

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0389

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 92411). Claimant filed a timely request for hearing. On March 2, 2016 and March 21, 2016, ALJ R. Frank conducted a hearing, and on March 24, 2016 issued Hearing Decision 16-UI-55737, affirming the Department's decision. On April 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Esco Corporation employed claimant as a welder from February 26, 1995 to August 21, 2015.

(2) The employer had a written drug and alcohol free workplace policy. The policy prohibited employees from being under the influence of alcohol while "in the workplace, on company property, during work hours, or so as to affect work performance." Exhibit 1. The policy prohibited employees from "report[ing] for duty . . . while being under the influence of . . . alcohol." *Id.* The policy provided that employees could be discharged for violating the policy. The policy permitted the employer to subject employees to alcohol testing if the employer had reasonable suspicion of employees' use. The policy defined odor, physical appearance and dilated pupils as examples that could provide the employer with reasonable suspicion to test an employee.

(3) The night prior to claimant's August 21, 2015 shift, claimant stayed up later than usual and consumed five to nine beers before going to bed. On August 21, 2015, claimant was scheduled to begin work at 4:00 a.m. Claimant arrived to the workplace shortly before his shift was to begin. He smelled "very strong[ly]" of alcohol, had a flushed face and his eyes were bloodshot, watery and glassy. Exhibit 1.

(4) One of the employer's supervisors observed claimant's odor and appearance. Claimant admitted to the supervisor that he had consumed alcohol before bed the night before reporting to work and was not sure he would pass the breathalyzer test. Claimant asked if he could leave and take a vacation day instead of undergoing alcohol testing, and his request was denied.

(5) The employer required claimant to submit to a reasonable suspicion test for alcohol. The first breathalyzer test, taken at 4:43 a.m., showed claimant's blood alcohol content was .056%. The second breathalyzer test, taken at 5:01 a.m., showed claimant's blood alcohol content was .054%.

(6) On August 21, 2015, the employer discharged claimant for testing positive for alcohol in connection with his employment.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant was discharged for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(F) defines "disqualifying act" to include testing positive for alcohol in connection with employment. An individual "tests positive" for alcohol 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 alcohol exceeds the amount allowed under the policy, or, if the policy does not specify a cutoff level, the individual has any detectable level of alcohol in his system. OAR 471-030-0125(2)(e). An employer's policy is considered "reasonable" if it is written and prohibits the use or effects of alcohol in the workplace, the employer follows it, the policy is provided to the individual in writing, the individual is not required to pay the cost of the test, and, when the policy provides for alcohol testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3) and (6). The employer has probable cause for testing if the employer has "observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by . . . alcohol in the workplace." OAR 471-030-0125(4)(a).

In this case, there is no dispute that the employer had a reasonable written policy that prohibited claimant from being under the influence of alcohol in the workplace and permitted the employer to subject claimant to probable cause testing upon observing objective indicators that he might have been impaired or affected by alcohol. Claimant did not dispute that he had consumed a fairly significant amount of alcohol the night before he reported to work, and did not dispute that he smelled of alcohol, had a flushed face, that his eyes were bloodshot, glassy and watery, or that he admitted his alcohol use to a supervisor. Nor did claimant dispute that those characteristics were indicative of alcohol use and could form the reasonable basis for suspecting he was under the influence of alcohol when he reported to the workplace on August 21, 2015. Claimant also did not dispute that his breathalyzer tests for alcohol both showed more than .05% blood alcohol content, proving that he was, in fact, on company property with alcohol in his system, in violation of the employer's reasonable policy.

Claimant argued that, nevertheless, he should not be disqualified from receiving unemployment insurance benefits because he was not actually working at the time of his positive test for alcohol, and that all the relevant events took place before the start of his scheduled shift. At hearing and in his

argument, claimant averred that since the discovery that he was under the influence of alcohol took place before he began work for the day, and since he had accrued vacation leave at the time, the employer should have allowed him to take the day off work instead of subjecting him to alcohol testing. However, the employer did not restrict the application of its alcohol-free policy only to those employees who were on the clock and working. Rather, the policy prohibited employees from being under the influence of or affected by alcohol "on company property," and prohibited employees from "report[ing] for duty." Therefore, the fact that claimant was on company property and reporting for duty at the time his intoxication was discovered constitutes a policy violation even though he had not yet begun work for the day. Under the Department's drug and alcohol policy, for purposes of determining whether an individual has committed a disqualifying act and should be disqualified from receiving benefits, an individual's "positive test" for alcohol is considered to be in "[c]onnection with employment" if the "positive test affects or has a reasonable likelihood of affecting the employee's work or the employer's interest and/or workplace." OAR 471-030-0125(2)(h). As a matter of common sense, the fact that claimant reported for duty as a welder while under the influence of alcohol had a reasonable likelihood of affecting his work or the employer's interest in ensuring that only sober employees performed inherently dangerous tasks like welding. Therefore, regardless whether claimant's conduct is analyzed under the Department's rules or the employer's policy, by reporting for duty while under the influence of alcohol, or even simply being on the employer's property while under the influence of alcohol, claimant violated the employer's policy and committed a disqualifying act.

Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-55737 is affirmed.

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

DATE of Service: April 28, 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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