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BYE: 201809

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0989

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 31, 2017 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not commit a disqualifying act (decision # 90638). The employer filed a timely request for hearing. On August 4, 2017, ALJ S. Lee conducted a hearing at which claimant did not appear, and on August 15, 2017 issued Hearing Decision 17-UI-90461, affirming the Department's decision. On August 17, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) St. Charles Health Systems, Inc. employed claimant as a cook from May 15, 2015 until March 7, 2017.

(2) The employer had a written policy designed to govern the effects of drugs and alcohol in the workplace. The policy prohibited employees from possessing, using or being under the influence of drugs or alcohol while on duty or on the employer's property. The policy specified that marijuana was a prohibited drug and also that an employee was under the influence of drugs or alcohol if any detectable levels of drugs or alcohol were present in the employee's system. Exhibit 1 at 3, 4. The policy permitted the employer to require employees to submit to drug or alcohol testing on a pre-employment or post-accident basis or if the employer had reasonable cause to suspect that an employee had used, was under the influence of or was affected by drugs or alcohol while working or while on the employer's property. Exhibit 1 at 2-3. The employer required claimant to read its drug and alcohol policy at hire and to sign an acknowledgement that he had done so. At hire, the employer also informed claimant of how to access the drug and alcohol policy electronically and the employer notified all employees, including claimant, of all updates or revisions to the drug and alcohol policy.

(3) On February 23, 2017, sometime in the afternoon and near the end of claimant's work shift, an employee reported to an employer representative that the employee had observed claimant sitting inside his car in the employee parking lot and smoking something that did not appear to have been a cigarette or a vaping pen immediately before reporting for work. The employee suspected claimant had been

smoking an intoxicating substance. The employee had observed claimant engaged in this activity in his car in the parking lot on approximately February 20, 2017.

(4) After receiving this report about claimant on February 23, 2017, the employer did not inform claimant, but contacted the organization with which it contracted for drug and alcohol testing, Cascade Occupational Medicine, to have it dispatch one of its technicians to obtain a urine sample from claimant for testing. Cascade was unable to arrange for a technician to travel to the workplace before claimant's shift ended at 2:00 p.m. on February 23, 2017 or later on February 23, 2017. Rather than have claimant travel to a drug testing facility where he could have provided a urine sample that day, the employer allowed claimant to go home since no Cascade technicians were able to visit the workplace at any time that day, and it was the employer's practice to have employees provide urine samples at the workplace.

(5) Between February 23 and 28, 2017, the employer did not attempt to arrange for claimant to submit to a drug or alcohol test. On February 28, 2017, claimant next reported for work, which was approximately eight days after the employee had observed him smoking in his car and five days after the employee had reported the employee's observations and suspicions to the employer. On February 28, 2017, a Cascade technician came to the workplace and obtained a urine sample from claimant.

(6) After February 28, 2017, Cascade delivered claimant's urine sample to a laboratory for testing. It was not known with certainty whether the laboratory that evaluated claimant's urine sample was a state or federally licensed clinical laboratory, although the employer's witness at hearing thought that Cascade would only have used a licensed laboratory. Claimant's urine sample tested positive for marijuana and that result was confirmed by subsequent testing.

(7) On March 6, 2017, the employer was notified that claimant's urine samples had tested positive for marijuana. On March 7, 2017, the employer sent a notice to claimant informing that he was discharged for having tested positive for marijuana on the drug and alcohol test that was administered on February 28, 2017.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for committing 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)(D) provides that it is a disqualifying act if an individual is under the influence of intoxicants while performing services for the employer, and ORS 657.176(9)(a)(F) provides that it is disqualifying act if an individual tests positive for drugs or alcohol in connection with employment.

OAR 471-030-0125(2)(c) states that for purposes of ORS 657.176(9)(a) , 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 states that for purposes of ORS 657.176(9)(a)(F), an individual "tests positive" for alcohol or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test,

the amount of drugs or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement, or the individual has any detectable level of drugs or alcohol present in the individual's system if the policy or agreement does not specify a cut off level. OAR 471-030-0125(3) states, in relevant part, that a written employer 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.

OAR 471-030-0125(2)(d) (March 12, 2006) states that "performing services for the employer" as used in ORS 657.176(9)(a)(D) means that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration. OAR 471-030-0125(2)(h) states that "connection with employment" as used in ORS 657.176(9)(a)(F) means where such positive test affects or has a reasonable likelihood of affecting the employee's work or the employer's interest and/or workplace.

Although there may be more than one potential issue surrounding the drug test that was administered to claimant on February 28, 2017, this decision focuses on one that is outcome dispositive. The Department's rules applicable to drug and alcohol adjudications set out at OAR 471-030-0125 (March 12, 2006) do not provide guidance about how much time may permissibly elapse between the observation of behavior that gives rise to an employer's reasonable suspicion and probable cause to believe that an employee was working while affected by drugs or alcohol and the administration of a drug or alcohol test to confirm or disconfirm that suspicion. However, that matter is addressed in the Department's Unemployment Insurance Benefit Manual, which states that a drug or alcohol test that is administered on a probable cause basis, like the one administered to claimant, should measure levels of drugs or alcohol in an employee's system that are work-connected and likely affected the employee at work since failure on the test will be a disqualifying act. UI Benefits Manual (rev. April 2, 2013) Ch. 400 §460. The Manual further states that, to meet the standard of work-connectedness, the observations of the employee's behavior that gave rise to the employer's suspicions should be "near in time to the [drug or alcohol] test" and the test should be administered "in the shortest time reasonable under the circumstances [after the observation] while ensuring that the test validates the connectedness element." *Id.* According to the Manual, this element of temporal proximity is required because "[t]he longer the time gap, the more we must question the claimant's whereabouts and activities during the gap" and presumably the less likely it is that a test administered after a gap will actually be measuring the levels of drugs or alcohol in claimant's system and influencing his behavior while in the workplace. *Id.*

In this case, at least five days elapsed between when the employee's report about claimant's behavior was made to the employer and when claimant was administered the drug test on February 28, 2017, and it appears that as many as eight days may have lapsed between the employee's observations of claimant's suspicious behavior and when claimant was finally tested. That several days intervened substantially undercuts the reliability of the drug test that claimant did not pass. Under these circumstances, the Manual instructs, "Regardless who (employer or worker) caused the testing delay, do not attach any significance to the test result. Too much time has elapsed for the result to be relevant to the behavior that prompted the resting in the first place." *Id.* Disregarding claimant's positive test result, the record fails to establish he committed a disqualifying act.

The employer discharged claimant but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-90461 is affirmed.

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

DATE of Service: September 11, 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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