EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1125

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for committing a disqualifying act (decision # 80628). The employer filed a timely request for hearing. On September 8, 2016, ALJ M. Davis conducted a hearing at which claimant did not appear, and on September 9, 2016 issued Hearing Decision 16-UI-67415, reversing the Department's decision. On October 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Although he did not appear at the hearing to present evidence, claimant submitted a written argument in which he sought to present facts not offered into evidence during the hearing. EAB construes claimant's argument as a request to have EAB consider this new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party presenting it shows that factors or circumstances beyond the party's reasonable control prevented the party from offering that information during the hearing. Claimant explained in his argument that he did not appear at the hearing to present information on his own behalf because "I had no knowledge of [the hearing] as I have been in the process of moving, recovery and looking for work in the meantime." Since a notice of hearing was mailed to claimant on August 24, 2016 at his address of record, to show that a lack of knowledge of the hearing constituted a factor or circumstance beyond his reasonable control, claimant must supply some detail about how he failed to receive this notice sent to his address or, if he did, at least some information as to why "the process of moving, recovery and looking for work" caused him to be reasonably unable to appear at the hearing having received the notice. Record Document, August 24, 2016 Notice of Hearing. Since claimant did supplied no detail beyond his conclusory assertion, there is no basis on which EAB can conclude claimant's lack of knowledge of the hearing was a factor or circumstance beyond his reasonable control. For this reason, claimant's request that EAB consider the new information that he sought to present by way of his written argument is denied.

FINDINGS OF FACT: (1) Xen 2, Inc. employed claimant as a commercial driver from April 2, 2014 until June 10, 2016. As a commercial driver, claimant was subject to regulations and requirements issued by the United States Department of Transportation (DOT).

(2) The employer had a written policy to control the effects of controlled substances and alcohol in the workplace. The policy prohibited employees from reporting for work with any detectable levels of controlled substances in their systems. The policy allowed for pre-employment, post-accident, reasonable suspicion, random and DOT required return to work and follow-up testing for drivers found to have violated the employer's drug and alcohol policy or self-reported a violation of it. Claimant received a copy of the employer's written policy.

(3) On April 11, 2016, claimant reported to the employer that he was a long-time user of marijuana, a controlled substance, and that he was "addicted" to it. Audio at 12:47. On April 14, 2016, claimant signed and entered into a written continued employment agreement with the employer, which would allow claimant to continue working for the employer despite his self-reported violation of the employer's drug and alcohol policy if he complied with all of its conditions. This agreement required claimant to enroll in a drug treatment program, pass weekly drug tests and pass a DOT required return to work drug test before he would be allowed to drive a truck. The agreement provided that if claimant violated its terms he would be discharged.

(4) On April 15, 2016, claimant entered a drug treatment program. On May 9, 2016, claimant took and passed one of the weekly drug tests administered by the treatment program. When the employer was notified of claimant's passing test result, claimant was advised he could take the DOT required return to work test and, if he passed, he could return to work as a driver.

(5) On May 25, 2016, claimant submitted to a DOT return to work drug test administered by Paragon MRO. Paragon was a federally or state licensed clinical laboratory. The employer paid Paragon for the drug test. The test that Paragon administered to claimant showed that claimant had marijuana in his system. Paragon conducted a confirmatory test and it also showed marijuana in claimant's system.

(6) On approximately May 27, 2016, Paragon issued a report to the employer showing the results of the May 25, 2016 drug test administered to claimant. Sometime thereafter, the employer informed claimant that the Paragon test had detected marijuana in his system. Claimant told the employer that he had not used marijuana since he had entered the drug treatment program and that the Paragon test result was attributable to his past long-time use of marijuana.

(7) On June 10, 2016, the employer discharged claimant for testing positive for marijuana, which was a violation of its drug and alcohol policy as well a violation of the continued employment agreement.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. A disqualifying act includes violating the terms of a reasonable last chance agreement entered into with the employer. ORS 657.176(9)(a)(G). A "last chance agreement" is a reasonable agreement between an employer and an employee who has, among other things, admitted to alcohol abuse, marijuana use or unlawful drug use and which allows the employee to return to work under certain conditions. ORS 657.176(13)(c)(A). Permissible conditions in a last chance agreement may include abstaining from alcohol use, marijuana use and unlawful drug use and to attend and comply with the requirements of a rehabilitation program acceptable to the

employer. ORS 657.176(13)(c)(B). Further, a last chance agreement is considered reasonable if it is written and signed by the employer and contains only reasonable conditions, including remaining abstinent, participating in a treatment program, submitting to random, blanket or periodic drug testing, and the employer pays the cost of any required drug or alcohol testing. OAR 471-031-0125(7) (March 12, 2006). When a failed drug test is the basis for concluding that a violation of an employer's drug and alcohol policy or a last chance agreement occurred, an initial positive test result must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a).

When claimant admitted to the employer he was "addicted" to marijuana, the employer became authorized to enter into a reasonable last chance agreement with claimant under ORS 657.176(13)(c)(A). While the possession of small amounts of marijuana may be legal in Oregon, it remains a controlled substance under federal law, no exception is made under the Department's regulations that prevents an employer from prohibiting its effects in connection with work and its impairing properties are well known, 26 USC §812 Schedule 1 at (10)(c); OAR 471-030-0125(9)(a). Although the agreement claimant entered into with the employer was denominated a "continued employment agreement," its purpose and terms were those of a "last chance agreement" within the meaning of ORS 657.176(13(c)(A) and OAR 471-030-0125(7). The continued employment agreement was on its face a reasonable last chance agreement since it was written and signed by claimant and it required him to submit to periodic drug testing and to participate in a drug treatment program under OAR 471-030-0125(7). The requirement in the continued employment agreement that claimant submit to and pass a DOT return to work drug test was also reasonable since, as a commercial driver, claimant was in a "safety sensitive" position and subject to DOT regulations. 49 CFR §382.101 *et seq.* DOT regulations require that, once a driver has self-reported the use of controlled substances, the employer may not allow the driver to return to work until, among other things, the driver has passed a controlled substance test with a verified negative result. 49 CFR §382.121(4). 49 CFR §382.309. Because the requirement that claimant submit to the DOT drug test was imposed under the regulatory authority of DOT, it appears to have been a reasonable condition of the continued employment agreement between claimant and the employer since the purpose of the agreement was to allow claimant's return to work. Finally, claimant's initial positive result on the DOT test was confirmed by Paragon, a federal or state licensed clinical laboratory. Claimant's positive test result was therefore valid, and was a violation of a valid last chance agreement. Although claimant asserted to the employer that his positive test result was the result of his prior, long-standing use of marijuana, the fact remains that the failed the DOT test, and thereby violated the terms of a last chance agreement.

Claimant was discharged for committing a disqualifying act. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-67415 is affirmed.

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

DATE of Service: October 25, 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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