

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0913

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 134227). Claimant filed a timely request for hearing. On July 1, 2015, ALJ Murdock conducted a hearing, and on July 21, 2015 issued Hearing Decision 15-UI-41747, affirming the Department's decision. On July 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Continental Casualty Co. employed claimant as a claim specialist from January 1, 2001 until April 7, 2015.

(2) The employer had a written policy prohibiting, among other things, the use and effects of drugs or alcohol in the workplace. The policy specifically prohibited an employee from reporting for work under the influence of alcohol, consuming alcohol during working hours unless the consumption was incidental to entertaining a business guest, and performing work while under the influence of alcohol. Transcript at 5. Claimant was aware of the employer's drug and alcohol policy and its prohibitions.

(3) On October 27, 2014, claimant was admitted to an intensive outpatient alcohol dependency treatment program through Serenity Lane Hospital. Exhibit at 4. On January 21, 2015, claimant transitioned to Serenity Lane's outpatient recovery support program. Exhibit 1 at 4. The Serenity Lane program was

accredited by the Joint Commission on Accreditation of Hospital Organizations (JCAHO) and the Commission on Accreditation of Rehabilitation Facilities (CARF). Exhibit 1 at 15.

(4) On February 27, 2015, while claimant was at work but still in the recovery support program at Serenity Lane, some of claimant's coworkers and her supervisor observed that she was behaving in a manner consistent with being under the influence of alcohol during working hours. As a result, the employer issued a written warning to claimant that required her to comply with the employer's work policies, including its drug and alcohol policy and, by March 17, 2015, to complete a training course on the employer's policies and to contact one of the counselors in the employer's employee assistance program (EAP). The warning advised claimant that if she behaved in the future as she had on February 27, 2015, she was subject to further disciplinary actions, up to and including discharge. Transcript at 10. Claimant was asked to and did sign the warning, which acknowledged that she had read and understood it. Transcript at 10. Sometime before March 17, 2015, claimant took the training and contacted the EAP counselor as specified in the warning.

(5) On April 6, 2015, while claimant was at work but still in the recovery support program and Serenity Lane, some of claimant's coworkers and her supervisor again observed that she was behaving in a manner consistent with being under the influence of alcohol in the workplace. Claimant's supervisor sent claimant home from work on April 6, 2015.

(6) On April 7, 2015, the employer discharged claimant for violating the employer's drug and alcohol policy by being under the influence of alcohol in the workplace on April 6, 2015. Transcript at 5, 15. On April 8, 2015, Serenity Lane discharged claimant because she had successfully completed its outpatient recovery program. Exhibit 1 at 4.

(7) On April 13, 2015, six days after she was discharged, claimant was admitted to Cedar Hills Hospital as an inpatient in its alcohol dependency treatment program. Exhibit 1 at 8. Claimant was discharged from hospitalization on April 20, 2015. *Id.* Claimant then transitioned to the outpatient treatment program and was expected to claimant it on July 23, 2015. Exhibit 1 at 11. Cedar Hills Hospital was accredited by the Joint Commission on the Accreditation of Hospital Organizations (JCAHO). Exhibit 1 at 18.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if claimant committed a disqualifying act as described in other statutory section. ORS 657.176(9)(a)(A) provides that disqualifying acts include a failure to comply with a reasonable written policy established by an employer to, among other things, govern the effects of drugs or alcohol in the workplace. ORS 657.176(9)(a)(G) provides that disqualifying acts also include violating the terms of a last chance agreement with the employer. ORS 657.176(9)(b)(A) states that behavior in violation of an employer's reasonable written drug and alcohol policy is not considered to have been a disqualifying act if the individual was on the date of the work separation or within ten days after the separation participating in a recognized drug or alcohol rehabilitation program and provides documentation of that participation to the Department. ORS 657.176(9)(b)(B) further states that participation in a recognized rehabilitation program does not excuse a violation of a last chance agreement from constituting a disqualifying act.

In Hearing Decision 15-UI-41747, the ALJ concluded that, despite claimant's participation in a recognized drug and alcohol rehabilitation program on the date of her discharge and her entry into another such rehabilitation program within ten days after her discharge, her behavior in allegedly reporting for work under the influence of alcohol on April 7, 2015 was not excused under ORS 657.176(9)(b)(A). Hearing Decision 15-UI-41747 at 5. The ALJ reasoned that, because the warning that claimant received for her behavior on February 27, 2015 was "arguably a reasonable 'last chance agreement,'" ORS 657.176(9)(b)(A) could not excuse her behavior given express language of ORS 657.176(9)(a)(B). Hearing Decision 15-UI-41747 at 5. We disagree.

The ALJ is correct that violations of last chance agreements are not excusable from constituting disqualifying acts by entry into a rehabilitation program within the specified period of time. However, a "reasonable last chance agreement" is defined as, among other things, an agreement under which the employer allows the employee to return to work only under certain stated conditions to which the employee has agreed. ORS 657.176(13)(c)(A); OAR 471-030-0125(7) (March 12, 2006). The warning that the employer issued to claimant did not have the traditional indicia of a last chance agreement, including that claimant would be allowed to return to work only under its conditions and she would be summarily discharged if she did not comply with those conditions. Rather, the warning stated only that claimant might be discharged if in the future she failed to comply with any of the employer's policies. In addition, claimant's signature on the warning served only as an acknowledgement that she had read and understood the warnings, and not as an expression of her willingness to accept continued employment under new conditions that the employer imposed. Finally, the employer's witness at hearing testified that the employer discharged claimant on April 7, 2015 not because she violated the terms of the warning issued to her on February 27, 2015 but because her behavior on April 6, 2015 violated the provisions of the employer's drug and alcohol policy. Because the warning for claimant's behavior on February 27, 2015 was in the form of a customary warning rather than a last chance agreement and it did not contain the requirements and conditions of a last chance agreement, the ALJ erred in concluding that it was a last chance agreement within the meaning of ORS 657.176(13)(c)(A) and OAR 471-030-0125(7). Given the testimony of the employer's witness, the ALJ also erred in concluding that the employer discharged claimant for violating the terms of the warning, even if it were found to have constituted a last chance agreement. Viewing this record as a whole, the employer discharged claimant for violating the terms of its drug and alcohol policy on April 6, 2015 and the issue is whether claimant's behavior on that day violated ORS 657.176(9)(a)(A).

Although the evidence is scant, it is assumed for purposes of this decision that the employer's drug and alcohol policy was a reasonable written policy that was provided or communicated to claimant and that claimant's behavior on April 6, 2015 violated that policy. *See* ORS 657.176(9)(a)(A); OAR 471-030-0125(3)(c). Even so, claimant was participating in an alcohol treatment program at Serenity Lane on the date the employer discharged her for violating its alcohol policy. Within six days after she was discharged on April 7, 2015, claimant was admitted to an alcohol treatment program at Cedar Hills Hospital and was an inpatient. Because both treatment programs are accredited by JCAHO and Serenity Lane was also accredited by CARF, both appear to have been "recognized drug or alcohol rehabilitation programs" within the meaning of ORS 657.176(9)(b)(A) and we infer claimant provided documentation of her participation in both to the Department. For this reason, assuming claimant violated the employer's drug and alcohol policy by her behavior on April 6, 2015, her behavior was not a disqualifying act under ORS 657.176(9)(b)(A). Because the warning for claimant's behavior on

February 27, 2015 was not a last chance agreement, ORS 657.176(9)(b)(B) does not exclude her from the exculpatory provision for entry into a recognized drug or alcohol rehabilitation program.

The employer discharged claimant, but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-41747 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 2, 2015

NOTE: 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.

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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