

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0613

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer did not discharge claimant for committing a disqualifying act (decision # 143018). The employer filed a timely request for hearing. On May 4, 2015, ALJ Frank conducted a hearing, and on May 12, 2015 issued Hearing Decision 15-UI-38363, concluding the employer discharged claimant for committing a disqualifying act. On May 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Esco Corporation employed claimant from June 8, 2011 to February 3, 2015 as a core maker.

(2) The employer had a written policy that prohibited the use, sale, possession or effects of drugs or alcohol in the workplace, on company property, during work hours, or so as to affect work performance. Exhibit 2. The employer published its policy in its employee handbook, and provided it to claimant at hire.

(3) The employer's drug and alcohol policy provided that all employees were subject to random drug testing. Refusal to submit to a drug test was grounds for termination. The employer's drug test policy defined "refusal to test" as providing an adulterated or substituted sample, or the failure to do the following: appear for a test on time, remain at the testing site until the process is completed, provide a urine specimen or sufficient volume of urine, undergo a medical examination to verify insufficient volume, cooperate with any part of the testing process, permit observation of the specimen donation, or to take a second test requested by the employer. Exhibit 2. The drug policy did not contain a time limit to provide a sample.

(4) On February 3, 2015, the employer randomly selected claimant to submit to a drug test. Claimant was taken to the testing facility and, at 6:57 a.m., was instructed to submit a urine sample for drug testing. During the test, the collector gave claimant the employer's Consent and Release Form, which

stated, “Failure to provide a sample within 3-hours will be considered a refusal to test.” Exhibit 2. Claimant provided a urine sample at 9:13 a.m. Exhibit 2. The testing facility determined the sample was invalid, and asked claimant to take a second test. Claimant was unable to provide a second urine sample by 10:58 a.m.

(5) On February 3, 2015, the employer discharged claimant for allegedly refusing to take a drug test due to his failure to provide a valid urine sample within three hours of when the testing period began at 6:57 a.m.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer did not discharge claimant for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if an individual committed a disqualifying act. A “disqualifying act” is defined to include refusing to take a drug test “as directed by the employer in accordance with the provisions of an employer’s reasonable written policy.” See ORS 657.176(9)(a)(B); OAR 471-030 0125(2)(b). A policy is “reasonable” if, in pertinent part, it is written, prohibits the use, sale, possession or effects of drugs or alcohol in the workplace, the employer follows its policy, the policy has been published and communicated to the individual or provided to the individual in writing, and, in this case, if the policy provides for random testing. OAR 471-030-0125(3).

In Hearing Decision 15-UI-38363, the ALJ correctly noted that the employer’s written policy prohibited the use and effects of drugs in the workplace, was published and communicated to claimant, and provided for random testing.¹ The ALJ also reasoned that “there is no evidence to suggest that the employer failed to follow the provisions of its own policy – another element of reasonableness under [OAR 471-030-0125(3)],” and found the employer discharged claimant for a disqualifying act because claimant refused to submit to a drug test by failing to provide a valid sample for testing.² We disagree that the employer followed the terms of its drug policy, and thus also disagree that the drug test can constitute grounds for disqualification from unemployment insurance benefits.

Claimant asserted in his hearing argument that the employer’s policy was not reasonable because the employer did not follow the “refusal to test” portion of its policy. Exhibit 1. Specifically, claimant argued that the employer’s policy did not state that failure to provide a sample within three hours would be considered a refusal to test. Exhibit 1. Although the employer’s published drug policy contains several specific circumstances that constitute “refusal to test,” we agree with claimant that it does not include a time limit to provide a sample. Exhibit 2. Although the consent form given to claimant during the test includes the “3-hour rule,” the language on the consent form is not included in the employer’s drug policy explicitly or by reference. Nor does the record show claimant received the consent form before he began the test. In sum, because the employer did not follow its own policy, the policy was not reasonable under ORS 657.176(9) and OAR 471-030-0125(3), and we must conclude claimant’s failure to provide a valid sample within three hours was not a disqualifying act. Thus, claimant is not disqualified from receiving unemployment insurance benefits for refusing to take a drug test.

¹ Hearing Decision 15-UI-38363 at 4-5.

² *Id.* at 5.

DECISION: Hearing Decision 15-UI-38363 is set aside, as outlined above.³

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

DATE of Service: July 14, 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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³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.