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BYE: 201707

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

413
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0523

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 111059). Claimant filed a timely request for hearing. On April 14, 2016, ALJ Shoemake conducted a hearing, and on April 22, 2016 issued Hearing Decision 16-UI-58000, reversing the Department's decision. On May 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument on June 6, 2016 which contained new information not presented during the hearing about the reasons for the inconclusive finding on the first drug test administered to claimant and the licensing status of the medical facility at which claimant gave his two urine samples. The employer justified its failure to submit this information at the hearing by stating, "I was under the impression that the documents I provided to the Employment Department that were used in determining the denial of benefits would be passed on to the Appeals Board. I did not know that I had to prove that the agency that did the drug screen was registered with the State or Federally [sic]." The new information that the employer sought to present to EAB about the first drug test was principally an exchange of text messages on June 4, 2016, which the employer could not have "assumed" the Department forwarded to EAB for the April 14, 2016 hearing because the hearing had already taken place when the texts were created. With respect to the licensing status of the laboratory that evaluated claimant's urine sample, the employer reasonably should have prepared for the hearing by examining the relevant rules and determining the proper foundation needed for the ALJ to consider the results of the second drug test administered to claimant. Also on June 6, the employer submitted an affidavit in which claimant's coworker asserted that claimant asked the coworker to provide claimant with clean urine for a drug test. The employer explained that it "just obtained [the affidavit] after 4:30 p.m. on June 6, 2016." The employer did not show that it did not become aware of the coworker's involvement in the incident that resulted in claimant's discharge until after the hearing, however. For these reasons, EAB did not consider the new information offered by the employer since it did not show as required by OAR 471-042-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from presenting that information during the hearing. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Monaghan's Landscaping LLC employed claimant as a landscaper from February 19, 2011 until February 19, 2016.

(2) The employer had a written policy that prohibited the use of drugs or alcohol before work or during work hours. The policy allowed for reasonable suspicion and post-accident drug and alcohol testing. The policy stated an employee would be discharged if he violated it.

(3) On February 9, 2016, the employer's owner smelled an odor of marijuana emanating from a truck claimant was riding in when he arrived at a job site in the morning. As a result, claimant and another person in the truck were instructed to appear at a local clinic and to submit to an alcohol and drug test. Claimant gave a urine sample for testing.

(4) On the morning of February 10, 2016, the employer was informed by the clinic that the result of claimant's drug test from the day before was "inconclusive." Transcript at 7, 25-26. Because the employer's director of operations knew claimant was receiving physical therapy that morning, she asked the physical therapy clinic to take another urine sample from claimant for testing. On February 10, 2016, claimant gave a urine sample at the clinic where he had gone for physical therapy.

(5) Sometime before February 19, 2016, the employer was informed that the laboratory that analyzed the urine sample claimant gave on February 10, 2016 had found it was positive for marijuana. Although the laboratory tested claimant's urine sample twice, it was not known whether that laboratory was a federal or state licensed clinical laboratory.

(6) On February 19, 2016, the employer discharged claimant for having marijuana in his system as detected by in the urine sample he submitted on February 10, 2016.

CONCLUSIONS AND REASONS: Claimant did not commit a disqualifying act.

ORS 657.176(2)(h) provides that an individual is disqualified from benefits if he committed a disqualifying act. ORS 657.176(9)(a)(D) states that an individual has committed a disqualifying act if, among other things, the individual is under the influence of intoxicants while performing services for the employer, and ORS 657.176(9)(a)(F) states that it is a disqualifying act if an individual tests positive for an unlawful drug in connection with employment. ORS 657.176(9)(c) provides that "it is no defense or excuse under [the Department's drug and alcohol adjudication policy] that an individual's separation resulted from . . . marijuana use." OAR 471-030-0125(2)(c) (March 12, 2006) states that an individual is "under the influence of intoxicants" if the individual has any "detectable level of drugs or alcohol present in the individual's system" unless the employer's policy or a collective bargaining agreement specifies a different level. Similarly OAR 471-030-0125(2)(f) states that an individual "tests positive" for an intoxicating substance if the individual has any detectible level of it in the individual's system absent a policy or agreement specifying a different level. OAR 471-030-0125(10)(a) further states that if a positive blood or urine test forms the basis for the conclusion that an individual was under the influence of intoxicants or tested positive for an intoxicating substance that test result must be confirmed by a second test conducted in a federal or state licensed clinical laboratory.

The basis for the employer's conclusion that claimant violated its drug and alcohol policy or otherwise committed a disqualifying act was the positive result on the test analyzing claimant's February 10, 2016 urine sample. However, the employer did not know, and was unable to provide evidence that the laboratory performing the initial analysis or the confirmatory analysis was a federal or state licensed clinical laboratory. Transcript at 9, 12. Absent this evidence, the record is insufficient to show that claimant violated the employer's drug and alcohol policy by the presence of marijuana in his system on February 10, 2016. The employer has failed to meet its burden to show that claimant committed a disqualifying act.

The employer discharged claimant but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-58000 is affirmed.

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

DATE of Service: June 8, 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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