

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1001

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for a disqualifying act (decision # 143805). The employer filed a timely request for hearing. On August 1, 2017, ALJ Frank conducted a hearing, and on August 2, 2017 issued Hearing Decision 17-UI-89468, affirming the Department's decision. On August 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument with its application for review. In its written argument, the employer included information not offered into evidence during the hearing about the employer's drug policy. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if the party providing the information demonstrates that circumstances beyond its reasonable control prevented the party from offering the information at the hearing. The employer did not explain why it did not present this information at the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so. For that reason, EAB did not consider the new information that the employer included in its written argument. EAB considered the employer's written argument to the extent it was based on evidence in the record.

FINDINGS OF FACT: (1) Landcare USA, LLC employed claimant as a tree climber foreman from June 22, 2016 until May 18, 2017.

(2) The employer had a policy that prohibited the use of drugs on the employer's premises and the possession of drugs in the "plant." Claimant signed an agreement at hire that stated, "Examples of intolerable offenses include . . . using alcohol or illegal drugs on Company premises, or [bringing] these substances into the plant." Exhibit 1 at 8. Claimant received a copy of the employer's written drug policy.

(3) On May 18, 2017, while loading the employer's truck in preparation for work off-site, claimant accidentally left his backpack containing marijuana sitting in the employer's parking lot. The

employer's office administrator drove into the employer's parking lot and saw a backpack on the ground in the lot. The office administrator brought the backpack into the office and opened it. Inside the backpack, she saw the marijuana. The employer identified the backpack as belonging to claimant, and claimant told the employer the backpack and marijuana belonged to him.

(4) On May 18, 2017, the employer discharged claimant because he had marijuana on the employer's property.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that claimant's discharge was not for a disqualifying act.

The employer discharged claimant for possession of marijuana on the employer's property. ORS 657.176(2)(h) provides that an individual shall be disqualified from the receipt of benefits if the individual has committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(E) makes it a disqualifying act to possess a drug unlawfully or in violation of the employer's reasonable written policy during work. A written employer policy is reasonable if the policy prohibits, among other things, the use or possession of drugs in the workplace; the policy has been published and communicated to the individual or provided to the individual in writing; and the employer follows its policy. OAR 471-030-0125(3) (March 12, 2006). "Drug" means a controlled substance as defined in ORS 475.005. ORS 657.176(13)(b). ORS 475.005 defines "drug" as "a drug . . . classified in Schedules I through V under the federal Controlled Substances Act, 21 U.S.C. 811 to 812." 26 USC §812 Schedule 1 at (c)(10). For purposes of ORS 657.176(9), "unlawful drug" means a drug that is unlawful to . . . possess . . . under Oregon law." OAR 471-030-0125(2)(g).

It is first necessary to determine if claimant violated the employer's drug policy. The employer's drug policy governed the use and possession of drugs in the workplace and was provided to claimant. However, the employer's policy both prohibited the use of drugs on the employer's "premises" and "bringing these substances into the plant." Marijuana is a federal Schedule 1 controlled substance, and is, therefore a drug. *See* ORS 475.005. Although there is no evidence to show that claimant used marijuana on the employer's premises, it is undisputed that claimant possessed marijuana in the employer's parking lot on May 18. However, the plain language of the employer's policy makes it a violation to *use* drugs "on Company premises," or bring drugs "into the plant." Although the word "plant" may sometimes include a business' land, it may also refer to only a business' buildings,¹ and because the employer's policy distinguishes its "premises" from its "plant," we interpret "on Company premises" as anywhere on the employer's property, and "into the plant" as inside the employer's buildings. We therefore conclude that, according to the plain language of the employer's drug policy, claimant's possession of marijuana in the parking lot did not violate the employer's drug policy. The record therefore does not show that claimant committed a disqualifying act.

ORS 657.176(9)(a)(E) also makes it a disqualifying act to possess a drug unlawfully. Although marijuana is a drug, it is only an "unlawful drug" if it is unlawful to possess the drug under Oregon law. *See* OAR 471-030-0125(2)(g). Because the record does not show that claimant possessed more than the

¹ *See* <https://www.merriam-webster.com/dictionary/plant>, (defining "plant" as "the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business; a factory or workshop for the manufacture of a particular product; the total facilities available for production or service; or the buildings and other physical equipment of an institution.)

legal limit of marijuana permitted by Oregon law, it does not show that claimant possessed marijuana unlawfully on May 18 or that his marijuana possession was a disqualifying act. *See* ORS 475.864(6).

For the foregoing reasons we conclude that the employer discharged claimant, but not for a disqualifying act, and that he is not disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-68802 is affirmed.

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

DATE of Service: September 20, 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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