

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0848

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not commit a disqualifying act (decision # 144502). The employer filed a timely request for hearing. On June 26, 2017, ALJ S. Lee conducted a hearing, and on June 29, 2017 issued Hearing Decision 17-UI-86893, affirming the Department's decision. On July 18, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Express Employment Professionals employed claimant from August 4, 2016 until December 1, 2016. Express Employment Professionals was an employee leasing agency. The employer assigned claimant to work for its client, Riddle Laminators, as a member of Riddle Laminators' break-down crew.

(2) The employer had a written policy designed to govern the effects of drugs and alcohol in the workplace. The policy prohibited employees from working under the influence of alcohol or substances that were illegal under federal or state standards or were impairing. Among other things, the policy allowed for pre-employment, random and reasonable suspicion testing. Upon hire, claimant received a copy of the employer's drug and alcohol policy.

(3) On November 23, 2016, Riddle Laminators contacted and informed the employer that claimant was exhibiting behaviors that were indicative of drug abuse. Riddle Laminators did not describe those behaviors to the employer. Riddle Laminators informed the employer that it was "not comfortable" having claimant work in its workplace any longer. Audio at ~11:40. After that day, the employer "pulled" claimant from the assignment with Riddle Laminators, and claimant did not again work on that assignment. Audio at ~9:48. The employer removed claimant from the assignment pending the administration of a drug test that would confirm or disconfirm Riddle Laminators' suspicions.

(4) Some time on or after November 23, 2016, the employer told claimant to report to OccuHealth/Evergreen Family Medicine, a clinic, to provide a urine sample for drug testing. On

November 28, 2016, claimant provided the urine sample. OccuHealth/Evergreen sent the sample to Pathology Associates Medical Laboratories (PAML) for evaluation. PAML was a federal and state licensed clinical laboratory. PAML performed initial and confirmatory tests on claimant's urine sample. Both tests showed that claimant tested positive for amphetamines, morphine and tetrahydrocannabinol (THC). THC was illegal under federal standards and amphetamines and morphine were illegal without a prescription under state and federal standards. Claimant did not have any prescriptions for the substances PAML detected in his urine sample.

(5) On approximately December 1, 2016, an employer representative notified claimant of the positive drug test result. The representative also told claimant that his assignment with Riddle Laminators was over.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for committing a disqualifying act.

OAR 471-030-0038(2)(b) (August 3, 2011) states that if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the work separation is a discharge. The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a). In the case of individuals working for temporary agencies or employee leasing companies, the employment relationship is deemed severed at the time that a work assignment ends. *Id.* Here, claimant was willing to continue his work assignment for the employer, an employee leasing company, after December 1, 2016, but the employer ended the assignment on that date. The employer therefore discharged claimant on December 1, 2016.

ORS 657.176(2)(h) provides that an individual who has committed a disqualifying act under ORS 657.176(9) or (10) is disqualified from receiving benefits. ORS 657.176(9)(a)(D) and (F) state that an individual who is under the influence of intoxicants while performing work for the employer or an individual who tests positive for drugs or alcohol in connection with employment has committed a disqualifying act. OAR 471-030-0125(2)(c) (March 12, 2006) states that an individual is "under the influence of intoxicants" if at the time a test is administered in accordance with the provisions of an employer's reasonable written policy, the individual has "any detectable level" of drugs or alcohol in the individual's system unless the policy specifies a particular level. OAR 471-030-0125(2)(e) states that an individual "tests positive" for an unlawful drug if when a test is administered in accordance with an employer's reasonable written policy, the individual has "any detectable level" of such drug in the individual's system if the policy does not specify a specific cut off level.

OAR 471-030-0125(3) defines a reasonable written employer drug and alcohol policy as one that prohibits the effects of drugs or alcohol in the workplace, that has been published or communicated to the individual or to whom a copy was provided, that is followed by the employer, and that where, as here, provides for drug or alcohol testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(4) states that an employer has probable cause to require an employee to submit to a test for drugs and/or alcohol if: the employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs or alcohol in the workplace; or the employer has received credible information that a worker uses or may be affected by drugs or alcohol in the workplace

In the present case, the employer failed to show that it had probable cause for requiring claimant to submit to the drug test. The employer required claimant to submit to the drug test based on suspicions expressed to the employer by its client, Riddle Laminators. Because the employer did not observe claimant in the workplace at Riddle Laminators and had no first-hand or objective evidence that gave it a basis to suspect claimant was impaired or affected by drugs or alcohol, the employer was required to show that it received “credible information” from Riddle Laminators that claimant may have been affected by drugs in the workplace. The employer’s witness candidly admitted that he did not obtain specific, descriptive information from Riddle Laminators about the observations on which its suspicions about claimant were based. Audio at ~11:40, ~12:13. The witness admitted he relied solely on Riddle Laminators’ opinion that claimant needed to be tested, without determining if there were reasonable grounds, indeed any plausible grounds, to support its stated belief that claimant had been under the influence of drugs or alcohol at work. On this record, where Riddle Laminators disclosed no specific information to the employer underlying its suspicions about claimant, there is insufficient evidence showing that the employer had credible information that claimant may have been affected by drugs in the workplace.

Because the employer failed to show that it had probable cause for requiring claimant to submit to the drug test, it failed to show that its policy was “reasonable” under OAR 471-030-0125(3). Claimant therefore was not “under the influence of intoxicants” under OAR 471-030-0125(2)(c), and did not “test positive” for an unlawful drug under OAR 471-030-0125(2)(e). Claimant therefore did not commit a disqualifying act under ORS 657.176(9)(a)(D) or (F), and is not disqualified from receiving benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 17-UI-86893 is affirmed.

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

DATE of Service: August 15, 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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