

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0451

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act by refusing to submit to a second drug test (decision # 80520). Claimant filed a timely request for hearing. On April 1, 2015, ALJ Triana conducted a hearing, and on April 3, 2015 issued Hearing Decision 15-UI-36322, concluding the employer discharged claimant for misconduct. On April 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB received claimant's argument, which consisted entirely of new information, but did not consider it because it was immaterial and irrelevant to the case.

FINDINGS OF FACT: (1) Forrest Paint Co. employed claimant as a tank cleaner from December 1, 2006 to January 9, 2015.

(2) The employer had a written drug and alcohol policy. The employer provided claimant with a copy of it when he was hired. The drug and alcohol policy prohibited the use or effects of drugs in the workplace. The employer did not require claimant to pay the cost of his own drug tests.

(3) On or before January 9, 2015, someone told the employer that claimant was on drugs. On January 9, 2015, the employer had claimant submit to a drug test. Claimant complied, but his initial sample was below temperature so the employer sent claimant to a drug testing facility for a second test. Claimant went to the testing facility for testing as instructed. At the time of testing, the facility employee instructed claimant to drop his pants and underpants to the floor while providing a urine sample, which would expose claimant's genitals to the employee. Claimant was uncomfortable at being told to "strip down" and expose himself to "some kid." See Audio recording at ~12:40, ~16:00. He had been subjected to ongoing teasing and harassment at work that involved drawings of and references to his genitalia, which made him averse to exposing himself, particularly in an environment related to his work. Claimant told the facility employee that he would provide a sample, but he refused to disrobe to the extent the employee had instructed. After approximately five minutes, during which claimant

continued to refuse to disrobe, the testing facility employee ended the test and claimant returned to the employer's business.

(4) After returning to the employer's facility, claimant explained what had happened to several supervisors and managers. They told him he could not return to work if he did not complete the second test, and claimant refused to complete a second test if he was going to have to disrobe for it. After a lengthy period of time, claimant and the others reached an impasse and stopped talking. Shortly thereafter, claimant stood up, left the office, and walked to his car. The employer never told claimant to leave or that he was fired.

(5) Claimant was next scheduled to work on January 12, 2015. He did not report to work that day, and was not told by the employer not to return to work for that shift. After a couple of weeks, claimant called the employer to see if he could return to work or how long he was to stay away from the workplace. He was not invited to return to work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant left work, but not due to the commission of a disqualifying act, and he should not be disqualified from receiving unemployment insurance benefits because of his work separation.

Claimant did not admit during the hearing that he quit work, or allege in the hearing that the employer discharged him from work. However, OAR 471-030-0038(2)(a) (August 3, 2011) provides that, if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. In this case, continuing work was available to claimant, contingent on his submission to a second drug test. Claimant's unwillingness to meet that condition of ongoing employment, at a time when the ongoing employment was available to him, constituted a voluntary leaving.

In Hearing Decision 15-UI-36322, the ALJ determined that law applicable to claimant's voluntary leaving was ORS 657.176(2) and OAR 471-030-0038. We disagree. The Department's drug and alcohol adjudication policy, as set forth in ORS 657.176(2)(h) and (10) and OAR 471-030-0125 applies where, as here, an individual voluntarily leaves work due to a potentially disqualifying act as defined therein.

ORS 657.176(2)(h) requires a disqualification from benefits if an individual has committed a disqualifying act. ORS 657.176(10)(c) provides that, for purposes of ORS 657.176(2), an individual is considered to have committed a disqualifying act when the individual voluntarily leaves work to avoid taking a drug test under a reasonable written policy.

There is no dispute in this case that the employer required claimant to submit to drug testing based upon a report that someone suspected him of drug use, nor is there any dispute that claimant refused to submit to a second test after the initial urine sample he provided for testing proved untestable. The only question remaining, then, is whether the employer required claimant to submit to drug testing on the day in question pursuant to its "reasonable" written policy.

OAR 471-030-0125(3) and (6) (March 12, 2006) provide, in pertinent part, that a written employer policy is "reasonable" if the policy prohibits the use, sale, possession or effects of drugs in the

workplace, the employer follows its policy, the policy has been published and communicated to the claimant or provided to him in writing, the employer does not require the employee to pay for testing, and, when the policy provides for testing, the employer either has probable cause or its policy provides for random, blanket or periodic testing. An employer has probable cause to test if the employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect the employee may be impaired or affected by drugs in the workplace, the employer has received credible information that the worker uses or may be affected by drugs in the workplace, the test is required by state or federal law or a collective bargaining agreement, or the test is required or allowed under a reasonable last chance agreement. OAR 471-030-0125(4).

Claimant admitted that the employer's policy prohibited the use and effects of drugs in the workplace, the employer published and distributed the policy to claimant, and it did not require him to pay for testing. However, the record lacks any evidence about whether the other requirements were met, including whether the employer's policy permitted probable cause drug testing, whether probable cause testing under that policy was based upon possession of observable, objective evidence of claimant's impairment, or whether the employer in fact followed its own policy with respect to subjecting claimant to drug testing. In the absence of evidence about the content of the employer's policy, we cannot conclude that the employer's policy was reasonable. In the absence of evidence that the employer's policy was reasonable, we must conclude that claimant's decision to leave work to avoid the second drug test was not a disqualifying act. Therefore, claimant may not be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-36322 is set aside, as outlined above.

J. S. Cromwell and D. H. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: June 12, 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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