

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0127

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharge claimant for committing a disqualifying act (decision # 92211). Claimant filed a timely request for hearing. On February 1, 2016, ALJ Holmes-Swanson conducted a hearing, and on February 2, 2016 issued Hearing Decision 16-UI-52150, concluding claimant did not commit a disqualifying act. On February 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) SFW Painting employed claimant from May 27, 2015 to December 12, 2015.

(2) The employer had a substance abuse policy that prohibited employees from reporting to work or performing work while under the influence or affected by a controlled substance. The employer's policy provided for random drug testing, but did not include any provisions allowing reasonable suspicion testing. The employer provided claimant with a copy of its policy upon hire.

(3) During the last week of claimant's employment, claimant and two other employees were working on a particular job. The employees joked with the clients about marijuana use. The clients later smelled marijuana and reported to the employer that they could smell marijuana and believed the employees had used marijuana before or during work. Claimant had never used marijuana at work or reported to work while under the influence of marijuana.

(4) The employer spoke to the three employees about the allegation. Claimant and the other employees denied using marijuana. The employer disbelieved claimant's denial and discharged him on December 12, 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not discharged for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from benefits for individuals who commit a disqualifying act. ORS 657.176(9)(a) provides, in pertinent part, that an individual is considered to have committed a disqualifying act when, among other things, he fails to comply with the terms and conditions of a reasonable written policy that governs the use, sale, possession or effects of drugs or alcohol in the workplace. In order for an employer's policy to be considered "reasonable," the employer must follow its own policy. OAR 471-030-0125(3).

The employer discharged claimant after concluding that he had either used marijuana while working or was under the influence of marijuana at work. The employer did not present any evidence substantiating that claimant was responsible for the marijuana odor the employer's clients reported, nor is there any direct evidence establishing that it is more likely than not that claimant either used marijuana while working or that he was working while under the influence of marijuana.

To any extent the discharge decision was based on claimant's alleged refusal to submit to a drug test when the CEO requested he do so, the preponderance of the evidence does not show that claimant's alleged refusal to test was a violation of the employer's policy or a disqualifying act. The employer's witness alleged that she observed the employer's CEO ask claimant to submit to a drug test, and, to her understanding, claimant refused. Audio recording at ~20:00. Claimant, on the other hand, testified that the CEO did not ask him to submit to a drug test and that he never refused to do so. Audio recording at ~22:15. We need not resolve the discrepancy to decide this case, however, because an individual may only be disqualified if he violated a "reasonable" policy, and the employer's policy may only be considered "reasonable" if the employer followed it. In this case, the employer's basis for testing claimant was that it had "probable cause" for testing based on its clients' suspicion that claimant was using or under the influence of marijuana at work. However, the employer's policy, as recited at the hearing, did not include any provision allowing the employer to conduct probable cause drug tests, and the employer did not follow its own policy when it purportedly required claimant to undergo probable cause drug testing. The employer's policy was, therefore, not "reasonable," as that term is defined for purposes of unemployment insurance cases. Regardless whether claimant was asked to submit to testing or whether he refused, he cannot be disqualified from unemployment insurance benefits for violating an unreasonable employer policy.

Even if we had concluded otherwise, our decision would remain the same. OAR 471-030-0125(4)(a) provides, in pertinent part, that a disqualifying refusal to undergo probable cause testing requires that the employer first have observable, objective evidence that formed a reasonable basis to suspect that the employee may be impaired or affected by drugs in the workplace. In this case, the evidence of claimant's suspected drug use consisted of a report indicating that clients smelled a marijuana odor when in the presence of three employees, including claimant. The employer did not provide any specific information about the allegation, so there was nothing indicating that claimant in particular smelled of marijuana, nor evidence suggesting that claimant in particular might have been displaying physical signs of marijuana use or intoxication while working. In the absence of observable, objective evidence indicating that claimant himself was suspected of being impaired or affected, the employer did not have a sufficient basis for asking claimant to submit to a probable cause drug test, and his refusal to test would not be considered a disqualifying act.

Finally, claimant testified during the hearing that he has an OMMP (Oregon Medical Marijuana Program) card, from which we infer that claimant periodically uses marijuana. Audio recording at

~22:21. The fact that an individual has an OMMP card or uses marijuana for medical reasons does not excuse an individual from complying with an employer's reasonable drug policy, and does not mean that an individual cannot be disqualified from benefits for committing a disqualifying act related to his or her marijuana use. However, the record in this case fails to show that having an OMMP card or using marijuana while off-duty violated the employer's substance abuse policy. Moreover, while OAR 471-030-0125(9)(a) provides that an individual has committed a disqualifying act if he admits violation of a reasonable written policy governing the use, sale, possession or effects of drugs, marijuana or alcohol in the workplace, claimant specifically testified that, due to the nature of his duties, he did not use marijuana at work or work while under the influence. Audio recording at ~23:35. Claimant's testimony that he has an OMMP card therefore does not constitute an admission that he violated the employer's substance abuse policy, and was not a disqualifying act.

Although the employer suspected claimant of using or being under the influence of marijuana while working, the employer did not prove by a preponderance of the evidence that claimant committed a disqualifying act for purposes of ORS 657.176(9) and OAR 471-030-0125. Therefore, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-52150 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 25, 2016

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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