

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1067

Reversed & Remanded

PROCEDURAL HISTORY: On September 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for an act that disqualified him from receiving benefits (decision # 124832). The employer filed a timely request for hearing. On October 19, 2018, ALJ Snyder conducted a hearing, and on October 26, 2018 issued Order No. 18-UI-118829, affirming the Department's decision. On November 14, 2018, the employer filed a timely application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Bi-Mart Corporation employed claimant from August 11, 2014 to July 24, 2018.

(2) The employer had a written drug policy prohibiting the effects of drugs in the workplace. The policy provided for drug testing of any employee involved in an accident resulting in more than \$100 in property damage.

(3) On July 10, 2018, claimant was involved in accident resulting in more than \$100 in property damage. The employer required claimant to submit a urine sample for drug testing. On July 24, 2018, the employer discharged claimant for testing positive for amphetamine and methamphetamine.

CONCLUSIONS AND REASONS: Order No. 18-UI-118829 is reversed and this matter remanded for another hearing on whether claimant should be disqualified from receiving benefits based on his discharge by the employer.

ORS 657.176(2)(h) provides that an individual shall be disqualified from the receipt of benefits if the individual has committed a disqualifying act described in subsection ORS 657.176(2)(9). ORS 657.176(2)(9)(a)(D) and (F) provide that an individual has committed a disqualifying act when the

individual is under the influence of intoxicants while performing services for the employer, or tests positive for an unlawful drug in connection with employment.

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, the individual has any detectable level of drugs present in the individual’s system, unless the employer otherwise specifies particular levels of drugs in its policy or collective bargaining agreement. ORS 657.176(13)(d) and OAR 471-030-0125(2)(c) (January 11, 2018). An individual “tests positive” for an unlawful drug when the test is administered in accordance with the provisions of an employer’s reasonable written policy, and at the time of the test the amount of drugs determined to be present in the individual’s system equals or exceeds the amount prescribed by such policy, or the individual has any detectable level of drugs present in the individual’s system if the policy does not specify a cut off level. OAR 471-030-0125(2)(e). Testing for drugs must be conducted in accordance with ORS 438.435. OAR 471-030-0125(10)(a).

A written employer policy is reasonable if the policy prohibits the effects of drugs in the workplace, the policy does not require the employee to pay for any portion of the test, the policy has been published and communicated to the individual or provided to the individual in writing, the employer follows its policy, and the policy provides for blanket drug testing. OAR 471-030-0125(3) and (6). A “blanket” test for drugs means a test for drugs applied uniformly to a specified group or class of employees. OAR 471-030-0125(5)(c).

In Order No. 18-UI-118829, the ALJ concluded that claimant is not disqualified from receiving benefits based on his discharge by the employer because the employer’s drug policy was not reasonable. Order No. 18-UI-118829 at 6. In support of that conclusion, the ALJ determined that a drug test of any employee involved in an accident resulting in more than \$100 in property damage is not a blanket test because it did not apply uniformly to a specified group or class of employee. *Id.* The ALJ emphasized that the test in this case was administered only to claimant and was based on an accident, and not claimant belonging to a group or class of employees. *Id.*

As noted in the employer’s written argument, however, EAB has, for years, repeatedly and consistently interpreted employer policies providing for post-accident drug or alcohol testing as providing for a test that is applied uniformly to a specified group or class of employees, and therefore a “blanket” test for drugs or alcohol under OAR 471-030-0125(5)(c). *See* Appeals Board Decision 13-AB-1028 (May 23, 2013); Appeals Board Decision 12-AB-3429 (January 30, 2013); Appeals Board Decision 12-AB-2629 (October 16, 2012); Appeals Board Decision 11-AB-1855 (July 11, 2011); Appeals Board Decision, 09-AB-3266 (October 22, 2009). As also noted in the employer’s written argument, the Oregon Court of Appeals has affirmed EAB’s interpretation. *See Bibolet v. Employment Dep’t*, 288 OR App 489, 407 P3d 831 (2017).

Accordingly, we interpret this employer’s policy providing for post-accident drug testing as providing for a test applied uniformly to a specified group or class of employees, those involved in accidents resulting in more than \$100 in property damage, and therefore a “blanket” test for drugs under OAR 471-030-0125(5)(c). The ALJ erred in determining otherwise, and in concluding that the employer’s drug policy therefore was not reasonable, and that claimant is not disqualified from receiving benefits based on his work separation from the employer. Order No. 18-UI-118829 therefore is reversed, and this matter remanded for a full and fair hearing into all facts necessary for a determination of all issues

properly before the ALJ in this case, which the ALJ failed to do at the October 19, 2018 hearing. Such issues include whether claimant's drug test was administered in accordance with the provisions of the employer's policy, whether the employer otherwise followed its policy, and whether the policy required claimant to pay for any portion of the test.

The ALJ also should conduct a full and an fair inquiry into the facts necessary for a determination of whether claimant's drug test was conducted in accordance with ORS 438.435 as required under OAR 471-030-0125(10)(a). ORS 438.435 provides, in relevant parts, that: A clinical laboratory is authorized to perform appropriate tests on materials derived from the human body for the purpose of detecting substances of abuse in the body. All laboratories performing the tests must be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests. When the specimen of a person tested for substances of abuse is submitted to the laboratory and the test result is positive, the laboratory shall perform a confirming test which has been designated by rule of the Oregon Health Authority (OHA) as the best available technology for use to determine whether or not the substance of abuse identified by the first test is present in the specimen prior to reporting the test results.

ORS 438.435 further provides, in relevant parts, that: The operator of a substances of abuse on-site screening facility may use substances of abuse on-site screening tests.¹ If the substances of abuse on-site screening facility obtains a positive test result on a specimen and the entity indicates that the test result is to be used to deprive any person of employment, the same specimen shall be submitted to a clinical laboratory licensed under ORS 438.110 and 438.150 or an equivalent out-of-state facility, and the presence of a substance of abuse confirmed prior to release of the on-site test result. If an initial test by a special category laboratory shows a result indicating the presence of a substance of abuse in the body, a confirmatory test shall be conducted in a licensed clinical laboratory if the results are to be used to deprive any person of any employment. If any test for substances of abuse is performed outside Oregon, the results of which are to be used to deprive any person any employment, the person desiring to use the test shall have the burden to show that the testing procedure used meets or exceeds the testing standards of Oregon.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant should be disqualified from receiving benefits based on his discharge by the employer, Order No. 18-UI-118829 is reversed, and this matter is remanded for development of the record.

DECISION: Order No. 18-UI-118829 is set aside, and this matter remanded for further proceedings consistent with this order.

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

¹ "Substances of abuse on-site screening facility" means a location where on-site tests are performed on specimens for the purpose of screening for the detection of substances of abuse. ORS 438.010(21).

DATE of Service: December 18, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-UI-118829 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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