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

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0564

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 131347). Claimant filed a timely request for hearing. On April 20 and April 28, 2017, ALJ Shoemake conducted a hearing, and on May 4, 2017 issued Hearing Decision 17-UI-82631, affirming the Department's decision. On May 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he contended that the ALJ erred in excluding certain documents from evidence that claimant marked as Exhibit 7 for identification and offered at the hearing. Because, on review, EAB disposed of this matter in claimant's favor on grounds other than the drug test administered on January 12, 2017, EAB need not and does not consider whether the ALJ's ruling on Exhibit 7 for identification was correct or was not.

In his written argument, claimant also included certain information not offered into evidence during the hearing. However, claimant did not explain why he could not present this information at the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For that reason, EAB did not consider the new information that claimant sought to introduce by way of his written argument. EAB considered only information received into evidence when reaching this decision.

FINDINGS OF FACT: (1) The Boeing Company employed claimant as a machine operator from February 18, 2011 until January 12, 2017.

(2) The employer had a written drug and alcohol policy to control the effects of drugs and alcohol in the workplace. That policy prohibited employees from reporting for work or remaining on duty after the unauthorized use of controlled substances, including opiates. Exhibit 1 at 6, 7. The policy also prohibited employees from a "refusal to test," defined as refusing to participate in drug and alcohol testing or tampering with or attempting to invalidate by any means an accurate test result. Exhibit 1 at 4. Among other types of drug testing, the policy permitted "reasonable suspicion" testing, defined as allowed when an employee's conduct would cause a reasonable person to believe that the employee was impaired. Exhibit 1 at 10. The policy required that to initiate a reasonable suspicion test, two employees, one who was a manager and one who was trained in observing and documenting impairment, agreed that the employee appeared impaired. Exhibit 1 at 10. The policy further required that both employees "observe and document the impairment indicators and concur that the employee may be impaired." Exhibit 1 at 11. If an employee tested positive for controlled substances, the policy allowed the employee to remain employed if the employer and employee agreed to enter into a compliance notification memorandum (CNM) agreement for three years. Exhibit 1 at 13. Among other things, the terms of an acceptable CNM required the employee to submit to unannounced drug testing for the three years the CNM was in effect and required the discharge of the employee if the employee tested positive for any controlled substances during those three years. Exhibit 1 at 13. The employer provided a copy of its drug and alcohol policy to claimant.

(3) On September 4, 2015, claimant's manager observed that he was asleep at his machine while on duty and that claimant was "confrontational" when awakened. Transcript at 8. Claimant was not observed sleeping by a second employee or manager and no impairment indicators were documented by a second employee or manager. Transcript at 19. Subsequently, claimant's manager and a second manager signed a "request to test form," requiring claimant to submit to a drug test. Exhibit 6 at 1. Although the second manager had not observed claimant sleeping, he concurred with the first manager that claimant should be subjected to a reasonable suspicion drug test based on the first manager's observations. Transcript at 7-8. On that same day, September 4, 2015, claimant provided a urine sample for a drug test. On September 10, 2015, University Services MRO issued a report finding that claimant's urine sample was positive for 6-monoacetylmorphine, an active metabolite of heroin, a controlled substance. Exhibit 6 at 2, 3; Transcript at 20, 21. That test result was re-analyzed and confirmed. Exhibit 6 at 3.

(4) On September 11, 2015, claimant entered into a CNM with the employer. As a condition of continued employment, claimant agreed, among other things, to submit to unannounced follow up drug and alcohol testing for a period of three years and agreed that a verified positive drug test result or a refusal to test determination in that three year period would result in his discharge. Exhibit 2 at 1.

(5) On January 12, 2017, at the end of his shift, claimant was instructed to submit to drug and alcohol testing under the September 11, 2015 CNM. As part of that testing process, claimant was required to give a urine sample. The employer believed that claimant tried to substitute a yellow fluid for the urine sample produced by his body during the test or had adulterated a urine sample provided from his body with the yellow fluid. The employer determined that claimant's actions in tampering with the urine sample constituted a refusal to submit to the drug test, which was a violation of the CNM.

(6) On January 12, 2017, the employer discharged claimant.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for committing a disqualifying act.

In Hearing Decision 17-UI-82631, the ALJ concluded that claimant's behavior during the drug test administered on January 12, 2017 was a disqualifying act. The ALJ reasoned that since claimant agreed to unannounced drug testing in the CNM and to a discharge if he refused to submit to a test or tampered with a urine sample that was ostensibly collected from his body during the testing process, and he tried to introduce a yellow fluid into the urine collection cup during the January 12, 2017 test, he violated the terms the CNM, which was a disqualifying act under the Department's drug and alcohol adjudication policy. Hearing Decision 17-UI-82631 at 4. In support of her conclusion, the ALJ further noted that "[t]he record does not assert or suggest that the last chance agreement [i.e. the CNM] contained any unreasonable terms." Hearing Decision 17-UI-82631 at 4. We disagree with the ALJ, and conclude that claimant's behaviors during the January 12, 2017 test did not constitute a disqualifying violation of a last chance agreement under the Department's drug and alcohol adjudication policy, even if those behaviors might have constituted a refusal to test under the employer's policies.

ORS 657.176(2)(h) provides that an individual is disqualified from benefits if the individual committed a disqualifying act as described in ORS 657.176(9). ORS 657.176(9)(a)(A) provides that an individual is considered to have committed a disqualifying act if the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer to govern the effects of drugs or alcohol in the workplace, and ORS 657.176(9)(a)(G) provides, in addition, that an individual is considered to have committed a disqualifying act if the individual violates the terms of a last chance agreement with the employer. ORS 657.176(13)(c)(A)-(B) define a "last chance agreement" as a "reasonable agreement" between an employer and employee who has violated the employer's "reasonable written [drug and alcohol] policy" that permits the employee to return to work under certain specified conditions. OAR 471-030-0125(3) (March 12, 2006) sets out the requirements that an employer's drug and alcohol policy must satisfy to be considered "reasonable," one of which is that the employer "follows its policy." OAR 471-030-0125(3)(b).

The employer required claimant to submit to the January 12, 2017 drug test based on the provisions of the September 11, 2015 CNM, and did not have a separate reason under its policies for requiring claimant to undergo drug and alcohol testing. Given the purpose and terms of the CNM, it appears to closely approximate a "last chance agreement" within the meaning of OAR 657.176(13)(c). However, since violating a last chance agreement is a disqualifying act under the Department's drug and adjudication policy only if, among other things, the event giving rise to it was a violation of an employer's reasonable written drug and alcohol policy, the first inquiry is whether the drug test that claimant failed on September 4, 2015 constituted a violation of the employer's reasonable drug and alcohol policy.

With respect to initiating a reasonable suspicion drug test, like that which was given to claimant on September 4, 2015, the plain language of employer's drug and alcohol policy required that two employees concur in the decision to compel the testing and that both employees "observe and document the impairment indicators." Exhibit 1 at 11 (§(2)(f)(1)). When asked, the employer's witness at hearing testified that, despite the requirements of the employer's written drug and alcohol policy, only one employee, claimant's manager, had observed him sleeping at work on September 4, 2015, which was the impairment indicator that caused the employer to initiate the reasonable suspicion drug test. Transcript

at 7-8, 19. Also in contradiction with what the employer's drug and alcohol policy actually stated, the employer's witness testified emphatically that a reasonable suspicion drug test was properly initiated under that policy based on the observation of a single employee and the second employee only "needs to concur that the reason to test is legitimate." Transcript at 19-20. Comparing the unambiguous language in the policy with the witness's testimony about how the reasonable suspicion drug test of claimant came about on September 4, 2015, the record shows the employer did not follow the requirements of its own policy in initiating the test.

Because the employer did not follow its policy, the drug test on September 4, 2015 was not instigated under a "reasonable" employer drug and alcohol policy, and claimant's positive result from that test was not a violation of the employer's reasonable policy as that term is defined by the Department's drug and alcohol adjudication policy. It follows, then, that the CNM claimant entered into on September 11, 2015 was not a "last chance agreement" based on a violation of a reasonable employer drug and alcohol policy, and that claimant's discharge for violating the CNM by allegedly tampering with his urine test sample on January 12, 2017 cannot be considered a violation of a "last chance agreement" as that term is defined at ORS 657.176(13)(d)(A), and claimant's discharge for violating the CNM therefore cannot be considered a disqualifying act under the Department's drug and alcohol adjudication policy. Since the drug test undertaken on January 12, 2017 was based upon the terms of the CNM, and was not otherwise authorized by the employer's policies, claimant's alleged "refusal to test" by tampering with or adulterating his urine sample, considered alone, does not constitute a disqualifying act. Claimant therefore is not disqualified from benefits based on the commission of a disqualifying act.

DECISION: Hearing Decision 17-UI-82631 is set aside, as outlined above.[1]

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

DATE of Service: June 21, 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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[1] 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.