

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1092

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 101318). Claimant filed a timely request for hearing. On August 22, 2017, ALJ Shoemake conducted a hearing, and on August 29, 2017 issued Hearing Decision 17-UI-91391, affirming the Department's decision. On September 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consolidated Supply Co. employed claimant as a truck driver from April 9, 2014 until May 5, 2017. As a condition of employment, claimant was required to maintain a commercial driver's license (CDL). Aspects of claimant's employment were regulated by the United States Department of Transportation (DOT).

(2) The employer had written policy intended to control the effects of drugs and alcohol in the workplace. That policy prohibited employees from being on duty while under the influence of any intoxicating substances or having any intoxicants, including drugs or alcohol, in their blood streams. The employer's policy allowed for pre-employment, random, reasonable cause and post-accident drug and alcohol testing. On June 3, 2016, claimant received copy of the employee handbook, which included the employer's drug and alcohol policy.

(3) On May 3, 2017, claimant was randomly selected for a DOT regulated drug and alcohol test. That day, claimant provided a urine sample at a nearby medical clinic for testing. The urine sample that claimant provided was evaluated by Legacy Laboratory. Legacy was a federal or state licensed clinical laboratory. Claimant's urine sample initially tested positive for marijuana. Legacy performed a second, confirmatory test and claimant's urine sample again tested positive for marijuana.

(4) On approximately May 5, 2017, the employer discharged claimant for testing positive for marijuana on the drug test that was administered on May 3, 2017.

CONCLUSIONS AND REASONS: Claimant committed a disqualifying act.

ORS 657.176(2)(h) provides that an individual shall be disqualified from receiving benefits if the individual commits a disqualifying act as described in ORS 657.176(9). ORS 657.176(9)(a)(A) provides that an individual is considered to have committed a disqualifying act if the individual fails to comply with the terms and conditions of an employer's reasonable written drug and alcohol policy and ORS 657.176(9)(a)(F) provides that an individual has committed a disqualifying act if the individual tests positive for alcohol or an illegal drug in connection with employment. A written employer drug and alcohol policy is considered reasonable if it prohibits, among other things, the effects of drugs or alcohol in the workplace; the policy has been published or communicated to the individual or provided to the individual in writing; and the employer follows its own policy. OAR 471-030-0125(3) (March 12, 2006). A reasonable employer policy may, among other things, provide for the random drug testing of employees. ORS 657.176(1)(a)(A); OAR 471-030-0125(3)(d)(B). An employee "tests positive" for drugs when the test is administered in accordance with a reasonable written employer policy and, if no cutoff level is specified in the policy, when the employee has "any detectable level" of drugs in the employee's system. OAR 471-030-0125(2)(e). For purposes of the Department's drug and alcohol adjudication policy, "drug" means a controlled as defined in ORS 471.005. ORS 657.176(13)(b). ORS 475.005 defines "drug" as a "drug . . . classified in Schedules I through V of the federal Controlled Substances Act, 21 USC 811-812." While the use of small amounts of marijuana for recreational purposes may be legal in Oregon, it remains a controlled substance under federal law and no exceptions are made under the Department's regulations that prevent an employer from prohibiting its effects in the workplace in a reasonable employer drug and alcohol policy. 26 USC §812, Schedule I at (10)(c); OAR 471-030-0125(9)(a).

Because the employer's drug and alcohol policy was written, a copy of it was provided to claimant, it was intended to govern the effects of drugs and alcohol in the workplace, it authorized only the types of testing allowed under the Department's drug and alcohol policy statutes and regulations, and there was no showing that the employer did not follow its own policy, the policy was reasonable, and it was reasonable for the employer to have required claimant to submit to a random drug test on May 3, 2017. That claimant's urine had a detectable amount of marijuana or marijuana metabolites when it was tested and that positive result was confirmed by a second test conducted by licensed laboratory established that, by this result, claimant committed a disqualifying act under OAR 657.176(9)(a)(A) and OAR 657.176(9)(a)(F).

Claimant committed a disqualifying act. Claimant is disqualified from receiving benefits.

DECISION: Hearing Decision 17-UI-91391 is affirmed.

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

DATE of Service: October 13, 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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