

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0694

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for a disqualifying act (decision # 81231). The employer filed a timely request for hearing. On May 26, 2016, ALJ Frank conducted a hearing at which claimant did not appear, and on June 3, 2016 issued Hearing Decision 16-UI-61038, affirming the Department's decision. On June 10, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Freres Lumber Company, Inc. employed claimant from January 4, 2015 until March 1, 2016, last as a bander operator.

(2) The employer had a written policy controlling the effects of drugs and alcohol in the workplace. That policy prohibited employees from having "any measurable levels" of drugs or alcohol in their systems while working. Exhibit 1 at 2. The policy stated that an employee also violated the policy if the employee failed to immediately report for drug testing upon the employer's instruction or failed to provide the sample required for testing. *Id.* The policy provided for pre-employment and random drug testing and for testing if the employer suspected an employee was under the influence of or had any measurable levels of drugs or alcohol in his or her system. *Id.* The employer gave claimant a copy of its drug and alcohol policy on December 30, 2014. Exhibit 1 at 9.

(3) Sometime before Christmas, 2015, the employer's plant manager noticed changes in claimant's behavior and suspected claimant was reporting for work under the influence of drugs. The plant manager discussed his concerns with claimant. Claimant denied taking drugs.

(4) Shortly before March 1, 2016, the plant manager observed claimant having a great deal of difficulty operating a lift truck and loading and unloading the truck and the bander. It appeared to the plant manager that claimant was unable to coordinate her thoughts and body movements sufficiently to perform the tasks. The plant manager asked claimant to come to his office. During the conversation that followed, the plant manager observed that claimant was unable to keep on topic, and her body

movements seemed nervous and jumpy. The plant manager further observed that the pupils in claimant's eyes were dilated. That plant manager told claimant he was concerned that she was under the influence of drugs. Claimant told the plant manager that she was willing to take a drug test.

(5) Shortly after, the plant manager drove claimant to a local hospital to be administered a drug test. During that ride, claimant brought up some personal issues and stated she had "really messed up." Audio at ~15:00. Claimant did not explain this comment and did not discuss drugs or drug use during the ride. At the hospital, claimant was asked to submit a urine sample. Claimant was unable to provide a urine sample that the hospital considered "testable." Audio at ~16:26. After two hours, the plant manager drove claimant back to the plant.

(6) On March 1, 2016, the employer discharged claimant for failing to produce a "testable" urine sample for drug testing.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for a disqualifying act.

ORS 657.176(2)(h) states that an individual who 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. 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 follows its own policy, the policy has been provided to the individual or published and communicated to the individual and, if the policy provides for testing, the only allowable types of testing are random, blanket, periodic and probable cause testing. ORS 657.176(9)(a)(B) states that failing or refusing to take a drug test as required by an employer's reasonable written drug and alcohol policy is a disqualifying act, and ORS 657.176(9)(a)(C) states that failing to cooperate with or subverting or attempting to subvert a drug test administered under a reasonable written drug and alcohol policy is also a disqualifying act. The employer carries the burden to establish by a preponderance of the evidence that it discharged claimant for a disqualifying act. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Because it was written, provided to claimant and there was no evidence the employer did not follow it, the employer's drug and alcohol policy appears to have been reasonable within the meaning of OAR 471-030-0125(3). Since the plant manager's observations of claimant prior to requiring her to submit to a drug test were a reasonable basis for him to suspect that she might be impaired or her work performance affected by drugs or alcohol, the employer had probable cause for the testing. *See OAR 471-030-0125(4)*. Accordingly, the employer had right to require claimant to submit to the drug test. The remaining issue is whether there is sufficient evidence to conclude that claimant's inability to produce a urine sample suitable for testing violated either the employer's drug and alcohol policy or the Department's drug and alcohol adjudication policy.

At hearing, the employer's witness did not know exactly the reason that claimant's urine sample was determined to be not "testable," including whether she failed to produce any urine at all or whether the sample she produced was insufficient in volume for testing, or whether it was not testable for other reasons, such as adulteration or some type of degradation that precluded using it for reliable testing. Audio at ~16:26, ~17:49. The employer did not present evidence sufficient to rule out that the urine

sample was not suitable for testing for reasons not attributable to claimant or, if attributable to her, that it was not due to bodily processes not in her voluntary control. As such, there is insufficient evidence to support the conclusion that claimant violated the terms of the employer's drug and alcohol policy by failing to provide the required sample for testing. There is also insufficient evidence to support the conclusion that claimant violated the Department's drug and alcohol adjudication by refusing to take or failing to cooperate with the drug test or subverting or attempting to subvert it.

The employer did not meet its burden to show that that claimant's failure to produce a urine sample suitable for testing violated either the employer's drug and alcohol policy or the Department's drug and alcohol adjudication policy. According the employer did not show that claimant engaged in a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-61028 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, 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.

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