

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0732**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151751). Claimant filed a timely request for hearing. On July 10, 2018, ALJ Scott conducted a hearing at which the employer did not appear, and on July 16, 2018 issued Order 18-UI-113191, concluding the employer discharged claimant for an act that disqualifies her from receiving benefits. On July 23, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

After the hearing, the ALJ held the record open to allow claimant to submit documents showing that she was participating in a recognized drug, cannabis or alcohol rehabilitation program within ten days after the date of the work separation. On July 10, 2018, the rehabilitation program faxed certain documents directly to the ALJ in response to this request. Those documents were admitted into evidence as part of Exhibit 1. On August 1, 2018, claimant submitted additional documents from the rehabilitation program and, in a submission dated August 9, 2018, stated that that the additional documents were prepared by the rehabilitation program to clarify the information it had provided in Exhibit 1. OAR 471-041-0090 (October 29, 2006) allows EAB to consider new and relevant information on review if the party offering it shows that the party was prevented from presenting it at the hearing by factors or circumstances beyond its reasonable control. Claimant was not reasonably able to foresee when she submitted Exhibit 1 that clarification of it would be needed.

For that reason, EAB will consider the claimant's additional submissions from August 1, 2018 and August 9, 2018 when reaching this decision. The August 1 and 9, 2018 submissions therefore have been marked as EAB Exhibit 1, admitted into the record, and included with this decision. Any party that objects to our the admission of EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

**FINDINGS OF FACT:** (1) US Forest Services employed claimant as a biological technician from March 8, 2018 until approximately May 14, 2018.

(2) The employer had a written policy governing the effects of alcohol in the workplace. The policy stated that an employee was prohibited from working if the employee had any level of alcohol in the employee's system. The contents of the employer's policy were communicated to claimant during training after she was hired. Claimant understood that the employer's vehicles constituted a part of the workplace and employees were subject to the terms of the employer's alcohol policy when using them.

(3) On April 30, 2018, claimant was working and consumed some alcohol during her lunch break, which occurred approximately in the middle of the workday. After consuming the alcohol, claimant drove one of the employer's trucks. The truck had a flat tire and claimant was required to call AAA for roadside assistance. The AAA representative noticed the odor of alcohol on claimant's breath and contacted law enforcement. A police officer arrived at the scene and claimant admitted to having driven the employer's truck after consuming alcohol. The police officer took claimant into custody and charged her with driving under the influence of intoxicants (DUII). Claimant was incarcerated. Law enforcement notified the employer of claimant's arrest for DUII.

(4) On May 1, 2018, claimant was released from jail. On May 2, 2018, claimant's supervisor contacted her and told her not report for work until the employer decided how it would proceed. A few days later, claimant's supervisor sent her an email requesting a statement from her about what had led to her arrest for DUII on April 30, 2018. Claimant complied and in her statement admitted to having consumed alcohol shortly before driving one of the employer's trucks.

(5) On or before May 8, 2018, claimant contacted Kolpia, a state licensed program providing alcohol abuse treatment services as well as services for individuals who entered into court-approved DUII diversion programs. On May 8, 2018, claimant was given a substance abuse evaluation by Kolpia. The Kolpia treatment program was a 90 day program.

(6) On approximately May 14, 2018, the employer notified claimant that she was discharged for having driven one of its trucks on April 30, 2018 after consuming alcohol.

(7) On or shortly after the May 8, 2018 evaluation at Kolpia, claimant attended one group session offered through Kolpia. Exhibit 1. Claimant did not seek or participate in additional services through Kolpia because she was awaiting a court date on entering a DUII diversion program. Exhibit 1.

(8) On approximately June 15, 2018, claimant had a court appearance on the DUII charge and the presiding judge approved claimant's entry into a diversion program subject to an assessment by county DUII coordinators.

(9) On July 10, 2018, claimant began counseling sessions through Kolpia after having scheduled an August 8, 2018 appointment for the assessment by the county DUII coordinators. EAB Exhibit 1. After the assessment, the county coordinators would determine whether claimant required an education or rehabilitation course of treatment from Kolpia. EAB Exhibit 1. As of August 1, 2018, Kolpia estimated that claimant's treatment program would be completed on October 10, 2018, which was 92 days after July 10, 2018.

**CONCLUSIONS AND REASONS:** Claimant is disqualified from receiving benefits based on her work separation from the employer.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if claimant committed a disqualifying act. 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 established by the employer that governs the effects of drugs, cannabis or alcohol in the workplace. ORS 657.176(9)(a)(A). If an individual admits to having violated a reasonable employer drug, cannabis or alcohol policy, the individual has also committed a disqualifying act. OAR 471-030-0125(9)(a) (January 11, 2018). OAR 471-030-0125(3) states, in relevant part, that a written employer policy is reasonable if it prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace, and has been published and communicated to the individual or provided to the individual in writing.

In this case, the employer's written policy was reasonable because it governed the effects of drugs, cannabis or alcohol in the workplace, and was published and communicated to claimant. Because claimant violated the policy, and admitted to her supervisor that she had violated the employer's policy, she committed disqualifying acts unless those acts were otherwise excused.

ORS 657.176(9)(b) provides that an individual is not considered to have committed a disqualifying act if at the time of or within 10 days of the date of separation the individual is participating in a recognized drug, cannabis or alcohol rehabilitation program and provides documentation of that participation to the Department. "Documentation" means a signed statement by an authorized representative of the program in which the individual is or was participating in a treatment program. OAR 471-030-0125(2)(i)(B). "Participation" means "to be engaged in a course of treatment through a recognized drug, cannabis or alcohol rehabilitation program." OAR 471-030-0125(2)(i)(C).

Although claimant may have gone to an evaluation at Kolpia on May 8, 2018, shortly after she was arrested and shortly before she was discharged, and attended one group session, it does not appear that she commenced the Kolpia rehabilitation program at that time. After attending the single group session, claimant did not at that time take part in ongoing treatment activities. It appears from the documentation that claimant provided from Kolpia that claimant did not want to start the Kolpia program until a judge had authorized DUII diversionary treatment for her and an acceptable Kolpia program had been determined for purposes of diversion. Exhibit 1; EAB Exhibit 1. A judge approved claimant for DUII diversion on June 15, 2018, well beyond 10 days after claimant's discharge, and it does not appear that claimant began a course of treatment through Kolpia until she had scheduled an assessment with the county DUII coordinators, after which she attended the group and individual counseling sessions on July 10, 2018. EAB Exhibit 1.

That claimant was not engaged in the Kolpia rehabilitation program until July 10, 2018 is corroborated by Kolpia's estimate that claimant would complete its 90 day program on October 10, 2018, 92 days after July 10, 2018. EAB Exhibit 1. As well, it is unlikely that claimant would have been begun active participation in a Kolpia program before July 10, 2018. Claimant apparently needed to have an appointment with the DUII coordinators to enable her attend the Kolpia counseling sessions. The DUII coordinators would not decide the type of rehabilitation program that claimant was required to receive through Kolpia, for purposes of DUII diversion, until the DUII coordinators' assessment was completed on August 8, 2018. EAB Exhibit 1.

In sum, the record fails to show that claimant was engaged in a course of treatment through Kolpia on or within 10 days after the date she was discharged. The employer therefore discharged claimant for acts that disqualify her from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-113191 is affirmed.

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

**DATE of Service:** August 27, 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](http://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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