

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0641

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act (decision # 102757). Claimant filed a timely request for hearing. On May 17, 2016, ALJ S. Lee conducted a hearing, and on May 26, 2016, issued Hearing Decision 16-UI-60545, concluding that the employer did not discharge claimant for committing a disqualifying act. On May 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument on May 31, 2016 and another on June 14, 2016. The employer failed to certify that she provided a copy of her May 31 argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We considered only the June 14 argument, which was served to claimant.

FINDINGS OF FACT: (1) Crossroads Treatment & Counseling Services employed claimant as a drug and alcohol counselor from August 18, 2015 through January 13, 2016. Claimant was in recovery from chemical dependence.

(2) Claimant was certified as a drug and alcohol counselor through the Addiction Counselor Certification Board of Oregon (ACCBO). To obtain this certification, claimant had been required to verify that she had been clean and sober for a minimum of two years to obtain her certification.

(3) The employer's personnel policy regarding drug and alcohol testing stated, in relevant part,

[The employer] reserves the right to request that you submit to random, post accident, or periodic drug and alcohol testing or when, based on observed behavior or other information, there is reason to believe that your use of drugs or alcohol is in violation of the Drug and Alcohol Free Workplace Policy. Failure to submit to these tests may result in termination of your employment. Exhibit 1.

The policy also contained the following section:

___ I am not recovering from chemical addiction, nor have I ever been diagnosed with a substance related disorder.

___ I am recovering from chemical addiction [sic] I hereby attest that I have not used alcohol or illicit drugs (or have abused prescription medication) for the ___ years immediately preceding this application. *Id.*

Signature

Claimant never received a copy of the employer's policy, and therefore never signed a statement that indicated she was in recovery from chemical addiction and specified how many years she had abstained from alcohol or illicit drug use.

(4) Sometime prior to January 13, 2016, the employer's owner received a report that claimant had been drinking alcohol. When claimant reported for work on January 13, the owner told her that she had information that claimant had been drinking alcohol and that claimant needed to submit to a urinalysis test for alcohol. Claimant denied that she had been drinking, and refused to submit to a urinalysis test. The owner discharged claimant for refusing to submit to a test for alcohol in violation of its personnel policy.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant, but not for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits for individuals who commit a disqualifying act. ORS 657.176(9)(a)(B) defines a "disqualifying act" to include an individual's failure or refusal to take a drug or alcohol test "as required by the employer's reasonable written policy." An employer's policy is considered "reasonable" when, among other things, it prohibits the use, sale, possession or effects of drugs in the workplace, the employer follows its policy, the policy is published and communicated to the individual or provided in writing, and, when the policy provides for testing, the employer has probable cause or the policy provides for random, blanket or periodic testing. OAR 471-030-0125(3) and (4) (March 12, 2006).

The employer discharged claimant on January 13, 2016 because she refused to submit to a urinalysis test for alcohol use. It is undisputed that claimant refused to submit to the test, and also undisputed that the employer's drug and alcohol testing policy required that she be discharged for her failure to submit to the test. We next determine whether this policy was reasonable. Claimant contended that she never received and had never seen a copy of the employer's drug and alcohol testing policy. Audio recording at 24:53. The employer was unable to provide evidence that claimant had received the policy, such as a copy of a statement signed by claimant that indicated she was in recovery and specified how many years long she had abstained from alcohol and illicit drug use. Audio recording at 40:29. The employer therefore failed to establish by a preponderance of evidence that its drug and alcohol testing policy was communicated to claimant. As a result, the policy was not reasonable in accordance with the requirement of OAR 471-030-0125(3)(c).

In its June 14, 2016 written argument, the employer contended that because claimant refused to submit to a test for alcohol use, the employer was “unable to document ‘continuous abstinence’” as required by OAR 309-019-0125(11) (May 28, 2015). This rule requires that a staff member, who is in recovery from substance abuse and is providing services in a treatment program approved by the Addictions and Mental Health Division of the Oregon Health Authority must “be able to document continuous abstinence under independent living conditions or recovery housing for the past two years.” *Id.*; OAR 309-019-0100(1) (February 3, 2014). We do not and cannot determine whether claimant’s refusal to submit to a test for alcohol use resulted in a violation of the rules prescribing the minimum conditions for state-approved treatment programs. The relevant inquiry here is whether claimant committed an act that disqualifies her from unemployment benefits under the applicable statute and rules. Based on our application of ORS 657.176(9)(a)(B) to the facts in this record, we conclude that the employer’s drug and alcohol policy was not reasonable, and that claimant’s refusal to submit to a test for alcohol was therefore not a disqualifying act.

The employer discharged claimant, but not for committing a disqualifying act. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-60545 is affirmed.

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

DATE of Service: July 6, 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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