safely and efficiently. Specifically, it prohibited them from reporting for work or being on company premises or on company time "with any detectable level of alcohol...in their system." Exhibit 1. The employer's policy was contained in its handbook, a copy of which was provided to claimant at hire.

(3) In August 2013, claimant reported for work under the influence of alcohol and the employer did not allow him to work.

(4) On August 19, 2014, when claimant reported for work, his immediate supervisor “felt [claimant] was acting in a manner that was unsafe” and also “felt he could smell alcohol on [claimant’s] breath.” Audio Record ~ 11:15 to 11:45; 18:10 to 18:30. The employer did not test claimant for alcohol because claimant was out in the field and the employer did not want to use company personnel to transport claimant to be tested. Based on the supervisor’s report, the employer discharged claimant for violating its drug and alcohol policy.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for committing a disqualifying act.

The employer alleged that it discharged claimant for violating its drug and alcohol policy, which, in relevant part, prohibited employees from “report[ing] for work...or be[ing] on company premises or on company time with any *detectable level* of alcohol...in their system. Exhibit 1. Under ORS 657.176(2)(h) and (9)(a), an individual who is discharged for violating an employer’s reasonable written drug and alcohol policy has committed a disqualifying act. OAR 471-030-0125(9)(b) defines “disqualifying act” to include, in the absence of a test for alcohol, “clear observable evidence that the employee is under the influence of alcohol in the workplace.” In a discharge case under the Department’s drug and alcohol adjudication policy, the employer bears the burden to establish a disqualifying act by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Here, the employer’s witness presented hearsay evidence that on August 19, 2014 claimant’s acting supervisor “felt he could smell alcohol on [claimant’s] breath.” Audio Record ~ 18:10 to 18:30. However, there is no evidence that anyone witnessed claimant use alcohol before or during claimant’s work shift, claimant did not admit alcohol use on August 19, and the employer did not test claimant for alcohol to prove he was under the influence while at work on August 19. Weighing the evidence as a whole, there seems to be no reason to accept the employer’s hearsay evidence over claimant’s first hand testimony under oath, leaving the evidence, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of production, here the employer, has failed to meet its burden of presenting “clear observable evidence” that claimant was under the influence of alcohol in the workplace.¹ Therefore, although the employer discharged for violating its drug and alcohol policy, it failed to establish that it discharged claimant for committing a disqualifying act under the above-cited rules.

Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

¹ Even if we had considered the new evidence the employer submitted with its written argument in an attempt to prove claimant had been warned about alcohol use prior to the date of his discharge, our decision would remain the same. The employer’s new witnesses said, in essence, claimant had been warned in the past about exhibiting the effects of alcohol while at work, which claimant admitted. Audio Record ~ 25:00 to 26:30. The critical issue was whether there was “clear observable evidence” that claimant was under the influence of alcohol in the workplace on August 19, 2014. The statements in question did not address that issue and would not have dissuaded us from concluding the employer failed to satisfy that evidentiary burden.

DECISION: Hearing Decision 14-UI-26845 is affirmed.

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

DATE of Service: **December 3, 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 the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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