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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1070

Reversed
Disqualification

PROCEDURAL HISTORY: On July 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act by leaving work to avoid meeting the requirements of a reasonable last chance agreement (decision # 125104). Claimant filed a timely request for hearing. On August 19, 2015, ALJ Frank conducted a hearing, and on August 26, 2015 issued Hearing Decision 15-UI-43507, concluding claimant is not subject to disqualification because he did not commit a disqualifying act. On September 8, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. EAB considered the employer's written argument and the entire hearing record in making this decision.

FINDINGS OF FACT: (1) Boise Cascade Company employed claimant from May 2, 2005 to May 20, 2015 as a maintenance employee.

(2) The employer had a written policy prohibiting the use and effects of drugs in the workplace. The employer's policy provided for drug testing. Exhibit 1 at 6. The employer provided claimant with a copy of the policy.

(3) On April 10, 2015, during a work-related training, claimant walked to a nearby manufacturing plant where he began working. Claimant was not an employee of the plant. Claimant then went to the plant's office and completed a job application using a false name. He then locked himself in the plant's bathroom, and refused to come out without police intervention. The plant manager called and told the employer's senior human resources generalist about the incident. After receiving the report of claimant's behavior, the employer attempted to contact claimant, but was unable to do so on April 10. On April 11, 2015, claimant called and told the employer he could not report for his scheduled shift that day. Claimant did not work on April 12.

(4) On April 13, 2015, claimant reported to work for his scheduled shift. Based on his behavior on April 10, the employer required him to submit to a urine test for drugs. The initial specimen tested positive for amphetamines and was confirmed by a test conducted in a federal or state licensed clinical laboratory.

(5) On April 23, 2015, claimant signed and entered into a last chance agreement with the employer as a condition of continued employment. As part of the last chance agreement, claimant agreed, in part, to comply with all employer practices. Exhibit 1 at 2. The employer's substance abuse policy, including its practices regarding last chance agreements ("referral agreements"), is contained in a collective bargaining agreement. The policy regarding last chance agreements states that an employee who successfully completes substance abuse counseling is subject to drug testing before returning to work and unscheduled drug screening for one year. Exhibit 1 at 7.

(6) On May 20, 2015, claimant's counselor through the employer's assistance program (EAP) notified the employer that claimant completed the treatment recommended by the EAP. Claimant met with a human resources specialist at his work site where the employer required him to submit to a urine test for drugs. Claimant refused to submit to the test because he believed he would test positive for marijuana, and quit work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude claimant committed a disqualifying act.

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 as described in ORS 657.176(10). Quitting to avoid meeting the requirements of a last chance agreement with the employer is a disqualifying act. ORS 657.176(10)(d). 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 after having violated the employer's reasonable drug policy. The last chance agreement is reasonable if it is written and contains only reasonable conditions, including, but not limited to, agreeing to remain drug free, participating in an employee assistance program (EAP), and submitting to random or periodic drug testing to demonstrate the employee remains drug free. ORS 657.176(13)(c), OAR 471-030-0125(7) (March 12, 2006). A written employer policy is reasonable if it prohibits the effects of drugs or alcohol in the workplace, is followed by the employer, has been provided to the individual in writing, and the employer has probable cause for requiring the individual to submit to drug testing, or the policy provides for random, blanket or periodic testing. OAR 471-030-0125(3).

An employer has "probable cause" for test an employee for drugs if the employer has, prior to the time of 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 such test is required pursuant to a reasonable written last chance agreement. 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 such policy or agreement. OAR 471-030-0125(2)(e). 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. OAR 471-030-0125(10)(a).

Claimant entered into a last chance agreement with the employer after having tested positive for drugs on April 13, 2015. In Hearing Decision 15-UI-43507, the ALJ reasoned that the last chance agreement may not have been valid because, although the employer had probable cause to test claimant on April 10 based on claimant's "bizarre" behavior at the manufacturing plant that day, it no longer had probable cause when it tested claimant three days later.[1] We disagree. OAR 471-030-0125(4) requires that the observations that gave rise to the suspicion that an employee is impaired occur "prior to the time of the test," but not necessarily the same day as the test. The employer's inability to contact claimant on April 10, and claimant's failure to report to work on April 11, did not abate the employer's reasonable basis to suspect that claimant was impaired or affected by drugs in the workplace. The ALJ also questioned whether the initial test was confirmed by a test conducted in a federal or state licensed clinical laboratory because the tests were performed by an out-of-state laboratory.[2] We, however, accept the employer's firsthand testimony that that the initial test was properly confirmed by a second test. *See* Audio Record at 19:39 to 19:51.

In Hearing Decision 15-UI-43507, the ALJ further concluded that claimant did not violate the last chance agreement, and therefore is not disqualified from receiving benefits, because claimant quit to avoid submitting to a drug test that was not allowed under the last chance agreement.[3] However, the last chance agreement states it is consistent with the terms of the collective bargaining agreement. Thus, the last chance agreement incorporates the terms of the collective bargaining agreement, including the term requiring an employee who successfully completes substance abuse counseling to submit to drug testing before returning to work. Exhibit 1 at 2, 7.

Thus, in quitting to avoid taking the drug test required by the last chance agreement, claimant committed a disqualifying act under ORS 657.176(10)(d), and is disqualified from receiving benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 15-UI-43507 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>October 6, 2015</u>

[1] Hearing Decision 15-UI-43507 at 6-7.

[2] *Id.* at 7.

[3] *Id.*

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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