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

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1238

Hearing Decisions 15-UI-45513 and 15-UI-45514 Affirmed
Disqualification

PROCEDURAL HISTORY: On August 7, 2015, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding the employer suspended claimant on June 4, 2015 for committing a disqualifying act (decision # 134458) and the second concluding the employer discharged claimant on June 29, 2015 for committing a disqualifying act (decision # 150221). Claimant filed timely requests for hearing on both decisions. On September 29, 2015, ALJ Vincent conducted a consolidated hearing, and on October 7, 2015 issued two hearing decisions, one affirming decision # 133458 (Hearing Decision 15-UI-45514) and the other affirming decision # 150221 (Hearing Decision 15-UI-45513). On October 14, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-45513 and 15-UI-45514. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1237 and 2015-EAB-1238).

FINDINGS OF FACT: (1) Roseburg Forest Products Co. hired on September 10, 2004. On June 4, 2015, the employer suspended claimant and on June 29, 2015, the employer discharged claimant. Claimant last worked as a jitney driver in the employer's finishing department.

(2) The employer had a written policy intended to control the effects of drugs or alcohol in the workplace. The policy prohibited employees from working if they were under the influence of intoxicating drugs or alcohol. Exhibit 1, Packet 1 at 10. The policy stated that employees were required to abide by the substance abuse provisions contained in the collective bargaining agreement between the employer and the employees' union. *Id.* The collective bargaining agreement stated that if an employee submitted an adulterated sample for a required drug test, it was grounds for discharge. Exhibit 1, Packet 1 at 13. The employer's policy allowed for blanket drug tests of employees. Claimant received a copy of the employer's drug and alcohol policy and was aware of its requirements.

(3) On June 1, 2015, the employer had a "sweep" drug test administered to all employees in the finish department, which included claimant. Transcript at 5. Claimant's urine sample was evaluated by Pathological Associates Medical Laboratory (PAML). PAML was a state or federally licensed clinical laboratory. PAML determined that claimant's urine sample was positive for THC, a constituent ingredient of marijuana, an intoxicating substance. This testing result was confirmed by a second test of claimant's sample, which was found to contain in excess of 400 ng/mL of THC when the allowable confirmatory test cut off was 15 ng/ml. Exhibit 1, Packet 2 at 3.

(4) On June 4, 2015, PAML notified the employer of claimant's positive results on the drug test. On that day, the employer suspended claimant from work. Exhibit 1 at 2. On June 5, 2015, claimant met with the employer to discuss the drug test. Claimant stated that she had recently eaten cookies containing marijuana when she was at a neighbor's house, but had not known about the marijuana at the time of consumption. Also on June 5, 2015, claimant entered into a last chance agreement with the employer as a result of the positive drug test result. Part of that agreement required claimant to submit to any drug or alcohol testing that the employer required and to comply with all terms of the employer's drug and alcohol policy. Exhibit 1 at 6. Before claimant could return to work under the last chance agreement she was required to submit to a drug test. Transcript at 8, 9. A positive test result would not prevent claimant from returning to work so long as the level of THC contained in the urine sample she submitted at that time did not exceed the amount that was detected in the sample she submitted on June 1, 2015.

(5) On June 25, 2015, claimant submitted to another drug test in order to return to work. When it evaluated the sample claimant submitted at that time, PAML was unable to detect uric acid or magnesium in the sample, which are characteristic and necessary chemical components of human urine. Transcript at 27, 28. PAML also determined that the sample did not have reactions to physical stimuli that were characteristic of human urine, such as foaming when its receptacle was shaken. Transcript at 28. PAML knew of no circumstances under which human urine could lack the components and reactions of claimant's sample. Transcript at 30. PAML concluded that the urine sample claimant submitted for testing was not human urine, but a substituted sample of some other liquid. Exhibit 1 at 4, 5. On June 26, 2015, PAML reported its conclusions to the employer.

(6) On June 29, 2015, the employer met with claimant to discuss the conclusions that PAML had reported. Claimant stated that the sample must have been diluted because she was exercising a great deal and drinking unusual amounts of water to flush the THC out of her system that had been detected during the June 1, 2015 drug test or because she had been taking an herbal supplement known as Golden Seal. On June 29, 2015, the employer discharged claimant for submitting an adulterated or substituted urine sample for testing on June 25, 2015.

CONCLUSIONS AND REASONS: The employer suspended claimant on June 4, 2015 and discharged her on June 29, 2015 for committing disqualifying acts.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer suspended or discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(A) states that the failure to comply with a reasonable written policy established by the employer or through collective bargaining to control the effects of alcohol and drugs in the workplace is a disqualifying act. ORS657.176(9)(a)(C) states that subverting or attempting to subvert a drug testing process in an

employment-related test required under an employer's reasonable written drug and alcohol policy is also a disqualifying act, including by interfering with the accuracy of the test result by diluting or adulterating a test specimen. ORS 657.176(9)(a)(G) states that violating the terms of a last chance agreement entered into with the employer as a result of a violation of drug policy is also a disqualifying act. OAR 471-030-0125(3)(a)-(c) and (d)(B) (March 12, 2006) provide that an employer's drug and alcohol policy is reasonable if it is written, has been provided to the individual, it is followed by the employer and the policy provides for random, blanket, periodic or probable cause testing. A last chance agreement is reasonable if it is written, signed by the employee and contains only reasonable conditions. OAR 471-030-0125(7).

It was not disputed at hearing that the employer's drug and policy was written and intended to govern the effects of intoxicating drugs in the workplace. It was not disputed that claimant was given a written copy of that policy and the employer followed its own policy when it suspended and later discharged claimant. Transcript at 14. It was not disputed that the policy incorporated the conditions of the drug policy contained in the collective bargaining agreement under which claimant worked. It also was not disputed that the employer's drug policy provided for, among other things, blanket drug testing, which the employer referred to as "sweep testing," in which testing was uniformly required for a specified group or class of employees. Transcript at 5. Accordingly, the employer's drug policy was reasonable.

Claimant's Suspension. On June 1, 2015, the employer required claimant along with all other employees in the finish department to submit to a blanket drug test under its policy. Although it was not the subject of any testimony at hearing, it appeared from PAML's test report that PAML performed a second confirmatory test to verify the accuracy of its initial result that detected the presence of THC in claimant's sample as required by OAR 471-030-0125(10)(a). Exhibit 1, Packet 2 at 3. Since the employer's drug policy prohibited employees from working if they were under the influence of an intoxicating drug, neither party disputed that marijuana was an intoxicating drug or that THC was a necessary constituent ingredient of marijuana, and OAR 471-030-0125(1)(c) provides that an employee is considered "under the influence" if he or she had any detectible level of drugs in their system when, as here, no intoxicating level for THC was specified in the employer's drug policy, PAML's confirmed test result that claimant had THC in her system when she was administered that drug test was sufficient to establish that claimant violated the employer's drug policy on June 1, 2015. Accordingly, claimant committed a disqualifying act under ORS 657.176(9)(a)(A).

Even if the positive test result is disregarded, claimant admitted to the employer on June 5, 2015 that the positive THC test result she recorded on June 1, 2015 was attributable to some cookies she had recently eaten that she did not know contained marijuana. The employer's drug policy and the Department's alcohol and drug adjudication statutes and regulations do not excuse inadvertent consumption of prohibited drugs from their operation. Under OAR 471-030-0125(9)(a) an employee, like claimant, who admits to facts constituting a violation of an employer's reasonable drug policy has also committed a disqualifying act, without the need for a supporting test result. On either ground, the employer suspended claimant on June 4, 2015 for a disqualifying act. Claimant is disqualified from receiving benefits as a result of her suspension on June 4, 2015.

Claimant's Discharge. Claimant was discharged because, when she took the drug test administered after she had entered the last chance agreement and as required before she returned to work, she presented an adulterated sample for testing. The employer's requirement that claimant agree to the last chance agreement before being allowed to return to work was lawful since, as discussed above, the

precipitating event for the agreement was claimant's violation of the employer's reasonable drug policy on June 1, 2015. ORS 657.176(13)(c). The last chance agreement was written and signed by claimant and contained the condition that she submit to drug testing for two years or until she had worked 4,000 hours and that she comply with all of the provisions in the employer's drug policy. Its terms and conditions were reasonable. Although it is not clear whether claimant voluntarily agreed to take the drug test on June 25, 2015 or the employer required her to do so, that is not relevant. In either case, the requirement that claimant take a second test before being allowed to return to work was a reasonable exercise of the employer's authority to compel claimant to submit to drug testing since the employer had a legitimate interest in knowing, before it allowed claimant to return to work, whether she had remained drug free since the June 1, 2015 drug test and was able to return to work safely, or whether she was continuing to use marijuana and her THC levels had not dropped since she failed the test. The drug test the employer that claimant took on June 25, 2015 was reasonably required under the last chance agreement.

The collective bargaining agreement, which was incorporated by reference into the employer's drug policy, prohibited the adulteration of body fluids submitted for drug testing. Exhibit 1, Packet 1 at 13. In addition, the statute that constitutes the Department's alcohol and drug adjudication policy provides that it is a disqualifying act for an employee to attempt to attempt to subvert a drug test result required under as reasonable employer policy or to interfere with an accuracy of a test result by any behavior, including the dilution or adulteration of a test specimen. An "adulterant" means a substance that does not occur naturally in urine, or occurs naturally but not at the concentration detected. ORS 657.176(13)(a). If claimant submitted a urine sample that was not human urine for analysis in the drug test administered to her on June 25, 2015, it likely was not an accidental occurrence but was a deliberate attempt to undermine the test or to interfere with its accuracy. As such it would be a disqualifying act.

Claimant contended did not dispute that the urine sample PAML received for testing after it was collected from her was the one that she gave on June 25, 2015. A qualified laboratory analyst, who had master's degree and had been working in the drug testing field for 11 years testified that he evaluated the urine sample claimant gave and concluded that it did not contain the biomarkers of human urine, principally detectible concentrations of uric acid and magnesium. The analyst tested the sample twice for the presence of those biomarkers. Transcript at 27-29. Upon physical inspection of claimant's sample, he also determined that it did not react as human urine did when it was subjected to physical agitation. Transcript at 28-29. While claimant argued that PAML's findings were explained by the fact that prior to submitting the urine sample on June 25, 2015, she had been drinking a great deal of water and exercising to eliminate the THC from her system that had been detected during the June 1, 2015 test, the analysist testified that such activities might produce a dilute specimen, but would not produce a specimen that was devoid of uric acid or magnesium, as claimant's was. Transcript at 30. Claimant also contended that the PAML's results from testing her urine sample might be explained by the presence of Golden Seal in her system, an herbal supplement she had been taking in large quantities after the June 1, 2015 drug test to "flush" THC from her system. Transcript at 16. The laboratory analyst, who was familiar with Golden Seal, rebutted claimant's explanation and testified that ingesting Golden Seal would not cause a urine specimen to lose the characteristic biomarkers of human urine as claimant's was devoid of, or to fail to react to physical stimulation in the manner that claimant's did. Transcript at 39. On this record, it appears that the urine sample that claimant produced on June 25, 2015 was, most likely, not human urine from claimant, but some other fluid. When the employer discharged claimant for submitting specimen for drug testing that was not her own urine, the employer discharged claimant

for committing a disqualifying act. Claimant is disqualified from receiving benefits as a result of her work separation on June 29, 2015.

DECISION: Hearing Decisions 15-UI-45513 and 15-UI-45514 are affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: November 9, 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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