

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0392

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 102940). Claimant filed a timely request for hearing. On March 16, 2016, ALJ Menegat conducted a hearing, and on March 18, 2016 issued Hearing Decision 16-UI-55367, concluding claimant did not commit a disqualifying act. On April 6, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer requested that EAB consider some "additional documents." The documents included copies of policies, emails, disciplinary notices and other materials related to claimant's discharge. The materials appear to be duplicative of those the ALJ admitted into evidence as Exhibit 1 or Exhibit 2. EAB therefore concluded the documents were unduly repetitious of evidence already in the record and did not admit the "additional documents." To any extent the documents included information that was not previously admitted into the record, OAR 471-041-0090 (October 29, 2006) requires that any party offering new information must show that factors or circumstances beyond the party's reasonable control prevented it from offering the information into evidence at the hearing. The employer's argument included no such showing, and, therefore, EAB may not admit the new information into the record or consider it when reaching this decision.

EVIDENTIARY MATTER: At the March 16 hearing, the ALJ admitted documents submitted by claimant as Exhibit 2. On this record, Exhibit 2 was not marked. Accordingly, we have marked Exhibit 2 based on the ALJ's description. Exhibit 2 consists of a document entitled "Observable Behavior-Reasonable Suspicion Record" (2 pages) and claimant's handwritten statement (2 pages).

FINDINGS OF FACT: (1) Confederated Tribes of Siletz employed claimant as an employment services worker from November 25, 2014 to January 8, 2016.

(2) The employer had a drug free workplace policy under which it prohibited the use and effects of drugs in the workplace. The policy prohibited employees from having any detectable level of a prohibited substance in their systems. The policy allowed the employer to test employees if the

employer had "reasonable cause" based on "actual evidence and/or observation of behavior," and that an employee's refusal to submit to testing was grounds for dismissal. The policy required that the employer notify the employee of the basis for a reasonable cause test.

(3) The employer had a vague report, dated December 21, 2015, that five days earlier, while attempting to use a new computer system, an unknown individual reported claimant was "confused" and had a "lack of acknowledging mistakes over and over," and that on some undisclosed date, claimant told one or more coworker, whose identities were not disclosed, of her marijuana use and "fondness for the drug." *See* Exhibit 2, "Observed Behavior-Reasonable Suspicion Record." Although the report was signed by a director, the source of the report was "via email conversations and 2nd hand."

(4) On January 7, 2016, the employer asked claimant to submit to a drug test. Claimant asked the employer what the basis for the test was and, after its initial refusal to tell her the basis of the test, the employer told her only that the request was based on confidential reports. Claimant refused to submit to a drug test and, on January 8, 2016, the employer discharged her for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for 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. A "disqualifying act" is defined to include refusing to take a drug test as required by the employer's reasonable written policy. *See* ORS 657.176(9)(a)(B); OAR 471-030-0125(2)(b). An employer's policy is considered "reasonable" if, in pertinent part, it is written, prohibits the use or effects of drugs 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 drug 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 drugs in the workplace." OAR 471-030-0125(4)(a).

There is no dispute that claimant refused to take a drug test when directed to do so by the employer. However, refusing a drug test is only disqualifying for purposes of unemployment insurance if it was required under the employer's "reasonable written policy." For a policy to be considered reasonable, the employer must follow it. In this case, the employer's policy required that the employer notify claimant of the reason she was being subjected to a reasonable suspicion drug test, but the employer initially refused to explain and subsequently told her only that the test was based on "confidential reports" without disclosing the allegations against her. Thus, it does not appear that the employer followed its own policy with respect to subjecting claimant to reasonable suspicion-based drug testing.

For an employer's policy to be considered reasonable with respect to "reasonable suspicion" drug tests, also known as a "probable cause" tests, the decision to test must be based on observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs in the workplace. The employer alleged that claimant was confused and made repeated mistakes. However, the confusion and mistakes occurred while claimant was attempting to use a new system. Objectively considered, being confused about or making mistakes while becoming

accustomed to a new system is not indicative of drug use or, specifically, marijuana use, as the employer alleged, and, therefore, did not provide the employer with a reasonable basis for suspecting claimant might be impaired. The employer also alleged that it had probable cause to test claimant because she made several comments about using marijuana or "her fondness for the drug". However, the evidence that she made any such statement was based on the employer's report of unattributed "email conversations and 2nd hand." The employer's evidence did not include any information to substantiate the allegation, for example, what claimant said, to whom she said it, whether the source of the information was reliable or biased, when she said it, how many times, or in what context, for example, whether claimant was being earnest or sarcastic, or what else was being discussed at the time of the alleged statements. The report is also vague in that it was signed and dated December 21, 2015, the observation was supposed to have occurred on December 16, 2015 between 8:30 a.m. and 10:00 a.m., but, elsewhere in the document, the observation was supposed to have occurred on December 21, 2015, thus making it unclear what behavior was observed, or when that occurred. Absent credible evidence that the reports the employer allegedly received constituted "observable, objective evidence" that was the basis for the employer to reasonably suspect claimant used marijuana and was impaired or affected by it in the workplace, we cannot conclude that the employer's policy was reasonable with respect to the probable cause test at issue in this case.

For those reasons, considered individually or together, claimant's refusal to submit to a drug test was not a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-55367 is affirmed.

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

DATE of Service: April 29, 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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