

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0360

Reversed
Disqualification

PROCEDURAL HISTORY: On December 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for committing a disqualifying act (decision # 80941). Claimant filed a timely request for hearing. On March 4, 2015, ALJ Vincent conducted a hearing, and on March 12, 2015 issued Hearing Decision 15-UI-35033, reversing the Department's decision. On April 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Sears Roebuck Company employed claimant from at least April 3, 2013 until October 8, 2014, last as an assistant store manager.

(2) The employer had a written drug and alcohol policy, titled Drug-Free Workplace Program, to address the effects of drugs and alcohol in the workplace. Exhibit 1 at 4. The policy stated that if an employee self-reported a drug or alcohol problem to the employer he or she was required to contact the employer's employee assistance program (EAP), participate in an approved treatment or rehabilitation program as recommended by the EAP and to enter into a last chance agreement. Exhibit 1 at 20. The policy also stated that an employee was required to comply with all EAP directives about his or her drug or alcohol rehabilitation and to complete the recommended treatment program. Claimant was given a copy of the Drug-Free Workplace Program document or saw it after he was hired, was aware of online training about it and signed an employee acknowledgment about the policy in April 2013. Transcript at 17.

(3) When the employer hired claimant in April 2013, claimant was sober. On approximately July 11, 2014, claimant reported to the employer that he "fell off the wagon" and was having problems with

alcohol abuse. Transcript at 18. The employer referred claimant to its EAP program and the EAP counselor referred claimant to an independent alcohol dependency counselor for an assessment. On July 30, 2014, claimant signed a last chance agreement with the employer in lieu of termination. The last chance agreement stated that claimant was required to participate "fully and completely" in the alcohol abuse treatment recommended by the EAP program and to follow all recommendations of the EAP counselor or the alcohol treatment provider for a period of up to one year. Exhibit 1 at 2.

(4) Sometime after approximately July 30, 2014, claimant was evaluated by the independent alcohol dependency counselor. The counselor assessed claimant as not requiring alcohol dependency treatment at that time.

(5) On September 28, 2014, claimant reported to the employer that he had "fallen off the wagon again" and had resumed abusing alcohol. Transcript at 21. Sometime later, the employer's EAP counselor contacted claimant and told him to make another appointment with the independent alcohol dependency counselor for an evaluation to determine her treatment recommendations after his relapse. Claimant did so, and on October 6, 2014 sent the EAP counselor a message stating that he had an appointment with the alcohol dependency counselor scheduled for October 7, 2014. Claimant did not keep his appointment with the dependency counselor because he was "intoxicated" at the time scheduled for the appointment. Transcript at 23. Sometime later, the independent alcohol dependency counselor informed the employer's EAP counselor that claimant had failed to keep the scheduled appointment with her.

(6) On October 8, 2014, the employer discharged claimant for violating the terms of his last chance agreement with the employer by not keeping his appointment with the alcohol dependency counselor and not following the directives of the EAP program about his alcohol rehabilitation and treatment.

CONCLUSIONS AND REASONS: Claimant was discharged for committing a disqualifying act.

ORS 657.176(2)(h) states that an individual is disqualified from benefits if the individual has committed a disqualifying act as described in the statutory sections that follow. ORS 657.176(9)(a)(G) states that violating the terms of a last chance agreement with the employer is a disqualifying act. A "last chance agreement" is a reasonable agreement that is entered into after, among other things, an individual has admitted to alcohol abuse to the employer and may include provisions that require an individual to attend and comply with the requirements of a rehabilitation or alcohol dependency education program acceptable to the employer. ORS 657.176(13)(c)(B)(ii); OAR 471-030-0125(7) (March 12, 2006).

In Hearing Decision 15-UI-35033, the ALJ concluded that claimant did not commit a disqualifying act by failing to attend his appointment with the alcohol dependency counselor on October 7, 2014 because the employer did not demonstrate that the last chance agreement, which required claimant to do so, was entered into pursuant to a reasonable drug and alcohol policy. Hearing Decision 15-UI-35033 at 2. The ALJ reasoned that the employer did not show that its drug and alcohol policy was reasonable because it did not show that its policy was ever communicated to claimant. *Id.* We disagree.

At the outset, an employer may require, as a condition of further employment, that an employee agree to a last chance agreement not only if the employee has violated the employer's reasonable drug and alcohol policy, but also if an employee has admitted to "alcohol abuse" or the use of unlawful substances

regardless of the enforceability of the employer's underlying drug and alcohol policy. ORS 657.176(13)(c)(A). Because the event that set into motion the last chance agreement was claimant's admission on July 11, 2014 that he was abusing alcohol, there was no requirement that, to be valid, the last chance agreement at issue in this case must have been promulgated pursuant to a reasonable drug and alcohol policy. However, although the employer's witness was not certain if the employer gave claimant a copy of its complete 25 page written drug and alcohol policy, claimant testified that in fact he saw it and signed an acknowledgment that he had received a copy of it. Transcript at 6-8, 17. For both of these reasons, the ALJ was incorrect when he concluded that the last chance agreement entered into between claimant and the employer was presumptively invalid. OAR 471-020-0125(3).

The last chance agreement between claimant and the employer was written, signed by claimant, and contained only reasonable conditions, including that he participate in a rehabilitation program, abide by the instructions of the employer's EAP program in obtaining treatment services and submit to random, blanket, periodic testing to demonstrate that he remained drug free. OAR 471-030-0125(7); Exhibit 1 at 2. It was not an unreasonable application of the last chance agreement for the employer to conclude that claimant had violated the terms of that agreement when he failed to attend the alcohol and dependency assessment on October 7, 2014 as the EAP counselor instructed him to do to determine the appropriate treatment approach in light of his September 28, 2014 relapse. Notably, claimant raised no exigent circumstances that might have interfered with his reasonable ability to keep that appointment.

Claimant's principal contention at hearing was that the last chance agreement applied only to compliance with the alcohol treatment recommendations arising from his admission of alcohol abuse on July 11, 2014, and was not properly applicable to recommendations arising from his relapse on September 28, 2014. While claimant's initial admission directly led to the promulgation of the last chance agreement, nothing in that agreement limited its scope to that admission only, and the language of the agreement required claimant to follow the treatment recommendations of the EAP program and the substance program to which he was referred for a period of one year after the agreement was entered into. Exhibit 1 at 2. Based on the language of the last chance agreement, it is not reasonable to construe it not to cover claimant's relapse on September 28, 2014, or only to cover admitted alcohol abuse up to July 11, 2014 and not thereafter.

Claimant violated the terms of the last chance agreement when he did not keep his appointment with the independent alcohol dependency counselor on October 7, 2014. Claimant was discharged for committing a disqualifying act and is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-35033 is set aside, as outlined above.

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

DATE of Service: May 21, 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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