EO: 200
BYE: 201730

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

363
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0985

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for committing a disqualifying act (decision # 104527). Claimant filed a timely request for hearing. On July 24, 2017, ALJ Seideman conducted a hearing, and on July 27, 2017 issued Hearing Decision 17-UI-89102, concluding the employer discharged claimant for misconduct and for committing a disqualifying act. On August 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written arguments submitted by the claimant and the employer when reaching this decision. The employer requested that EAB not consider claimant's written argument since claimant's argument failed to include a verbatim recitation of the language set out in OAR 471-041-0080 (October 29, 2006) stating that the argument had been served on the employer. However, the final page of claimant's argument indicated that it was copied to the employer, and it appears by the employer's reference to claimant's argument that the employer, in fact, received it. Because claimant's ostensible non-compliance with OAR 471-041-0080 was merely technical in nature and her failure to include a precise recitation of the certification language in her argument was harmless and did not prejudice the employer, the employer's request is denied.

FINDINGS OF FACT: (1) A-B Technologies International, Inc. employed claimant as a production worker from February 1, 2017 until March 30, 2017.

(2) The employer had a written drug and alcohol policy that governed the effects of drug and alcohol in the workplace. The policy prohibited employees from, among other things, using illegal drugs in the workplace or when engaged in the employer's business, or to the extent that in the employer's judgment such off-duty use impaired the employee's ability to perform the employee's job. Exhibit 2 at 1. The

employer's policy provided for pre-employment, post-accident or post-injury, random and "reasonable basis" drug testing. Exhibit 2 at 1. Claimant was given a copy of the employer's drug and alcohol policy when hired and, she signed an acknowledgement that she had received it on March 10, 2017. Exhibit 1 at 2.

(3) Claimant first began working at the workplace on an assignment through an employee leasing agency. Claimant's assignment for the employer was scheduled to end on December 28, 2016. Around that time, the employer offered claimant a permanent position contingent on passing a pre-employment drug test. At that time, claimant informed an employer representative that she probably could not pass a drug test because she had used marijuana on at least one recent occasion. Sometime later, after discussing the matter with claimant, the employer continued claimant's assignment through the leasing agency until January 31, 2017, at which time claimant agreed to submit to a drug test and, if she passed, would be offered a job with the employer. Claimant passed the pre-employment drug test and was hired in the permanent position.

(4) Around March 27, 2017, the employer's chief operating officer (COO) and human resources representative wanted to confirm that claimant was "still maintaining a drug free status." Transcript at 6. On March 27, 2017, the COO met with claimant asked if she had used drugs since the January 31, 2016 drug test, and claimant told the COO she had remained drug-free. The COO told claimant she wanted claimant to report to Cascade Health Solutions, a drug testing facility, to confirm her drug-free status. Claimant then informed the COO that she was not certain she would pass the drug test because the previous weekend she had eaten a piece of candy given to her by a friend that contained marijuana. The COO told claimant, "Well, let's just see what the results tell us." Transcript at 7. Claimant reported to Cascade that day and gave a urine specimen. When claimant returned to the workplace, the COO instructed claimant to go home until the results of the drug test were reported and known.

(5) On March 30, 2017, the employer received a report from Legacy MetroLab evaluating the urine specimen that was collected from claimant on March 27, 2017. Claimant's specimen tested positive for marijuana on an initial test and a confirmatory test. Exhibit 3 at 1. Upon receiving this report, the employer discharged claimant for violating the employer's drug and alcohol policy.

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

In Hearing Decision 17-UI-89102, the ALJ concluded both that the employer discharged claimant for misconduct under ORS 657.176(2)(a), OAR 471-030-0038(1)(c) (August 3, 2011) and OAR 471-030-0038(3)(a), and for committing a disqualifying act under ORS 657.179(2)(h), ORS 657.176(9) and OAR 471-030-0125 (March 12, 2006). The ALJ reasoned that the same circumstance, claimant testing positive for marijuana on March 27, 2017, constituted two separate grounds for finding that claimant was disqualified from receiving benefits. However, OAR 471-030-0125(1) and OAR 471-030-0125(11), read together, provide that when an unemployment insurance case involves the use, sale, possession or effects of drugs or alcohol in the workplace, and the employer has a written policy the matter of claimant's disqualification is governed exclusively by the Department's drug and alcohol adjudication policy set out at ORS 657.176(9) and (10) and OAR 471-030-0125 unless the employer has no written drug and alcohol policy, in which case the general misconduct provisions of OAR 471-030-0038 apply. Because the employer in this case had a written drug and alcohol policy and the drug test

claimant failed to pass was administered under that policy, the ALJ erred in applying the general misconduct provisions of ORS 657.176(2)(a) and OAR 471-030-0038 to claimant's work separation. Properly applying only the Department's drug and alcohol adjudication policy to claimant's work separation, we disagree with the ALJ's conclusion that claimant committed a disqualifying act.

ORS 657.176(9)(a)(D) provides that an individual has committed a disqualifying act if the individual is under the influence of intoxicants while performing services for the employer, and ORS 657.176(9)(a)(F) provides that an individual commits a disqualifying act if the individual tests positive for alcohol or an unlawful drug in connection with employment. OAR 471-030-0125(2)(c) provides that an individual is "under the influence" of intoxicants if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, the individual has any detectable level of drugs or alcohol present in the individual's system, unless the employer otherwise specifies particular levels of drugs or alcohol in its policy or collective bargaining agreement. OAR 471-030-0125(2)(e) similarly provides that an individual "tests positive" for alcohol or an unlawful drug when the test is administered in accordance with an employer's reasonable written policy and, if the policy does not specify a cutoff level, the individual has any detectable level of drugs or alcohol in the individual's system.[1]

OAR 471-030-0125(3) states, in relevant part, that an employer's written drug and alcohol policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace, the employer follows its policy, the policy has been published and 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.

This decision considers only two issues that are dispositive of this matter. It is undisputed that claimant was required to submit to the drug test on March 27, 2017 as a probable cause or reasonable suspicion test under the employer's drug and alcohol policy. Exhibit 2 at 1; Exhibit 4 at 2; Exhibit 3. Regardless of the discretionary judgment the employer's drug and alcohol policy vested in the employer to determine if the employer had probable cause to require an employee to submit to a drug or alcohol test, the Department's regulations state that an employer has probable cause to test an employee only if, prior to the time of the test, the employer had "observable, objective evidence" that gave it a reasonable basis to suspect that the employee "may be impaired or affected by drugs or alcohol in the workplace," the employer had received "credible information" that that an employee "may be affected by drugs or alcohol in the workplace," or the test was required by applicable state or federal law or a collective bargaining agreement. OAR 471-030-0125(4)(a)-(c).

Here, it appears that the employer's COO required claimant to submit to the drug test on March 27, 2017 because she wanted to follow up on the drug test claimant passed on January 31, 2017 simply to ensure

[1] With respect to the status of marijuana, now a legal recreational drug in Oregon, ORS 657.176(9)(c) states that it is no excuse under the Department's drug and alcohol adjudication policy that the use of marijuana caused an individual's violation of a drug and alcohol policy. ORS 657.176(13)(d) includes marijuana among the drugs that may cause an individual to violate to violate an employer's drug and alcohol policy by being intoxicated when it states that an individual is considered to be "under the influence of intoxicants" if, among other things, the level of marijuana in the individual's exceeds the level allowable in the employer's written policy. OAR 471-030-0125(9)(a) defines an admitted violation of a reasonable written employer drug and alcohol policy to include a policy that includes marijuana unless "in the case of drugs, *other than marijuana*, the individual can show that the violation did not result from unlawful drug use" (emphasis added).

that claimant had remained drug-free for the two months since that test. The employer presented no evidence that anyone suspected claimant was impaired or affected by drugs on March 27, 2017, that it had any observable evidence to suspect that claimant was impaired or affected by drugs on that day or any other recent day, or that it had any credible evidence from any source on which to base a suspicion that claimant was impaired or affected by drugs. In addition, the employer did not present any evidence or suggest that the probable cause test to which claimant was required to submit on March 27, 2016 was required by any law or collective bargaining agreement. While claimant ultimately admitted to the COO on March 27, 2017 that she had recently ingested marijuana, that admission came after claimant was told she was to be tested, was not the reason the COO decided to require claimant to take the drug test and could not have formed the probable cause basis for that test. The employer therefore did not have probable cause to require claimant to take the March 27, 2017 drug test. Even though claimant failed the March 27, 2017 drug test, that result may not be considered a violation of the employer's drug and alcohol policy, or to have constituted a disqualifying act.

OAR 471-030-0125(9)(a) provides that an individual may be considered to have committed a disqualifying act solely on the basis of an admission to having violated a reasonable employer drug and alcohol policy. As mentioned above, however, while claimant admitted to the COO on March 27, 2017 that she had consumed marijuana in the recent past and might fail the drug test, claimant did not admit that, by that consumption, she had violated the employer's drug and alcohol policy. *See* Transcript at 17-20. Accordingly, the admission claimant made to the COO was not, of itself, sufficient constitute a disqualifying act.

Although the employer discharged claimant, it did not show that it did so for a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-89102 is set aside, as outlined above.

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

DATE of Service: <u>September 14, 2017</u>

NOTE: 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.

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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