

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1317

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 91502). Claimant filed a timely request for hearing. On September 9, 2015, the Office of Administrative Hearings (OAH) sent the parties notice of a hearing scheduled for September 22, 2015. On September 22, 2015, ALJ Buckley issued Hearing Decision 15-UI-44608, dismissing claimant's request for hearing for failure to appear at the hearing. On October 3, 2015, claimant filed a timely request to reopen the hearing, explaining in detail why he failed to appear. On October 15, 2015, OAH sent the parties notice of a hearing scheduled for October 29, 2015. On October 29, 2015, ALJ Seideman conducted a hearing and issued Hearing Decision 15-UI-46778, allowing claimant's request to reopen the hearing, and concluding that claimant did not commit a disqualifying act. On November 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Forest River Manufacturing LLC employed claimant from March 3, 2014 to December 31, 2014 as a welder.

(2) The employer had a written drug policy prohibiting employees from working under the influence of illegal drugs, or possessing or using illegal drugs on company property. The employer gave claimant a copy of the policy.

(3) On December 31, 2014, during claimant's lunch break, the employer's production manager noticed claimant sitting with what appeared to the manager to be drug paraphernalia in his lap. Claimant told the manager it was an atomizer. Claimant had purchased the electronic cigarette atomizer earlier during his lunch break, and did not have a battery, mouthpiece or oil to use with the atomizer. The manager asked claimant if it could be used to consume marijuana. Claimant replied that it could be used for marijuana.

(4) On December 31, 2014, claimant did not use or possess marijuana or other illegal drug at work, and was not under the influence of marijuana or any illegal drug. The manager discharged claimant immediately for having drug paraphernalia on company property.

(5) Claimant received the notice of hearing for September 22, 2015. At 10:00 p.m. on September 21, 2015, claimant accidentally dropped his smartphone, breaking it and rendering it inoperable. He had no other telephone in his household. Claimant had one relative in his town with a telephone, but that relative was on vacation out of state on September 22, 2015. Claimant was unable to find another way to call in to the hearing.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant had good cause to reopen the hearing, and did not commit a disqualifying act.

Good Cause to Reopen. ORS 657.270(5) provides that any party who failed to appear at the hearing may request to reopen the hearing upon a showing of good cause for failing to appear. The request must be in writing, filed within 20 days of the date of mailing of the hearing decision, and explain in detail why the party failed to appear. Unless the party demonstrates “good cause,” the request will not be allowed. OAR 471-040-0040(2) (February 2, 2012) provides that “good cause” means “when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control.”

Claimant missed the hearing because he accidentally broke the only telephone in his household the night before the hearing, and tried but was unable to find another telephone to use in time for the morning hearing. Accidentally breaking his only telephone, and having no other telephone accessible to him the morning of September 22, 2015, were factors beyond claimant’s reasonable control. Claimant therefore demonstrated good cause for failing to appear at the hearing, and his request to reopen is allowed.

No Disqualifying Act. ORS 657.176(2)(h) provides that an individual is disqualified from receiving benefits if the individual has committed a disqualifying act described in ORS 657.176(9). Failing to comply with the terms of a reasonable written policy established by the employer that governs matters including the use, possession or effects of drugs in the workplace, or possessing a drug unlawfully during work are disqualifying acts. ORS 657.176(9)(a)(A), (E). An employer policy is reasonable if it prohibits the use, sale, possession or effects of drugs 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) (March 12, 2006). 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).

The employer discharged claimant because he had an electronic cigarette atomizer at work on December 31, 2014, and the manager knew it could be used to consume marijuana. The employer alleged that possessing drug paraphernalia at work violated its “zero tolerance” drug policy. Audio Record at 14:46 to 15:12. On this record, the employer’s drug policy was reasonable. It prohibited the use, possession and effects of drugs in the workplace and was given to claimant in writing. The record does not show the employer’s policy was unreasonable due to its terms regarding testing. *See* OAR 471-030-0125(d).

However, the record fails to show that claimant violated the employer’s drug policy. Although an atomizer can be used to consume illegal drugs, neither the employer’s drug policy nor the Department’s drug adjudication policy prohibits the possession of an electronic cigarette or other drug paraphernalia at

work. Nor is there any evidence in the record that claimant used, was under the influence of, or possessed illegal drugs on December 31, 2014.

Claimant therefore did not commit a disqualifying act under ORS 657.176(9), and is not disqualified from receiving benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 15-UI-46778 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 15, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.