

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1081

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 155725). Claimant filed a timely request for hearing. On June 1, 2016, ALJ Frank conducted a hearing, and on June 3, 2016 issued Hearing Decision 16-UI-61025, reversing the Department's decision. On June 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB). On August 5, 2016, EAB issued Appeals Board Decision 2016-EAB-0749, reversing Hearing Decision 16-UI-61025 and remanding this matter for further development of the record. On August 23, 2016, ALJ Frank conducted a hearing and issued Hearing Decision 16-UI-66687, affirming the Department's decision concluding the employer discharged claimant for committing a disqualifying act. On September 13, 2016, claimant filed an application for review with EAB.

Claimant submitted a written argument, but did not certify that he provided a copy of that argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). For that reason, EAB did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Hoffman Structures, Inc. employed claimant as a laborer from March 3, 2016 until March 7, 2016.

(2) The employer had a written policy intended to control the effects of drugs and alcohol in the workplace. The policy prohibited employees from reporting for work with THC (a marijuana metabolite) in their systems above an initial cut off level of 50 ng/mL, and a confirmatory cut off level of 15 ng/mL. Exhibit 1 at 2. The policy also provided that all employees were hired subject to passing a drug and alcohol test and if, upon testing, the concentration of any prohibited drug in their systems exceeded the specified cut off levels, the offer of employment would be withdrawn. Exhibit 1 at 3. Claimant received a copy of the policy on March 3, 2016 and was aware of its terms.

(3) On March 3, 2016, claimant reported for orientation, was given a copy of the drug and alcohol policy, and, along with eight other new hires, was required to submit to drug and alcohol tests. Claimant

provided a urine sample for analysis. Claimant was paid for the time he spent giving the urine sample and for the remainder of the work day on March 3, 2016. Claimant reported for work on March 4, 2016 and was paid for his work on that day. On March 5 and 6, 2016 claimant did not report for work since those days were weekend days.

(4) On March 7, 2016, claimant reported for work. On that day, the employer was notified that claimant had failed the drug test administered to him on March 3, 2016. Legacy Metro Labs, a federally licensed clinical laboratory, had issued a report that analyzed claimant's March 3, 2016 urine specimen and determined that the level of marijuana metabolite in his system exceeded the initial cut off level for that drug. Legacy Metro Labs performed a confirmatory test and determined that the claimant's urine specimen had 41 ng/mL of marijuana metabolites, which exceeded the employer's confirmatory cutoff level of 15 ng/mL. Exhibit 1 at 9. On March 7, 2016, the employer notified claimant he was discharged for violating the employer's drug policy.

(5) On March 7, 2016, after he was discharged, claimant contacted Kaiser Permanente's Department of Addiction Medicine to enter its outpatient chemical dependency treatment program. The Kaiser representative with whom claimant spoke informed him that he was required to attend an orientation to the Kaiser program before he could be assessed to determine the level of treatment appropriate to his needs. Two days later, on March 9, 2016, claimant attended the orientation to the Kaiser program and was assigned a counselor. The first available time for claimant to attend a drug assessment with his assigned counselor was March 18, 2016. Claimant completed the assessment that day. At the assessment, the counselor determined that claimant would be required to submit to three drug tests, and at that time did not require subsequent counseling or any other treatment services.

(9) On and after March 9, 2016 claimant submitted to the drug tests his counselor required, all of which he passed.

CONCLUSIONS AND REASONS: Although claimant violated the employer's drug policy on March 3, 2016 by having a concentration of marijuana metabolites in his system that exceeded the employer's cutoff levels, that violation was not a disqualifying act because he was participating in a recognized drug rehabilitation program within 10 days after the date of his discharge.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if claimant committed any of the disqualifying acts described in ORS 657.176(9) or ORS 657.176(10). Disqualifying acts include failing to comply with the terms and conditions of a reasonable written drug and alcohol policy or testing positive for alcohol or an unlawful drug in connection with employment. ORS 657.176(9)(a)(A); ORS 657.176(9)(a)(F). However, an individual is not considered to have committed a disqualifying act if the individual, within 10 days after the date of the separation, is participating in a recognized drug or alcohol rehabilitation program and provides documentation of that participation to the Department. ORS 657.176(9)(b)(A). For purposes of this statutory subsection, "documentation" means a signed statement from an authorized representative that an individual is engaged in a course of treatment, "participation" means to be engaged in a course of treatment through a recognized drug or alcohol rehabilitation program, and a "recognized drug rehabilitation program" means a program authorized and licensed under the provisions of OAR chapter 415 or under similar provisions in another state. OAR 471-030-0126(2), (3) and (5) (August 1, 2004).

In Hearing Decision 16-UI-66687, the ALJ concluded the employer's drug and alcohol policy was "reasonable," the drug test the employer required claimant to take on March 3, 2016 was a statutorily permissible "blanket" drug test, claimant violated the employer's drug policy when his test result showed he had a concentration of THC that exceeded the policy's cutoff level, and the test result was valid because the laboratory that performed the confirmatory testing was a federally licensed clinical laboratory. See OAR 471-030-0125(3)(a)-(c), (3)(d)(B), (10)(b). Although claimant contended that he entered drug treatment within 10 days after he was discharged and presented at hearing a signed statement from a counselor from that drug rehabilitation program, the ALJ found that he did not fall within the exculpatory provision of ORS 657.176(9)(b)(A) that would render his violation of the employer's drug policy not a disqualifying act since he was not "assessed" by the program 10 days after his discharge, and the ALJ doubted that the drug program which claimant described was legitimately a rehabilitation program since its sole requirement was that claimant submit to periodic drug testing. Hearing Decision 16-UI-66687 at 7. Based on the conclusion that the exculpatory provision was not applicable, the ALJ further concluded that the employer discharged claimant for a disqualifying act, *i.e.* violating the employer's drug policy by having a concentration of THC in his system that exceeded the cutoff level. We disagree.

For purposes of this decision, it is assumed that all the prerequisites were met for claimant's result on the March 3, 2016 drug test to have been a violation of the employer's drug policy under the Department's drug and alcohol adjudication policy set out at ORS 657.176(9)(a). The sole issue that is considered is whether claimant's violation should not be considered a disqualifying act under ORS 657.176(9)(b)(A). For claimant's violation to be considered non-disqualifying by virtue of his participation in the treatment program offered by the Kaiser Permanente NW, Department of Addiction Medicine, Outpatient Treatment Services, that program must be a "recognized rehabilitation program." ORS 657.176(9)(a). A "recognized drug rehabilitation program within the meaning of that provision is a program authorized and licensed under the provisions of OAR chapter 415 or similar provisions in another state. OAR 471-030-0126(5). The program in which claimant sought treatment was located in Vancouver, Washington and the relevant inquiry is whether it was licensed in that state under provisions similar to those in Oregon. Claimant testified that the Kaiser Permanente program was a "recognized rehabilitation program" authorized and licensed under the provisions similar to OAR chapter 415 in the state of Washington. Audio Record at September 16, 2016 Hearing (Audio 2) at ~28:35. The employer failed to show otherwise and, absent such a showing, we conclude that the Kaiser Permanente program through which claimant sought treatment was a recognized drug rehabilitation program as defined under OAR 471-030-0126(5).

The second issue in determining whether claimant's violation is excused from constituting a disqualifying act is whether claimant was participating in that program within 10 days of his discharge. ORS 657.176(9)(b). "Participation" means to "be engaged in a course of treatment" through a recognized rehabilitation program. OAR 471-030-0126(3). While the ALJ focused on the fact that claimant was not able to arrange an assessment by the program within the first 10 days after his discharge in finding that he could not take advantage of the exception set out at ORS 657.176(9)(b)(A), the statute and its enabling regulation is not so circumscribed in meaning. Hearing Decision 16-UI-66687 at 6. The orientation that claimant attended on March 9, 2016, only two days after his discharge, and which he was required to attend before becoming eligible for a program assessment or an intake appointment, is reasonably viewed within the particular confines of the Kaiser Permanente program as being the point at which he was first engaged in the course of that program's treatment. Exhibit 2. This

is especially so when claimant did not delay in attending the orientation and arranged for the earliest assessment he could, on March 18, 2016, which through no fault of his own was not within 10 days after his discharge on March 7, 2016. Exhibit 2; Audio 2 at ~26:37. On this record, we find that claimant was participating in the Kaiser Permanente drug rehabilitation program within 10 days after his discharge.

The final factor in determining whether claimant's violation is excused from constituting a disqualifying act is whether he provided documentation of his program participation to the Department. ORS 657.176(9)(b)(A). The specifics of the required documentation are set out at OAR 471-030-0126(2). The progress report over the signature of a counselor in the Kaiser program that claimant submitted as Exhibit 2 met all requirements to constitute adequate documentation of his participation in that program. Since there is no statutory or regulatory time limit by which the documentation of claimant's participation must have been provided to the Department, and no specified means by which that documentation must be provided to the Department, claimant's submission of that documentation as a hearing exhibit was sufficient to satisfy the remaining requirement of the statutory provision.

While the ALJ expressed doubt that claimant was participating in a legitimate drug rehabilitation program since the only program requirement was periodic drug testing, no evidence was presented to dispute that the chemical dependency counselors at the Kaiser Permanente program assessed claimant as only requiring that level of intervention to successfully complete the program. Since the statute and regulations do not specify the substance of the drug rehabilitation program in which claimant must participate to qualify for exculpation under ORS 657.176(9)(a)(A), but only that it must be a "recognized rehabilitation program," the statute leaves the contents of an acceptable rehabilitation program to the professional judgment of the recognized rehabilitation program. It would not be appropriate for the ALJ to substitute his judgment for that of a counselor at a recognized rehabilitation program as to the appropriate level of treatment for claimant.

Claimant met all of the requirements for his violation of the employer's drug policy not to be considered a disqualifying act. Accordingly, claimant is not disqualified from benefits based on that violation.

DECISION: Hearing Decision 16-UI-66687 is set aside, as outlined above.

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

DATE of Service: October 20, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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