

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0686

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 80458). Claimant filed a timely request for hearing. On May 25, 2016, ALJ Triana conducted a hearing, and on May 26, 2016 issued Hearing Decision 16-UI-60458, reversing the Department's decision. On June 10, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to present information that was not offered at the hearing about the licensing status of the laboratory that initially analyzed claimant's urine sample for the presence of substances prohibited under its drug and alcohol policy and the second laboratory that performed a confirmatory analysis, about the cut-off levels for prohibited substances in an employee's body and about claimant's alleged "admission" on March 15, 2015 that she had violated the employer's drug and alcohol policy. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if the party providing the information demonstrates that circumstances beyond its reasonable control prevented the party from offering the information at the hearing. With respect to the licensing status of the laboratories, the employer's representative contended that EAB should consider this evidence "at the time of the hearing, I was unaware that this would be a question and I did not have the credentials available to me." It was well within the employer's reasonable control to prepare for the hearing by reviewing the applicable statutes and regulations to determine what it needed to establish to support its position that claimant was disqualified from benefits. Had it done so, it would have known that a necessary element was that the laboratory that performed the confirmatory testing was a federally or state license clinical laboratory. *See* OAR 471-030-0125(10)(a) (March 12, 2016). The employer provided no reasons why it did not offer the other information at the hearing it now wants EAB to consider. The employer's request to present new information is therefore denied. EAB considered only information received into evidence at the hearing when reaching this decision.

EAB considered claimant's written argument to the extent it was relevant and based on evidence in the record.

FINDINGS OF FACT: (1) Collins Management Corporation employed claimant as a worker in a saw mill from October 6, 200 until March 17, 2016.

(2) At the time claimant was hired, the employer had a written policy intended to control the effects of drugs and alcohol in the workplace. That policy, as written, prohibited an employee from, among other things, being under the influence of drugs or similar substances in the workplace or having in his or her body a concentration of drugs or similar substances that exceeded certain cut-off levels that were listed in a separate document maintained by the employer's human resources department. The drug and alcohol policy allowed the employer to perform pre-employment, random and reasonable suspicion drug and alcohol testing. The employer gave claimant a copy of this policy when she was hired.

(3) On January 9, 2012, the employer revised its written drug and alcohol policy to prohibit employees from having any "measurable amount" of drugs or similar substances in their bodies. Claimant did not receive a copy of that revision to the policy and it was not otherwise published to her.

(4) On March 15, 2016, a laboratory with which the employer contracted randomly selected claimant and seven other employees for drug testing. On that day, a representative from the employer's human resources office drove claimant to the drug testing site at Columbia River Community Health Services. During the ride, claimant told the representative that she thought she "would test dirty." Audio at ~23:55. At the testing site, claimant gave a urine specimen. Later, while claimant was still at the site, she was told that her urine sample had tested positive, but neither the prohibited substance or its concentration was identified in her body. The testing site sent claimant's urine sample to Legacy Health Services Metro Lab for confirmatory testing. The initial testing site notified the employer of claimant's positive test result, but did not specify the substance that was detected or its level in claimant's body.

(5) On March 17, 2016, the employer discharged claimant for violating its drug and alcohol policy by testing positive for some drug or substance on March 15, 2016. On about March 21, 2016, Legacy's Metro Lab notified the employer that claimant's urine sample had tested positive for a prohibited substance, but did not identify the substance or its concentration in claimant's body.

CONCLUSIONS AND REASONS: The employer did not show that it discharged claimant for a disqualifying act.

ORS 657.176(2)(h) states that an individual who has committed a disqualifying act is disqualified from benefits. ORS 657.176(9)(a)(A) provides that an individual has committed a disqualifying act if the individual has failed to comply with the terms and conditions of an employer's reasonable written drug and alcohol policy, and ORS 657.176 (9)(F) provides that testing positive for alcohol or drugs in connections with employment is also a disqualifying act. OAR 471-030-0125(3) (March 12, 2006) states that an employer's drug and alcohol policy is considered reasonable if the policy is intended to control the effects of drugs or alcohol in the workplace, the employer followed its own policy, the policy was provided to the individual or published and communicated to the individual and the policy provides for specified types of testing. Given the intention of the employer's policy, its testing provisions, and that the employer gave claimant a copy of its policy in effect at the time she was hired, it appears that its 2008 policy was a reasonable policy. Claimant disputed that she was given the 2012 amendment to the policy or that the amendment was published or communicated to her; the employer's witness had no

first-hand information on this issue. We therefore conclude that the employer did not demonstrate that the policy as revised in 2012 applied to claimant rather than the policy in effect when she was hired. Audio at ~14:42, ~15:05 ~15:34, ~27:08, ~27:16.

We need not and do not consider whether the employer's discharge of claimant before it was notified that she had failed the confirmatory test, its lack of information about the substance that was detected in claimant's body and in what concentrations, or the employer's failure to include the cut-off levels for prohibited substances in the text of its written policy violated the Department's drug and alcohol adjudication policy. Rather, we consider only whether the employer failed to meet its burden to show claimant committed a disqualifying because it did not present any evidence addressing the licensing status of Legacy Health Systems Metro Lab, the laboratory that performed the confirmatory testing. OAR 471-030-0125(10)(a) is clear that if a positive test for drugs was the basis for claimant's disqualification under the Department's drug and alcohol adjudication policy, that test result must be confirmed by a federal or state licensed clinical laboratory or it is not a valid test result. Because the employer failed to affirmatively show during the hearing that the confirmatory laboratory was a federal or state licensed laboratory, it did not show that claimant's test result violated the employer's drug and alcohol policy or that it detected prohibited substances in her body.

In its written argument, the employer asserted that since claimant admitted to the employer's human resources representative before she was administered the drug test that it would be positive for drugs, she should be considered to have violated the employer's drug and alcohol policy regardless of the invalidity of the drug test results. Employer's Written Argument at 1. However, OAR 471-030-0125(9)(a) states that an admission may substitute for proving a claimant violated an employer's drug and alcohol policy only if claimant admitted she had violated the employer's reasonable written policy. Here, claimant's speculation that she thought she would test "dirty," was not an admission that she had violated the employer's drug and alcohol policy since she did not explicitly state she was in violation, did not identify the substance about which she was concerned and apparently did not know whether she had concentrations in her body that exceeded the 2008 cut off levels in the employer's drug and alcohol policy. Audio at ~23:55, ~24:27, ~31:37. While claimant's statement might be construed as an admission that she had ingested some drugs that might be detected on the test, it was not an admission or tantamount to an admission that she had violated the employer's policy unless it was accompanied by some further indication that she likely had in her system an amount sufficient exceed the 2008 cut-off levels of the particular drug. The employer did not demonstrate that claimant's alleged admission constituted a basis to disqualify claimant from benefits.

The employer did not demonstrate that it discharged claimant for a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-60543 is affirmed.

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

DATE of Service: July 22, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.