

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0883**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for a disqualifying act (decision # 74135). The employer filed a timely request for hearing. On July 10, 2015, ALJ Murdock conducted a hearing, and on July 14, 2015 issued Hearing Decision 15-UI-41445, concluding the employer discharged claimant for committing a disqualifying act. On July 22, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent that it is relevant and based on evidence in the record.

**FINDINGS OF FACT:** (1) Asante employed claimant from February 2, 1988 until April 30, 2015 as a registered respiratory therapist.

(2) The employer had a written policy that prohibited the use and effects of drugs in the workplace. The policy provided for drug and alcohol testing. The employer last provided the policy in writing to claimant in February 2014.

(3) On March 2, 2015, claimant reported to work and was observed by coworkers as having slurred speech, eyes rolling back, and difficulty following instructions. Based on this behavior, the employer required claimant to submit a urine sample for drug testing, and claimant tested positive for oxycodone.

(4) On March 16, 2015, the employer required claimant to enter into a last chance agreement with the employer as a condition of continued employment after the March 2, 2015 incident. Claimant signed the last chance agreement. As part of the last chance agreement, claimant agreed to remain drug free, participate in a rehabilitation program, and submit to random drug tests during the 12 months following completion of the rehabilitation program. Exhibit 2. The last chance agreement stated that the employer would discharge claimant immediately if a drug test showed any measurable amount of drugs. Exhibit 2.

(5) On March 9, 2015, claimant completed the rehabilitation program and claimant's medical provider released her to return to work because she was no longer being prescribed opiates.

(6) On April 21, 2015, claimant took Vicodin, a drug containing hydrocodone. Claimant did not have current prescription to use Vicodin. On April 22, 2015, the employer selected claimant for a random drug test. Claimant tested positive for hydrocodone. The initial test was confirmed by a test conducted in a federal or state licensed clinical laboratory.

(7) On April 30, 2015, the employer discharged claimant for violating her last chance agreement signed on March 16, 2015 with the employer.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude claimant is disqualified from receiving benefits.

ORS 657.176(2)(h) provides that an individual shall be disqualified from the receipt of benefits if the individual has committed a disqualifying act. Violating the terms of a last chance agreement with the employer is a disqualifying act. ORS 657.176(9)(a)(G). ORS 657.176(13)(c) provides that "last chance agreement" means a reasonable agreement between an employer and an employee who has violated the employer's reasonable written policy or has engaged in drug or alcohol use connected with work, and that permits the employee to return to work under conditions that may require the employee to abstain from unlawful drug use and attend and comply with the requirements of a rehabilitation or education program acceptable to the employer.

For purposes of ORS 657.176(13)(c), a last chance agreement is a document signed by the employee for the condition of continued employment and is reasonable if it is written and contains only reasonable conditions, including agreeing to remain drug free and submitting to random drug testing to demonstrate that the employee remains drug free. OAR 471-030-0125(7) (March 12, 2006). An employer policy is reasonable if it prohibits the effects of drugs or alcohol in the workplace, is followed by the employer, has been published and communicated to the individual or provided to the individual in writing, and, when the policy provides for drug or alcohol testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3). An employer has probable cause to require an employee to submit to a test for drugs if the employer has, prior to the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs in the workplace, including but not limited to, bizarre behavior in the workplace or a change in productivity. OAR 471-030-0125(4)(a).

The agreement entered into between claimant and the employer on March 16, 2015 was a "last chance agreement" because the agreement permitted claimant to return to work under conditions that required her to abstain from unlawful drug use, and was signed by claimant for the condition of continued employment. Claimant argues implicitly that the LCA was not reasonable because it did not contain a contingent plan for when she needed to use medication for pain management on her days off work. Claimant's Argument at 3-4. However, OAR 471-030-0125(7) specifically provides that a condition to remain drug free is a reasonable term in a last chance agreement. Thus, the last chance agreement was reasonable because it was written and contained only reasonable conditions, including claimant's agreement to remain drug free and submit to random drug tests to demonstrate that she remained drug free.

The next inquiry is whether the last chance agreement resulted from claimant's violation of a reasonable employer policy. The event that gave rise to the last chance agreement was when claimant behaved in an impaired manner and tested positive for oxycodone on March 2, 2015. The employer had a written policy that prohibited the effects of drugs in the workplace and provided claimant with a copy of the policy. The employer followed its policy, and the preponderance of the evidence shows the employer had probable cause to test claimant based on her behavior when she had slurred speech, abnormal eye movements, and difficulty following instructions. Thus, the employer's policy, which claimant violated by being impaired by oxycodone at work on March 2, which, in turn, gave rise to the last chance agreement at issue in this case, was reasonable.

The next issue is whether claimant violated the last chance agreement by testing positive for hydrocodone on April 22, 2015. An individual tests positive for an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy, and at the time of the test the amount of drugs determined to be present in the individual's system equals or exceeds the amount prescribed by the policy. OAR 471-030-0125(2)(e)(A). In the case of a positive urine test for drugs, in order to determine whether an individual tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. In this case, any measurable amount of hydrocodone violated the last chance agreement. The initial positive test was confirmed by a test conducted in a federal or state licensed clinical laboratory. Claimant therefore committed a disqualifying act when she violated the last chance agreement by testing positive for hydrocodone, and is thus disqualified from receiving benefits.

**DECISION:** Hearing Decision 15-UI-41445 is affirmed.

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

**DATE of Service:** August 26, 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](http://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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