

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0544

Reversed & Remanded

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 151901). Claimant filed a timely request for hearing. On April 27, 2017, ALJ Shoemake conducted a hearing, and on April 28, 2017 issued Hearing Decision 17-UI-82147, affirming the Department's decision. On May 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-82147 must be reversed, and this matter remanded.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for a disqualifying act. ORS 657.176(9)(a)(F) defines a disqualifying act to include testing positive for an unlawful drug in connection with employment. OAR 471-030-0125(10)(a) provides that for a positive drug test to be considered a disqualifying act, however, certain testing procedures must have been followed, including, "[i]n the case of a positive . . . urine test for drugs . . . in order to determine whether an individual . . . tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory."

In Hearing Decision 17-UI-82147, the ALJ concluded that claimant's discharge was for a disqualifying act, finding as fact that the test results were "verified by the laboratory." While we agree that the employer submitted into evidence a lab report stating that claimant's urine had tested positive for heroin, amphetamine and methamphetamine, and suggested via a space called "Verification Date" that a medical doctor somehow "verified" them, the lab report did not indicate what the medical doctor did to verify the results, and nothing on the lab report suggested that the lab performed two tests of claimant's urine sample, much less suggested that "an initial test" was "confirmed by" another test that was also positive for unlawful drugs. Exhibit 2, page 10 of 16 (lab report). Nor did the ALJ ask either of the employer's witnesses whether or not the "initial" positive urinalysis test for heroin, amphetamine and methamphetamine was "confirmed" by a second round of testing. In the absence of that information, the record fails to show whether or not claimant's positive drug test should be considered a disqualifying act for purposes of unemployment insurance benefits.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for a disqualifying act, Hearing Decision 17-UI-82147 must be reversed, and this matter remanded for development of the record.

We note that EAB considered claimant's written argument when reaching this decision. As he argued at the hearing, claimant asserted in his argument that he should not be disqualified from receiving unemployment insurance benefits because of his positive drug test because the relapse into drug use that resulted in his positive drug test was the result of stress or pressure he felt working in a hostile environment, which the employer's management failed to adequately address. Claimant's argument is, in essence, that if the employer had resolved his hostile work environment concerns he would not have relapsed into drug use, and would not have tested positive for heroin, amphetamines and methamphetamines. Claimant's argument is irrelevant to this decision. The applicable laws and rules allow only one exception to disqualification for a positive drug test, "if the individual, on the date of separation or within 10 days after the date of separation, is participating in a recognized drug or alcohol rehabilitation program and provides documentation of participation in the program to the department." ORS 657.176(9)(b). "It is no defense or excuse under this section that the individual's separation resulted from alcohol use, marijuana use, unlawful drug use, alcoholism or drug addiction." ORS 657.176(9)(c). There is no exception listed in or allowed by the laws and rules for individuals who relapse into drug use due to their inability to cope with a difficult work environment; indeed, even an individual who tests positive for unlawful drugs because he inadvertently consumed them or was deceived into taking them may still be disqualified from receiving unemployment insurance benefits if he tests positive for drugs in connection with work. Claimant's difficult work environment is therefore immaterial and irrelevant to whether or not he should be subject to disqualification from unemployment insurance benefits based upon his positive test for heroin, amphetamines and methamphetamines.

DECISION: Hearing Decision 17-UI-82147 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 31, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-82147 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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