

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0971

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for committing a disqualifying act (decision # 94438). Claimant filed a timely request for hearing. On August 18, 2016, ALJ M. Davis conducted a hearing, and on August 19, 2016 issued Hearing Decision 16-UI-65979, reversing the Department's decision. On August 24, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it attempted to introduce information not presented during the hearing to show that the laboratory that analyzed claimant's urine specimen was a federal licensed clinical laboratory. However, the employer failed to certify that it provided a copy of its argument to claimant as required by OAR 471-041-0080 (October 29, 2006). As well, the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the evidence it now seeks to present during the hearing as required by OAR 471-041-0090 (October 29, 2006). In preparing for a hearing involving a drug or alcohol test result, the employer may reasonably be expected to review the relevant law in advance of the hearing and to gather and offer the information needed to support its position during the hearing. For these reasons, EAB did not consider the employer's written argument or the new information it sought to present when reaching this decision.

FINDINGS OF FACT: (1) Smoke Craft, Inc. employed claimant in its loading department from August 17, 2015 until February 3, 2016.

(2) The employer had a written policy that governed the effects of drugs and alcohol in the workplace. The policy stated that an employee who tested positive for illegal drugs was subject to discharge. The policy also provided that an employee who accrued twelve points within a calendar year under the employer's point-based attendance system was required to submit to a drug and alcohol test. Claimant received a copy of the employer's drug and alcohol policy at hire and was aware of its provisions. Claimant understood that the employer would require him to submit to a drug and alcohol test if he accrued twelve attendance points.

(3) Between January 1 and 25, 2016, claimant accrued five attendance points. On January 26, 2016, claimant accrued an additional eight attendance points when he failed to report his absence to the employer as his supervisor had instructed him to do, and the absence was recorded as a “no call / no show.” As of that day, claimant accrued thirteen attendance points, which exceeded the twelve points required to prompt a mandatory drug and alcohol test. From January 27 through 29, 2016, claimant was off work and a physician’s note excused those absences.

(4) On February 1, 2016, claimant reported for work and was told he needed to submit to a drug and alcohol test. Claimant did so. Claimant gave a urine specimen at a collection site operated by A Worksafe Service. That organization screened that specimen and determined it was positive for illegal drugs. The specimen was then delivered to Paragon MRO of Salem for further testing. Paragon had claimant’s urine sample evaluated by Legacy Metro Lab in Portland. Legacy determined that claimant’s specimen was positive for 6-acetylmorphine and opiates. Exhibit 1 at 7. On February 3, 2016, Paragon sent a report to the employer summarizing the results of Legacy’s evaluation, and noting, “[a] positive result for 6-acetylmorphine indicates the use of heroin.” *Id.*

(5) On February 3, 2016, the employer discharged claimant for testing positive for an illegal drug on February 3, 2016, which violated its drug and alcohol policy.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for committing 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. An individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written drug and alcohol policy or tests positive for alcohol or an unlawful drug in connection with employment. ORS 657.176(9)(a)(A); ORS 657.176(9)(a)(F). An individual “tests positive” for an unlawful drug when, among other things, the individual has any detectable level of such drug in his or her system if the policy does not otherwise specify a cut-off level. OAR 471-030-0125(2)(c) (March 12, 2006). However, for purposes of ORS 657.176(9)(a), an individual can be disqualified from benefits by a positive drug test only if that test result has been confirmed by a test conducted by a federal or state licensed laboratory. OAR 471-030-0125(11).

The employer discharged claimant based his February 1, 2016 urine sample testing positive for 6-acetylmorphine, an illegal drug. However, the employer’s witness testified at hearing that she did not know whether the laboratory that performed the confirmatory testing was a federal or state licensed clinical laboratory. Audio at ~16:40. As a result, although claimant tested positive for an illegal drug, the employer did not meet its burden to establish that the positive test result was disqualifying for purposes of the Department’s drug and alcohol adjudication policy. Since this conclusion is dispositive, we need not and do not consider any other issues arising under the employer’s drug and alcohol policy.

Although claimant was discharged, it was not for committing a disqualifying act. Claimant therefore is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-65979 is affirmed.

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

DATE of Service: September 23, 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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