

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0217

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant is disqualified from the receipt of benefits (decision # 143145). Claimant filed a timely request for hearing. On November 12, 2014, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for November 26, 2014. On November 26, 2014, ALJ M. Davis issued Hearing Decision 14-UI-29442, dismissing claimant's request for hearing for failure to appear. On December 10, 2014, claimant filed a request to reopen the hearing. On January 7 and February 2, 2015, ALJ Clink conducted a hearing, and on February 11, 2015 issued Hearing Decision 15-UI-33388, allowing claimant's request to reopen, and affirming the Department's decision that claimant is disqualified from the receipt of benefits. On February 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

No party applied for review of that portion of Hearing Decision 15-UI-33388 allowing claimant's request to reopen the hearing. EAB therefore limited its review to whether claimant is disqualified from the receipt of benefits.

EAB considered the entire hearing record. With his application for review, claimant submitted written argument, in which he asked to reopen the hearing again for consideration of documents not offered into evidence at the hearing. Claimant's request is construed as a request for consideration of new information under OAR 471-041-0090(2) (October 29, 2006). OAR 471-041-0090(2) states that new information may be considered when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing.

Claimant's documents contain information that claimant tested negative for alcohol several hours after he allegedly was under the influence of alcohol while performing services for the employer, and that a doctor believed claimant's use of an alcohol-based mouthwash likely caused his positive test for alcohol at work. However, the fact that claimant tested negative for alcohol several hours after he allegedly was

under the influence of alcohol at work is not new information. *See* Transcript (February 7, 2015) at 9-12, 14-15. Nor is the information that a doctor believed claimant's use of an alcohol-based mouthwash likely caused his positive test for alcohol at work material to whether claimant was "under the influence" of alcohol while performing services for the employer, as defined under ORS 657.176(13)(d), and OAR 471-030-0125(2)(c), (3) and (6) and (10) (March 12, 2006). Claimant's request for consideration of new information under OAR 471-041-0090(2) therefore is denied.

EAB did not consider the substantive portion of claimant's written argument because claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006).

FINDINGS OF FACT: (1) Esco Corporation employed claimant from June 7, 2004 to August 20, 2014.

(2) The employer had a written policy that prohibited employees from being under the influence of alcohol in the workplace, and provided for random alcohol testing. The policy did not specify a particular level of alcohol in an employee's body necessary for the employee to be considered under the influence of alcohol. The employer published its policy, communicated the policy to claimant, and provided it to him in writing.

(3) While performing services for the employer on August 20, 2014, claimant was required to submit a saliva sample for a random test for alcohol. The employer conducted the test at its on-site, state licensed, clinical laboratory. Claimant was not required to pay for the cost of the test.

(4) Claimant's saliva tested positive for alcohol. The initial test was confirmed by a second test of claimant's saliva. The employer discharged claimant for being under the influence of alcohol while performing services for the employer.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant is disqualified from the receipt of benefits.

ORS 657.176(2)(h) provides that an individual shall be disqualified from the receipt of unemployment insurance benefits if the individual has committed a disqualifying act described in ORS 657.176(9)(a). ORS 657.176(9)(a)(D) provides that an individual has committed a disqualifying act when the individual is under the influence of intoxicants while performing services for the employer. ORS 657.176(13)(d) provides, in relevant part, that an individual is "under the influence of intoxicants" when the level of alcohol present in the individual's body exceeds the amount prescribed in the employer's reasonable written policy.

For purposes of ORS 657.176(9)(a) and 657.176(13)(d), an individual is "under the influence" of alcohol if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy, the individual has any detectable level of alcohol present in the individual's system, unless the employer otherwise specifies a particular level of alcohol in its policy. OAR 471-030-0125(2)(c). A written employer policy is "reasonable" if it prohibits the effects of alcohol in the workplace, is followed by the employer, has been published and communicated to the individual or provided to the individual in writing, provides for random testing, and the employee is not required to

pay for the cost of the test. OAR 471-030-0125(3) and (6). In the case of a positive blood urine test for alcohol, in order to determine whether an individual is under the influence, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a). In the case of a positive breathalyzer test for alcohol, a confirming test is not required. OAR 471-030-0125(10)(b).

In the present case, the employer required claimant to submit a saliva sample for a random test for alcohol in accordance with the employer's written policy. Claimant was "under the influence" of alcohol because he had a detectable level of alcohol in his system, and the employer did not otherwise specify a particular level of alcohol in its policy. The employer's policy was reasonable because it prohibited the effects of alcohol in the workplace, was followed by the employer, had been published and communicated to claimant and provided to him in writing, provided for random testing, and claimant was not required to pay for the cost of the test. Finally, the initial test was confirmed by test conducted in a state licensed clinical laboratory.

Claimant therefore was "under the influence" of alcohol as defined under ORS 657.176(13)(d), and OAR 471-030-0125(2)(c), (3) and (6) and (10). He therefore committed a disqualifying act under ORS 657.176(9)(a)(D), and is disqualified from the receipt of benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 15-UI-33388 is affirmed.

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

DATE of Service: April 10, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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