

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0975

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 124451). Claimant filed a timely request for hearing. On July 25, 2017, ALJ Lohr conducted a hearing, and on July 26, 2017 issued Hearing Decision 17-UI-88954, affirming the Department's decision. On August 15, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Dancer Logging, Inc. employed claimant as a mechanic's helper from November 9, 2010 until July 6, 2017.

(2) The employer had a written policy designed to govern the effects of drugs and alcohol in the workplace. The policy permitted the employer, among other things, to require an employee to submit to random or probable cause drug and alcohol testing. The employer's policy was communicated to claimant at hire and during annual trainings.

(3) On July 6, 2017, claimant took one of the employer's vehicles to a tire shop for new tires. The tire shop was one of the businesses with which the employer's employees regularly interacted. The employer's shop foreman received a call from the tire shop informing him that, while in the shop, claimant had been "acting in a manner that was not [like claimant]," that claimant had been uncharacteristically "aggressive" and that it appeared that "something was up" with claimant and it was "drug related." Audio at ~23:03, ~24:47. The tire shop employee who observed claimant first-hand that day and who had reported his behavior knew claimant well, had attended school with him and was familiar with his usual manner of interaction.

(4) On July 6, 2017, when claimant returned to the employer's shop from the tire shop, the shop foreman handed claimant some papers and told claimant that he needed take a drug and alcohol test. The foreman offered to drive claimant to the testing facility. Claimant told the shop foreman, "I don't need to take a test." Audio at ~26:09. The shop foreman drove claimant home after claimant refused to submit to drug and alcohol testing.

(5) Claimant did not communicate with the employer after July 6, 2017 and did not report for work thereafter.

CONCLUSIONS AND REASONS: Claimant committed a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if an individual has committed a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(9)(a)(B) provides that an individual has committed a disqualifying act if the individual fails or refuses to take a drug or alcohol test as required by an employer's reasonable written drug or alcohol policy. OAR 471-030-0125(3) (March 12, 2006) states, in relevant part, that an employer's written drug and alcohol policy is reasonable if it prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace, the employer follows its policy, the policy has been published or communicated to the individual or provided to the individual in writing, and when the policy provides for drug or alcohol testing, the employer has probable cause for requiring the individual to submit to the test.

The employer's written drug and alcohol policy met the prerequisites for being considered "reasonable," including that it prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace, it was published and communicated to claimant, and it provided for drug and alcohol testing. In addition, claimant did not contend and there was no evidence suggesting that the employer did not follow its own policy in requiring claimant to submit to a drug and alcohol test on July 6, 2017. The remaining issue is whether the employer had probable cause for requiring claimant to submit to the test at issue.

The employer's cause for requiring claimant to submit to a drug and alcohol test on July 6, 2017 was based on the observations of a tire shop employee as relayed to the employer's shop foreman. OAR 471-030-0125(4)(a) provides that a reasonable basis to suspect that an employee is affected by drugs or alcohol, and therefore to require the employee to submit to a drug and alcohol test, may include the display of "bizarre" or unusual behavior by the employee. If the employer has not observed first-hand the employee's behavior that gives rise to the suspicion that the employee was working while affected by drugs or alcohol, the employer may still require the employee to submit to testing if the employer has received "credible information" from some other source that the employee was so affected. OAR 471-030-00125(4)(b). Here, the information that the employer received from the tire shop employee about claimant's behavior was credible, was a reasonable basis to suspect claimant was affected by drugs or alcohol while in the tire shop, and therefore probable cause for requiring claimant to submit to the test.

First, claimant did not dispute that the tire shop employee who reported his behavior to the employer was well acquainted with him and familiar with his usual affect and manner of interaction. Since the tire shop employee had experience with claimant over a significant period of time in a variety of situations, it appears that she had a reliable foundation from which to conclude that claimant's behavior on July 6, 2017 was unusual and atypical for him. As a result, the report that the tire shop employee gave to the shop foreman about claimant's aberrational behavior on July 6, 2017 was credible, and since it was about bizarre or unusual behavior on claimant's part while on duty, it also supplied the necessary foundation for the employer to suspect claimant might be affected by drugs or alcohol in the workplace that day and to require claimant to submit to a drug and alcohol test. By refusing to take the drug and alcohol test on July 6, 2017, claimant committed a disqualifying act under ORS 657.176(9)(a)(B). Claimant therefore is disqualified from receiving benefits.

DECISION: Hearing Decision 17-UI-88954 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 7, 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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