

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0324

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act under the Employment Department’s drug and alcohol adjudication policy (decision # 95105). Claimant filed a timely request for hearing. On March 15, 2018, ALJ Wyatt conducted a hearing, and on March 23, 2018 issued Order No. 18-UI-105861, concluding claimant did not commit a disqualifying act and is not disqualified from benefits. On April 5, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the employer’s written argument in reaching this decision and it is addressed herein.

FINDINGS OF FACT: (1) Starbucks Corporation employed claimant as a barista until it discharged him on January 6, 2018.

(2) The employer had a written policy that was communicated to claimant that prohibited employees from “using alcohol, drugs or any other substances which may impair their work performance or the ability to professionally represent Starbucks.” The policy further prohibited employees from “working while under the influence of alcohol or drugs,” and reporting to work “under the influence of alcohol, illegal drugs or controlled substances not in accord with a valid prescription.” The employer’s policy did not provide for drug testing. Exhibit 1 at 3.

(3) From December 14 through December 16, 2017, claimant was ill with a cold. On the morning of December 15, 2017, claimant consumed cannabis edibles. Claimant did not work on December 15. On the night of December 15 and the morning of December 16, claimant took cold medicine.

(4) Claimant was scheduled to work beginning at 5:00 a.m. on December 16, 2017. When claimant awoke before his shift, he felt sick, dizzy and had low energy. Claimant felt worse once he reported to work an hour later, at 5:00 a.m. Claimant had an anxiety disorder and experienced panic attacks during his shift that day.

(5) On December 16, 2017, claimant's manager was a customer at the employer's coffee shop where claimant worked, and observed claimant leaning on the counter and acting in an "unprofessional" manner. Transcript at 7. The manager discussed claimant's behavior with the shift supervisor on duty, who reported to the manager what she had observed, that claimant was not able to stand up straight or focus on customers' orders or talk, would "wander" away from his position at the register into the back room, and seemed unable to complete tasks asked of him. Transcript at 15. The supervisor also told the manager that claimant had told her that he believed he was still under the influence of cannabis edibles he had consumed the prior evening. The manager observed that claimant had "difficulty paying attention, delayed reactions, and poor muscle and limb coordination." Exhibit 1 at 2.

(6) Claimant's supervisor sent claimant home before the end of his shift, without explanation to claimant. The supervisor had waited to send claimant home until it had two other employees on shift, as required by an employer policy.

(7) Claimant worked until January 6, 2018 without further incident. On January 6, 2018, the employer discharged claimant for allegedly being under the influence of marijuana at work on December 16, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant did not commit a disqualifying act under the Department's drug and alcohol adjudication policy and is not disqualified from receiving unemployment compensation benefits.

ORS 657.176(2)(h) provides that an individual is disqualified from benefits if the individual committed a disqualifying act described in ORS 657.176(9). An individual is considered to have committed a disqualifying act if the individual fails to comply with the terms and conditions of a reasonable written policy that is established to govern the effects of drugs, cannabis or alcohol in the workplace, or if the individual is under the influence of intoxicants while performing services for the employer. ORS 657.176(9)(a)(A); ORS 657.176(9)(a)(D). An individual is also considered to have committed a disqualifying act if the individual admits a violation of a reasonable written employer policy governing the effects of drugs, cannabis, or alcohol in the workplace. OAR 471-030-0125(9)(a). For purposes of ORS 657.176(9), 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, cannabis, or alcohol present in the individual's system, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement. OAR 471-030-0125(2)(c) (January 11, 2018).

It is first necessary to determine if the record shows claimant violated the employer's drug policy. The employer's drug policy governed the use and effects of drugs in the workplace and was communicated to claimant. The employer's policy did not specifically mention cannabis in its policy. An employer's policy does not need to mention cannabis specifically for it to be governed under the policy. Here, the employer's policy prohibited employees from *using* "any other substances which may impair their work performance or the ability to professionally represent Starbucks." Because cannabis may impair an employee's work performance or ability to professionally represent the employer, the employer's policy prohibited the *use* of cannabis. However, the employer did not discharge claimant for using cannabis at work. Rather, the employer discharged claimant for allegedly being *under the influence* of cannabis while working, which conduct the employer addresses separately in its drug policy.

The plain language of the employer's drug policy prohibits employees from "working while under the influence of" drugs and reporting to work "under the influence of . . . illegal drugs or controlled substances not in accord with a valid prescription." The employer's drug policy does not list cannabis or otherwise define what "drugs" means for purposes of its policy. Nor does it provide a more general term or prohibition for the *influence* of intoxicants as it does for the *use* of substances at work. As asserted in its written argument, the employer's policy "covers all controlled substances," but mistakenly argues that cannabis is a controlled substance under Oregon law. ORS 657.176(13) defines "drug" as a controlled substance as defined in ORS 475.005, which explicitly excludes cannabis from being a controlled substance. ORS 475.005(6)(b). Thus, because the employer's policy is limited to the influence of "drugs," "illegal drugs" and "controlled substances," we conclude that the plain language of the employer's drug policy does not prohibit employees from working while under the influence of cannabis.

The employer argues in its written argument that the ALJ's conclusion, that claimant was not under the influence of cannabis, was inconsistent with his findings of fact because his findings of fact show observable, uncontested evidence consistent with a person under the influence of cannabis such as difficulty speaking, lost focus and inability to follow directions. We disagree that the ALJ was incorrect in deciding that claimant was not "under the influence" of cannabis under Employment Department law because, even though claimant exhibited behavior suggesting he might be under the influence of cannabis, to establish that claimant was "under the influence" for purposes of Employment Department law, the employer would have had to test claimant for cannabis in accordance with the provisions of a reasonable written policy or collective bargaining agreement and the result of the test would have to show a detectable level of cannabis or a particular level of cannabis specified in its policy or collective bargaining agreement. OAR 471-030-0125(2)(c). The employer's policy does not provide for drug testing, and the employer did not test claimant. Therefore, the employer did not establish that claimant violated its policy or that he was "under the influence" of cannabis on December 16. Furthermore, we reject the employer's argument that OAR 471-030-0125(9)(b) applies to this case. That rule provides that, in the absence of a test, an employee may be found "under the influence of *alcohol*" based on clear observable evidence. The employer did not allege at hearing that claimant was under the influence of alcohol, and OAR 471-030-0125(9)(b) does not apply to this case.

The employer also argues in its written argument that its witness asserted at hearing that claimant admitted he had "consumed pot brownies." At hearing, the employer alleged that claimant admitted that on December 16 he was still under the influence of cannabis edibles consumed on December 15. An individual is considered to have committed a disqualifying act if the individual admits a violation of a reasonable written employer policy governing the effects of drugs, cannabis, or alcohol in the workplace. OAR 471-030-0125(9)(a). The employer did not allege claimant used cannabis at work. Moreover, claimant denied having spoken to his supervisor about consuming cannabis the evening of December 15 and although he had consumed cannabis the morning of December 15, asserted that his poor performance at work on December 16 was due to illness and possibly cold medicine and panic attacks, and that he was not under the influence of cannabis on December 16. Transcript at 22. Absent a basis for concluding that claimant was not a credible witness, his denial is as credible as the employer's witness's assertion, and the evidence is, therefore, equally balanced as to whether claimant admitted being under the influence of cannabis. In a discharge case, the employer bears the burden of proving claimant should be disqualified from benefits by a preponderance of the evidence. *Babcock v.*

Employment Division, 25 Or App 661, 550 P2d 1233 (1976). Where, as here, the evidence is equally balanced, the party with the burden of persuasion has failed to satisfy its burden of proving that claimant committed a disqualifying act by admitting he used cannabis at work.

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: Order No. 18-UI-105861 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: May 4, 2018

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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