

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0627

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for committing a disqualifying act (decision # 170309). The employer filed a timely request for hearing. On April 30, 2015, ALJ Vincent conducted a hearing, and on May 8, 2015 issued Hearing Decision 15-UI-38182, reversing the Department's decision and 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).

Claimant submitted a written argument which included information he did not present at the hearing. Claimant did not explain why he did not offer this new information at the hearing, or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider claimant's new information. EAB considered only evidence entered into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Ferguson Enterprises, Inc. employed claimant as an appliance installation technician from June 23, 2014 until February 6, 2015.

(2) The employer had a written substance abuse policy intended to control the effects of drugs or alcohol in the workplace. The policy stated, among other things, that an employee who was moved into a position in which he or she was regularly or intermittently required to drive on company business was required to submit to a drug test at a designated collection site within 24 hours of accepting the driving duties. Exhibit 1 at 8. Claimant was given a copy of the employer's policy when he was hired.

(3) On February 4, 2015, claimant accepted new job duties requiring him to intermittently drive one of the employer's vehicles on company business. At the employer's arrangement, at approximately 2:00 p.m. on February 4, 2015, claimant walked into Concentra Medical Center for what he understood was going to be a physical examination to determine if he met the physical requirements to drive one of the

employer's vehicles. After "a long wait" in which he was not seen, claimant made an appointment for the next day at 1:30 p.m. for the services the employer had requested for him from Concentra. Audio at ~25:00. Claimant then left the medical center.

(4) On February 5, 2015, claimant reported to Concentra some time either shortly before or shortly after 1:30 p.m. Claimant checked in for his appointment. Claimant was not promptly seen at the medical center. Sometime before 2:33 p.m., claimant left the medical center and did not schedule another appointment. At 2:33 p.m., a representative from the medical center called out claimant's name for him to be seen, but claimant did not respond because he had left. Shortly after 2:33 p.m., a representative from Concentra called the employer's warehouse manager and told him that claimant had left the medical center before being examined or being administered the drug test that the employer had requested.

(5) On February 6, 2015, the employer discharged claimant for violating its substance abuse policy by not taking the drug test on February 5, 2015.

CONCLUSIONS AND REASONS: The employer discharged claimant for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(B) states that a claimant is considered to have committed a disqualifying act if he fails or refuses to take a drug or alcohol test as required by an employer's reasonable written drug or alcohol policy. OAR 471-030-0125(3), (4) and (5) (March 12, 2006) define a "reasonable" employer drug and alcohol policy as one that prohibits the effects of drugs or alcohol in the workplace, has been provided to claimant in writing, is followed by the employer and, if it provides for drug or alcohol testing, that testing is random, periodic, blanket or based on probable cause.

In this case, the employer's policy was intended to prohibit the effects of drugs or alcohol in the workplace. Exhibit 1 at 3, 4. A copy of the employer's written policy was provided to claimant when he was hired. Audio Record at ~17:40, ~21:47. The employer's policy provided for random, periodic, blanket and probable cause drug and alcohol testing. Exhibit 1 at 7-8. Claimant did not dispute that the employer followed its own policy when it required that he be drug tested, and there was no evidence in the record that the employer did not follow its policy. The employer's policy was reasonable even if claimant was not subjectively aware of its scope or its particular requirements as they applied to him.

Claimant was required to submit to a drug and alcohol test under the "Driving Eligibility Drug Testing" section of the employer's substance abuse policy. Exhibit 1 at 8. This section required that any employee who accepted a position with driving responsibilities be drug tested within 24 hours of accepting the position. *Id.* Because this drug testing requirement was applied "uniformly to a specified group or class of employees" it was a "blanket" test that is permissible under a reasonable employer drug or alcohol policy. OAR 471-030-0125(5)(c); OAR 471-030-0125(3)(d)(B). By the time claimant appeared at Concentra Medical Center on February 4, 2015 at 2:00 p.m. for the examination that the employer had arranged for him, he had obviously accepted the employer's offer of the new position with driving responsibilities. When claimant did not take the drug test on February 5, 2015, he violated the "Driving Eligibility Drug Testing" provision of the employer's reasonable substance abuse policy since

he did not submit to the required testing within 24 hours after he accepted the new driving duties on in the early afternoon on February 4, 2015.

While claimant argued at hearing that he was not aware that he was expected to take a drug test on February 5, 2015, and would not have left the medical center if he had known, the Department's drug and alcohol adjudication statutes and regulations do not require a particular mental state before a violation of a reasonable employer drug or alcohol policy is considered a disqualifying act. Audio at ~24:37, ~25:20, ~26:07, ~27:30, ~29:31; *see* ORS 657.176(9), OAR 471-030-0125. If the employer's policy was reasonable, and claimant violated it, that is sufficient to establish that he committed a disqualifying act. Because claimant violated the employer's reasonable substance abuse policy, regardless of his intentions, he committed a disqualifying act. Claimant is therefore disqualified from unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 15-UI-38182 is affirmed.

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

DATE of Service: July 17, 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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