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

EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0115

Reversed
Disqualification

PROCEDURAL HISTORY: On September 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 103539). The employer filed a timely request for hearing. On January 3, 2017, ALJ Frank conducted a hearing at which claimant failed to appear, and on January 11, 2017 issued Hearing Decision 17-UI-74516, concluding the employer discharged claimant but not for a disqualifying act under the Department's drug and alcohol adjudication policy. On January 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument and the entire hearing record in making this decision.

FINDINGS OF FACT: (1) The Boeing Company employed claimant from November 18, 2011 to June 22, 2016 as a milling machine operator.

(2) The employer had a written drug policy that prohibited the possession, use, effects and sale of drugs in the workplace. The policy was published and communicated to claimant.

(3) On November 13, 2015, claimant was involved in a workplace accident while operating a crane. Exhibit 2 at 45. During the investigation of that accident, two managers observed that claimant exhibited impairment indicators including "abnormal/unusual [behavior for claimant]," "confusion," and "difficulty performing tasks." Audio Record at 13:13 to 13:26, Exhibit 2 at 45. Based on the impairment indicators observed by the managers on November 13, 2015, the employer required claimant to submit to drug and alcohol testing that day under its "reasonable suspicion" policy. The initial drug test tested positive for amphetamines. A second confirmation drug test by an Oregon licensed clinical laboratory showed the sample was positive for amphetamines and methamphetamines.

(4) On November 19, 2015, claimant signed a last chance agreement (LCA) with the employer as a condition of continued employment with the employer. As part of the last chance agreement, claimant agreed that he would seek assistance from the employer's employee assistance program (EAP),

successfully complete the required treatment specified by his EAP counselor, maintain contact and cooperate with personnel monitoring the EAP, and be subject to follow-up drug and alcohol testing. Claimant also agreed to continue his participation in the EAP until EAP personnel determined his participation was no longer necessary, and that any failure by him to follow the terms of the LCA or participate satisfactorily in the EAP program would be grounds for discharge. Exhibit 2 at 43.

(5) On May 25, 2016, claimant's treatment center reported to the EAP that claimant displayed a "lack of engagement" and had not complied with aspects of his treatment plan. Exhibit 2 at 42.

(6) Claimant's EAP counselor attempted to contact claimant by calling him and leaving voicemails at his listed contact number on May 27, June 6 and June 10, 2016. Claimant did not return the calls. On June 10, 2016, the EAP sent claimant a letter via certified and regular mail that stated that the EAP required claimant contact the EAP by June 15, 2016. On June 15, 2016, claimant called the EAP and was instructed by the EAP to schedule a "follow-up" appointment. Claimant failed to schedule a follow-up appointment with the EAP by June 21, 2016. On June 21, 2016, claimant's EAP counselor reported to the employer that claimant had failed to maintain contact with the EAP and schedule and attend his follow-up appointment, and was "non-compliant" with his treatment program. Exhibit 2 at 42, 46.

(7) On June 22, 2016, the employer discharged claimant for failing to comply with the last chance agreement.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant for committing a disqualifying act.

ORS 657.176(2)(h) provides that an individual shall be disqualified from the receipt of unemployment insurance benefits if the individual has committed a disqualifying act described in ORS 657.176(9). Violating the terms of a last chance agreement with the employer is a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(G). A "last chance agreement" is defined in part as "a reasonable agreement between an employer and an employee who has violated the employer's reasonable written policy, has engaged in drug or alcohol use connected with work ***or*** has admitted to alcohol abuse, marijuana use or unlawful drug use." ORS 657.176(13)(c)(A) (emphasis supplied). A last chance agreement is further defined as an agreement that permits the employee to return to work under conditions that may require the employee to abstain from alcohol and drug use and attend and comply with the requirements of a rehabilitation or education program acceptable to the employer. ORS 657.176(13)(c)(B). A last chance agreement must be signed by the employee for the condition of continued employment, and is reasonable if it is written, contains only reasonable conditions, and does not require an employee to pay unreasonable costs to participate in a rehabilitation program or to pay for any of the cost of a drug or alcohol test. OAR 471-030-0125(7) (March 12, 2006).

Claimant entered into a last chance agreement with the employer after he tested positive for drugs on November 13, 2015. In Hearing Decision 17-UI-74516, the ALJ concluded that claimant violated the terms of the November 19, 2015 agreement.[1] However, the ALJ also concluded that claimant's discharge for violating the last chance agreement could not serve to disqualify claimant from receiving

[1] Hearing Decision 17-UI-74516 at 6.

unemployment insurance benefits because the employer failed to show that there was a statutory basis for the last chance agreement.[2] The ALJ reasoned that the agreement did not meet the statutory definition of a last chance agreement as defined by ORS 657.176(13)(c)(A) because the agreement did not arise from claimant's violation of the employer's "reasonable written policy."[3] The ALJ concluded that the employer's policy did not meet two elements of a "reasonable written policy": that the employer had probable cause for requiring claimant to submit to drug or alcohol testing, and that it followed its own policy.[4] *See* OAR 471-030-0125(3)(b) and (d)(A). We disagree with the ALJ's conclusion that there was no statutory basis for the last chance agreement, and conclude that claimant's violation of the last chance agreement was a disqualifying act.

It is undisputed that claimant violated the last chance agreement. At issue is whether the agreement between claimant and the employer was a reasonable "last chance agreement" pursuant to ORS 657.176(13)(c) and OAR 471-030-0125(7) so that his violation of the agreement was a disqualifying act. The ALJ summarized the definition of a last chance agreement as an agreement between an employer and employee "who has violated the employer's reasonable written policy."[5] However, the two other bases for a last chance agreement stated in ORS 657.176(13)(c)(A) are where an employee "has engaged in drug or alcohol use connected with work or has admitted to alcohol abuse, marijuana use or unlawful drug use." ORS 657.176(13)(c)(A). Because the plain meaning of the statute includes engaging in drug use connected with work as an independent basis for a last chance agreement, we shall not subtract that basis from consideration. The "or" in the statute has to mean that the "reasonable policy" requirement doesn't apply to the second ground listed in ORS 657.176(13)(c)(A). Moreover, although other grounds for disqualification provided in ORS 657.176(9)(a)(A), (B), (C), and (E) all refer to an individual's failure to comply with requirements of a "reasonable written policy," the applicable statute here regarding a violation of a last chance agreement, ORS 657.176(9)(a)(G), makes no such reference, just that the last chance agreement itself be "reasonable" under the construct set forth in OAR 471-030-0125(7).

There is no evidence that claimant admitted to alcohol abuse or drug use, but is undisputed that claimant's drug test results were positive for amphetamines and methamphetamines, and, under ORS 657.176(13)(c), a disqualifying act if the last chance agreement was a reasonable agreement between the employer and claimant because claimant engaged in drug use connected with work. We conclude that it was. The drug test established that claimant had engaged in drug use. Oregon rule does not define "connected with work" for purposes of ORS 657.176(13)(c)(A). However, "connection with employment" as used in ORS 657.176(9)(a)(F), the statute providing that testing positive for an unlawful drug "in connection with employment" is a disqualifying act, is defined by Oregon rule to mean "where such positive test affects or has a reasonable likelihood of affecting the employee's work or the employer's interest and/or workplace." OAR 471-030-0125(2)(h). Because claimant was working when he was tested, and the test results were positive for illegal drugs, we conclude that he was engaged in drug use connected with work under both the plain meaning of "connected with work" and

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

its definition under ORS 657.176(9)(a)(F); both of which are consistent with Oregon appellate case law defining the phrase “connected with work” as the phrase is generally used in misconduct cases under another provision of ORS 657.176. In addition, this last chance agreement was signed by claimant and permitted him to return to work under the conditions that he abstain from alcohol and drug use, and attend and comply with the employer’s EAP. *See* ORS 657.176(13)(c)(B) and OAR 471-030-0125(7). The last chance agreement was reasonable because it was a written agreement containing reasonable conditions, and the record does not show that the cost of participating in the program was unreasonable or that claimant had to pay for the drug and alcohol tests required by the EAP. OAR 471-030-0125(7).

Claimant violated the terms of a last chance agreement with the employer. Claimant is therefore disqualified from the receipt of benefits under ORS 657.176(2)(h) and ORS 657.176(9)(a)(G).

DECISION: Hearing Decision 17-UI-74516 is reversed.

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

DATE of Service: March 3, 2017

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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