

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0122

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 80517). Claimant filed a timely request for hearing. On January 15, 2019, ALJ R. Frank conducted a hearing, and on January 16, 2019 issued Order No. 19-UI-122856, affirming the Department's decision. On February 5, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision. Claimant requested in his argument that the employer produce video surveillance evidence substantiating its claims that claimant consumed alcohol at the employer's smoking area. However, the employer is not required to produce evidence. Claimant might have subpoenaed the employer to produce such evidence for the hearing but did not, and EAB may not consider new evidence in its review unless the party establishes that factors or circumstances beyond the party's control prevented the party from producing that evidence at the hearing. It does not appear that such circumstances exist here.

FINDINGS OF FACT: (1) Elegant Auto Sales, LLC employed claimant as a salesman for two or three months before discharging him on November 10, 2018.

(2) The employer had a policy prohibiting employees from using or being under the influence of alcohol at work. The employer published its policy in a handbook, which it gave to claimant. Claimant acknowledged receiving the handbook, and understood the employer's policy about alcohol.

(3) Approximately one week prior to November 10, 2018, the owner smelled alcohol on claimant from a good distance away while on the business premises and during work hours. The owner observed that he thought claimant was drunk at the time. The owner asked claimant if he had been drinking. Claimant said he had. The owner told claimant he was not allowed to drink on the premises, and claimant agreed.

(4) Three or four days later, the owner talked to the general manager about what he had observed. Other employees had reported that claimant was drinking at work. Some customers also complained.

(5) On November 10, 2018, the owner and general manager observed claimant smelling of alcohol at work again. They also observed “a bunch of beer cans, and empty bottles and a couple of filled ones” in the employee smoking area. Transcript at 8. The trash can near the area contained another five or six empty cans. The owner and general manager concluded that claimant was still drinking on the job despite agreeing not to do so, and discharged claimant effective immediately.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant for a disqualifying act.

Claimant testified that he never used or possessed alcohol while on duty, did not violate the employer’s policy prohibiting that conduct, and thought he was actually discharged because he sustained an on-the-job injury shortly before being discharged. Transcript at 15-16. Claimant also testified that he thought the employer discharged him because he was “too aggressive” at work, and was not a “good fit.” Transcript at 18-19, 20. Although the discharge did occur in proximity to claimant seeking treatment for an on-the-job injury, the record fails to show by a preponderance of the evidence that the employer fabricated evidence of alcohol use to discharge claimant as a pretext, and actually fired claimant because of his injury. Although the owner was somewhat inconsistent prior to the hearing about the reason for discharging claimant, he provided only one reason for discharge at the hearing. We therefore focus on the employer’s allegations of alcohol use to determine whether or not claimant’s work separation was disqualifying.

ORS 657.176(2)(h) requires a disqualification from benefits if an individual has committed a disqualifying act. OAR 471-030-0125(9)(b) defines “disqualifying act” to include “clear observable evidence that the employee is under the influence of alcohol in the workplace.”

The reliability of the owner’s testimony was somewhat compromised by the inconsistent reasons given for discharging claimant. However the owner did consistently testify about what he observed and did, and consistently testified about what others observed of claimant. The owner’s testimony was supported by firsthand evidence from the employer’s witness, who was called to testify at the hearing without prior notice or time to prepare. Transcript at 29-30. The witness did not appear to have been coached or have an interest in the outcome of the hearing. Put another way, the record does not suggest a reason to find the employer’s witness unreliable or untruthful about the events he described. The witness reluctantly confirmed that he had observed claimant use alcohol at work two or three times, had once briefly talked about it with claimant, had seen signs of intoxication, and had smelled beer on his breath. Transcript at 31-33. Claimant did not question the witness or refute the testimony he gave. The owner’s testimony, hearsay from others, confirmed by the employer’s witness, outweighed claimant’s denial that he used or possessed alcohol at work.

It appears that the owner, general manager, and the other witness had repeatedly observed claimant either use alcohol, smell of alcohol, or display signs of alcohol intoxication at work. The employer’s evidence amounts to “clear observable evidence” that claimant was under the influence of intoxication at work. Claimant’s discharge was, therefore, for a disqualifying act.

DECISION: Order No. 19-UI-122856 is affirmed.

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

DATE of Service: March 7, 2019

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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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 desisyon.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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