

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1298

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant is disqualified from receiving benefits based on his work separation from the employer (decision # 100006). Claimant filed a timely request for hearing. On October 22, 2015, ALJ Wyatt conducted a hearing, and on October 30, 2015 issued Hearing Decision 15-UI-46887, affirming the Department's decision. On November 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Umpqua Dairy Products employed claimant from August 1, 2000 to August 12, 2015.

(2) The employer had a written policy prohibiting employees from being under the influence of drugs, including marijuana, in the workplace, which the employer published and provided to claimant in writing. The policy stated that an employee was considered to be under the influence if a prohibited substance was present in the body, including having any detectable level present in the body. The policy stated that violating the policy would generally subject an employee to immediate discharge.

(3) The employer's policy provided for random drug testing based on a pool of all employees. The policy stated that the selection process for random testing used a random selection process so that all employees within the pool had an equal chance of being selected for testing. The policy stated that all positive test results were confirmed by a second test, that the employer paid for the cost of any required test administered, and that the time an employee spent undergoing required testing was also paid and should be reported as hours worked.

(4) On August 5, 2015, claimant was selected for random drug testing from a pool of all employees using a random selection process so that all employees within the pool had an equal chance of being selected for testing. On August 7, 2015, the employer required claimant to submit a urine sample for random drug testing. The test was conducted in a federally licensed clinical laboratory. Claimant tested positive for tetrahydrocannabinol (THC), and therefore marijuana. On August 11, 2015, the initial test was confirmed by a test conducted in the same federally licensed clinical laboratory.

(5) On August 12, 2015, the employer discharged claimant for being under the influence of marijuana while performing services for the employer on August 7, 2015.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant is disqualified from receiving benefits based on his work separation from the employer.

ORS 657.176(2)(h) provides that an individual is disqualified from the receipt of benefits if he has committed a disqualifying act described in subsection ORS 657.176(9). ORS 657.176(9)(a)(D) provides that an individual is considered to have committed a disqualifying act when the individual is under the influence of intoxicants while performing services for the employer. ORS 657.176(13)(d) provides that an individual is "under the influence of intoxicants" when the level of marijuana present in the individual's body exceeds the amount prescribed in the employer's reasonable written policy. "Performing services for the employer" as used in ORS 657.176(9)(a)(D) means that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration. OAR 471-030-0125(2)(d) (March 12, 2006).

For purposes of ORS 657.176(13)(d), an individual is "under the influence" of intoxicants if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy, the individual has any detectable level of drugs present in the individual's system, unless the employer otherwise specifies particular levels of drugs in its policy. OAR 471-030-0125(2)(c). In order to determine whether an individual is under the influence of drugs, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a). For purposes of ORS 657.176(9)(a) and ORS 657.176(13)(d), a written employer policy is reasonable if the policy prohibits the effects of drugs in the workplace, the employer follows its policy, the policy has been published and communicated to the individual or provided to the individual in writing, and when the policy provides for drug testing, it provides for random testing. OAR 471-030-0125(3). A "random test for drugs and/or alcohol" means a test for drugs and/or alcohol given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing. OAR 471-030-0125(5)(c). No employer policy is reasonable if the employee is required to pay for the cost of the test. OAR 471-030-0125(6).

In a discharge case, the employer has the burden to establish that the claimant is disqualified from the receipt of benefits. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

We first address whether the employer's policy was reasonable. It is undisputed that the employer's drug policy prohibited the effects of drugs in the workplace, provided for random drug testing and tests as defined under OAR 471-030-0125(5)(c) at no cost to the employee, and had been published and provided to claimant in writing. It also is undisputed that the employer followed its policy, except that claimant asserted the employer's drug testing was not random because some employees, including claimant, were tested more often than others. Transcript at 18-19. However, the employer's director of human resources initially testified that every employee's name was put into a pool managed by a third party, which, on a monthly basis, provided a list of names randomly selected for drug testing, and that claimant's name was on that list for the month of August 2015. Transcript at 6. In response to claimant's assertion that some employees, including claimant were tested more often than others, the

human resources director emphasized that all employees were in the pool, including the employer's owners, and that the employer was not involved in the random selection process conducted by the third party. Transcript at 20, 23-14. The mere fact that some employees, including claimant, were selected more often than others is not inconsistent with a random selection process. Absent another basis for concluding the director of human resources was not a credible witness, her testimony was sufficient to establish that the employer's drug testing was random. The employer therefore followed its policy, and the policy was reasonable.

We next address whether claimant was under the influence of marijuana. At hearing, claimant asserted that his positive test for THC, and therefore marijuana, was a false positive or the result of second-hand exposure to marijuana. Transcript at 16-18. However, it is undisputed that the initial test showed claimant had a detectable level of marijuana present in his system, and that the initial test was confirmed by a test conducted in a federally licensed clinical laboratory. That is sufficient to establish that claimant's positive test for marijuana was not a false positive. Claimant therefore was "under the influence" of marijuana as defined under ORS 657.176(13)(d), OAR 471-030-0125(2)(c) and OAR 471-030-0125(10)(a). He therefore committed a disqualifying act under ORS 657.176(9)(a)(D), and is disqualified from the receipt of benefits under ORS 657.176(2)(h). Claimant's assertion that his positive test for marijuana was the result of second-hand exposure is not material to those issues.

Claimant is disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-46887 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 4, 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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