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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0892

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for a disqualifying act (decision # 110152). Claimant filed a timely request for hearing. On August 7, 2018 and August 28, 2018, ALJ Amesbury conducted a hearing, and on August 30, 2018 issued Order No. 18-UI-115824, affirming the Department's decision. On September 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision to the extent the argument was relevant and based upon the hearing record. EAB did not consider claimant's argument because he did not certify that he provided a copy of it to the employer as required under OAR 471-041-0080(2)(a).

FINDINGS OF FACT: (1) The City of Gold Beach employed claimant as a police officer from June 16, 2010 to June 1, 2018.

(2) The employer's drug and alcohol policy required the following urine specimen collection procedures: the employer was to provide claimant with a form to list all prescribed medications and controlled substances currently being used; the sample would immediately be divided into two equal parts, separately sealed, labeled and stored; one sample would be sent to the testing laboratory and the other retained; and the retained sample would be held, as long as viable, until the employee either instructed that the sample be sent to the employee-designated lab or that it be destroyed.[1]

(3) The employer's drug and alcohol policy "prescribed medications" section provided that employees utilizing prescribed medications or controlled substances "that may affect his/her ability to safely perform assigned duties must immediately report this treatment to his/her supervisor," but also stated:

[1] *See* Exhibit 1, Gold Beach Police Department Labor Agreement Drug & Alcohol Policy, Article 11-Discipline & Discharge at 17-18.

> It shall be the employee's responsibility to determine from their physician whether a prescribed treatment may impair job performance. Failure to report the use of a prescribed medication or controlled substance which an employee has been informed may affect his/her abilities to safely perform assigned duties may subject an employee to disciplinary action. In the event there is a question regarding an employee's ability to safely perform assigned duties, clearance from the employee's physician will be required.[2]

(4) In July 2017, claimant investigated an assault in which the victim told claimant that her assailant had used brass knuckles. Claimant disbelieved the victim, omitted reference to the brass knuckles from his report, and later, in different contexts, stated both that the assault was "a solid assault case" and "mutual combat."[3]

(5) Prior to February 6, 2018, claimant injured his knee at work. He was prescribed hydrocodone for pain, and his physician placed him on light duty until March 6, 2018. Claimant had a conversation with the police chief when beginning light duty; the police chief understood as a result of the conversation that claimant was taking painkillers and advised him not to drive an employer vehicle.[4] Thereafter, claimant did not drive vehicles while on light duty.

(6) On March 6, 2018, claimant's physician cleared claimant to resume full duty even though he continued to prescribe claimant hydrocodone. Claimant knew based upon his training and experience that hydrocodone could cause impairment. Claimant returned to work, drove the employer's vehicles and carried a service weapon, but did not re-inform the police chief or anyone else that he continued to use hydrocodone. He did not feel impaired while at work.

(7) In April 2018, the employer discovered claimant's omission of the brass knuckles reference from his July 2017 assault reports. In late April 2018, the employer referred the omission to the chief of police.

(8) On May 1 and May 2, 2018, claimant felt exhausted, overslept, and did not report to work on time. A colleague called claimant to tell him to report to work both days.

(9) On May 3, 2018, claimant took a dose of hydrocodone approximately two hours before his shift began. He did not feel intoxicated or impaired when he reported to work, did not report his medication use to anyone, and drove a patrol vehicle on duty. Approximately two hours into his shift, claimant was involved in a motor vehicle accident that was partially his fault.[5]

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[2] *See* Exhibit 1, Gold Beach Police Department Labor Agreement Drug & Alcohol Policy, Article 11-Discipline & Discharge at 19.

[3] August 7, 2018 hearing, Transcript at 33.

[4] *See* August 7, 2018 hearing, Transcript at 54.

[5] According to claimant's physician's clinical observations and 35 years of experience as an orthopedic surgeon, the effects of hydrocodone generally last three to four hours, and an individual who took the medication would "assume[]" based upon two months of personal use of the medication "that it would not be affecting his job" three hours after he consumed a dose of medication. *See* Exhibit 1, Letter from South Coast Orthopaedic.

(10) The police chief was called into work because of claimant's accident and indicated to claimant that he might be drug tested. Claimant told the police chief that the drug test results would be positive for hydrocodone. The police chief asked claimant when he had last taken the medication; claimant initially replied that he had taken it the night before. The police chief indicated that the drug test would show how much of the drug was in claimant's system. Claimant then stated that he had taken it that morning, which he clarified was around noon before his 2:00 p.m. shift. The police chief asked why claimant had specified more than one time when answering his question, and claimant responded by telling the chief that it was his "defense mechanism" and that he was afraid of getting into trouble.[6]

(11) On May 3, 2018, the police chief collected a urine sample from claimant. He did not provide claimant with a form upon which to list the prescription medications and controlled substances he was taking. The police chief submitted the entire sample to the employer's designated laboratory, without splitting the sample or reserving half of it for claimant's potential use.

(12) Claimant's urine sample tested positive for hydrocodone. On June 1, 2018, the employer discharged claimant for violating its drug and alcohol policies.

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

As a preliminary matter, the ALJ determined that the employer discharged claimant, "in part, for violations of its policies requiring claimant to report to work on time and satisfactorily conduct investigations and prepare reports."[7] The ALJ also stated, however, that although "the employer testified that claimant would not have been fired solely for being late to work" claimant's tardiness was not attributable to him as misconduct. *Id.* We agree with the ALJ that the employer's testimony established by a preponderance of the evidence that the proximate or but-for cause of its decision to discharge claimant did not include claimant's tardiness, because the employer "didn't have time to go over that" and "[j]ust solely on the tardies probably" would not have discharged him.[8]

The ALJ's Order did not address whether or to what extent claimant's "defective investigative report" contributed to the decision to discharge claimant effective June 1, 2018, but nevertheless found that the record lacked "persuasive evidence" that claimant's conduct with respect to the defective report was misconduct, and opined that his conduct was at worst "an isolated instance of poor judgment and excusable under OAR 471-030-0038(3)(b)."[9] The employer's witness testified that the report "just landed on my desk" and he "literally hadn't had a chance to go over the fact finding investigation prior

[6] *See* August 7, 2018 hearing, Transcript at 31. The police chief initially claimed that claimant said "that lying and being untruthful was his defense mechanism." *Id.* at 41. When the ALJ asked, however, whether claimant actually said those words, the police chief clarified that he did not actually "recall if those exact words were used." *Id.* at 42. Although the record establishes that claimant admitted he answered the chief's questions as he did because of his "defense mechanism" the record does not show that claimant ever said or implied that his "defense mechanism" was "lying and being untruthful."

[7] Order No. 18-UI-115824 at 5.

[8] *See* August 7, 2018 hearing, Transcript at 35.

[9] Order No. 18-UI-115824 at 5.

to this [the prescription medication use issue] happening."[10] The preponderance of the evidence therefore established that claimant's "defective investigative report" and alleged dishonesty were likely not the basis of the employer's decision to discharge claimant when it did. Because those incidents were not the reasons the employer chose to discharge claimant, claimant's engagement in the alleged conduct described was not disqualifying misconduct.[11]

The reason the employer ultimately chose to discharge claimant when it did was his violation of the employer's drug and alcohol policy, which included his failed drug test and an alleged failure to notify the employer that he was taking hydrocodone. The ALJ concluded that claimant's failed drug test was not a disqualifying act, reasoning that "although employer offered evidence that the drug-testing portion of its drug policy was otherwise reasonable" because the employer "could not confirm that" the policy required confirmatory testing, claimant's positive drug testing was not disqualifying under OAR 471-030-0125(10)(a).[12] We agree with the ALJ's ultimate conclusion with respect to claimant's drug test failure, but on different grounds.

ORS 657.176(9)(a)(A) and (B) provide that an individual's failure to comply with an employer's "reasonable written policy" or failure of a drug test under an employer's "reasonable written policy" are disqualifying acts. However, OAR 471-030-0125(6) states that, without exception, for purposes of ORS 657.176(9), "no employer policy is reasonable if the employer does not follow their own policy." In this case, the employer conceded at the hearing and in written argument that it did not follow its own drug and alcohol policy with respect to administering a drug test to claimant.[13] Therefore, the ALJ erred in finding that the "drug-testing portion of its [the employer's] drug policy was otherwise reasonable."

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[10] *See* August 7, 2018 hearing, Transcript at 34.

[11] ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

Because the employer included the tardiness, reporting and alleged dishonesty issues in its termination notice to claimant, we note that even if we had concluded that those issues caused the work separation, we would still agree with the ALJ that the discharge was not for misconduct. Had the employer discharged claimant for tardiness, the tardiness was not misconduct because oversleeping was not the result of a conscious act on claimant's part, and therefor was neither willful nor wantonly negligent. Had the employer discharged claimant for the defective report, it is just as likely on this record that claimant acted inadvertently or by mistake in using the wrong standard to decide whether or not to include reference to brass knuckles in his report as it is that he did so consciously or with the intent to violate the employer's expectations. Had the employer discharged claimant for dishonesty, although the employer established that claimant's stated opinions about whether the altercation was "a solid assault case" or "mutual combat" varied over time, the record does not show it is more likely than not that claimant was consciously or intentionally dishonest when making either statement, as opposed to responding under different contexts based upon what he knew or thought at the time he made each statement.

[12] *See* Order No. 18-UI-115824 at 8.

[13] *See* Employer's Written Argument at 4; August 7, 2018 hearing, Transcript at 27-28, 42-43; August 28, 2018 hearing, Transcript at 49.

Because the employer did not follow its own policy, its policy was not reasonable, and claimant's discharge for violating that policy cannot be considered a disqualifying act under ORS 657.176(9).

The ALJ also concluded that the employer fired claimant "for violating the prescription drug disclosure requirements of its drug and alcohol policy."[14] The ALJ reasoned that although claimant had "informally" notified the police chief of his use of hydrocodone when going on light duty, "[p]roviding the information 'informally' is not the same as 'reporting' that information," and claimant had, by driving the employer's vehicles after his physician returned him to full duty, "implied to the chief and employer that he was no longer using painkillers."[15] The ALJ ultimately found that claimant "did not fulfill" his "duty under employer's [drug and alcohol] policy to immediately report such drug usage," and was therefore discharged for a disqualifying act.[16] We disagree.

There is no dispute that the referenced "prescription drug disclosure requirements" were part of the employer's drug and alcohol policy. In fact, the prescription medication provisions at issue appeared at page 19 of that policy. As previously noted, only violations of "reasonable" employer policies are or may be considered disqualifying acts, "no employer policy is reasonable if the employer does not follow their own policy," and, for the reasons already stated, the employer in this case conceded that it did not follow its own policy. Therefore, even if claimant violated the employer's drug and alcohol policy by failing to disclose his use of hydrocodone use, the violation was not a disqualifying act.

Even if the employer's drug and alcohol policy in this case had been reasonable, the outcome of this decision would remain the same. The ALJ erred in finding that the employer's policies imposed upon claimant any obligation after speaking with the police chief about his hydrocodone use to somehow also make a "formal" report, much less that he later re-report his continued use of the medication, as the employer's policies do not contain such requirements. Nor does this record show that the conditions in the employer's policies that were supposed to trigger claimant to report or get clearance from a physician to work while taking prescription medication – including feeling "uncertain" if he should operate a motor vehicle, feeling impaired, or believing they might be affected on duty – occurred in this case. Put another way, to any extent claimant should have reported his medication use to the employer, he did, and to any extent he should nevertheless have obtained "clearance" from his physician to work while using hydrocodone, claimant's prescribing physician did, in fact, release claimant to return to work on March 6, 2018 without any restrictions.[17]

For the foregoing reasons, the ALJ erred in concluding that claimant committed a disqualifying act under ORS 657.176(9). Claimant may not be disqualified from benefits based upon this work separation.

[14] Order No. 18-UI-115824 at 8.

[15] *Id.*

[16] *Id.*

[17] *See* Exhibit 1, Letter from South Coast Orthopaedic.

DECISION: Order No. 18-UI-115824 is set aside, as outlined above.[18]

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

DATE of Service: October 17, 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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[18] This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.