

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1254

Affirmed
Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On May 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 93412). On June 13, 2017, decision # 93412 became final without a record of claimant having filed a request for hearing. On September 7, 2017, claimant filed a request for hearing. On September 11, 2017, ALJ Kangas issued Hearing Decision 17-UI-92278, dismissing claimant's request for hearing on decision # 93412 as late, subject to claimant's right to renew the hearing request by responding to an appellant questionnaire by September 25, 2017. On September 25, 2017, the Office of Administrative Hearings (OAH) received claimant's response to the questionnaire. On September 28, 2017, OAH issued a letter order stating that Hearing Decision 17-UI-92278 was vacated and that OAH would schedule a hearing to address the timeliness of claimant's original hearing request and, if appropriate, the merits of decision # 93412. On October 10, 2017, OAH served notice of a hearing set for October 23, 2017. On October 23, 2017, ALJ Amesbury conducted a hearing, and on October 25, 2017 issued Hearing Decision 17-UI-95327, allowing claimant's request for hearing, and concluding the employer discharged claimant, but not for a disqualifying act. On November 1, 2017, the employer filed an application for review of Hearing Decision 17-UI-95327 with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB with its application for review, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant's request for hearing should be allowed are **adopted**.

FINDINGS OF FACT: (1) Lube Management Corp. employed claimant from February 2015 until it discharged her on April 30, 2017.

(2) The employer had a written drug policy that prohibited the possession and condition of being under the influence of illegal drugs (except marijuana) in the workplace, and that provided for drug testing based on reasonable suspicion. Claimant received a copy of the drug policy at hire and again in January 2017.

(3) On March 26, 2017, claimant's manager observed claimant exhibiting "behavior" that raised his suspicion that she was under the influence of intoxicants while at work, including a decrease in claimant's normal level of productivity. Transcript at 16. The manager spoke with claimant, and she denied being under the influence of intoxicants. The manager drove claimant to have a urine drug test, paid for by the employer, pursuant to its reasonable suspicion drug test policy. On April 1, 2017, the employer received claimant's drug test results showing the test was positive for an "illegal drug" that was not marijuana. Transcript at 18. The employer did not conduct a second confirmatory test of the initial test. Beginning that day, the employer suspended claimant for a period of up to 30 days.

(4) The employer's drug policy provided that, after the eleventh day of a suspension following a positive drug test result, the employer permitted the suspended employee to "go take their own drug test." Transcript at 12. The employer required the employee to pay for the cost of that drug test. If the employee provided a negative drug test within 30 days from the first day of the suspension, the employer permitted the employee to return to work. Claimant did not provide results of another drug test to the employer before April 30, 2017.

(5) On April 30, 2017, the employer discharged claimant for failing to take a drug test that was negative for illegal drugs other than marijuana within 30 days from the day she was suspended for testing positive for an illegal drug.

CONCLUSIONS AND REASONS: We conclude that claimant did not commit a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the claimant has committed a disqualifying act. ORS 657.176(9)(a)(B) provides, in pertinent part, that an individual has committed a disqualifying act if she fails to take a drug test as required by the employer's reasonable written policy. OAR 471-030-0125(2)(b) (March 12, 2006) provides that an individual fails to take a drug test when the individual does not take a drug test as directed by the employer in accordance with the provisions of an employer's reasonable written policy. OAR 471-030-0125(6) provides that no employer policy is reasonable if the employee is required to pay for the cost of the drug test. OAR 471-030-0125(10)(a) provides that, in the case of a positive urine test for drugs, in order to determine whether an individual fails a test, is under the influence, or tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory.

In the present case, the employer's drug policy was not reasonable because claimant was required to pay for a second, confirmatory test of the initial drug test. Moreover, the record does not show that the initial test was confirmed by a second test, or that the initial test was conducted in a federal or state licensed clinical laboratory. Because the employer's test was not administered according to a reasonable

written policy, and the record does not show that the test was confirmed by a second test, claimant did not fail to take a drug test as required by the employer's reasonable written policy under ORS 657.176(9)(a)(B) and OAR 471-030-0125(2)(b), and therefore did not commit a disqualifying act under ORS 657.176(2)(h).

Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-95327 is affirmed.

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

DATE of Service: November 30, 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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