

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0305

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 114430). Claimant filed a timely request for hearing. On March 6, 2019, ALJ Griffin conducted a hearing, and on March 8, 2019 issued Order No. 19-UI-126016, reversing the Department's decision. On March 26, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of the argument to the other parties as required by OAR 471-041-0080(2) (October 29, 2006). For that reason, the argument was not considered when reaching this decision.

FINDINGS OF FACT: (1) Roseburg Forest Products employed claimant as a laborer at its mill in Coquille, Oregon from June 18, 2018 until December 20, 2018. Claimant worked a night shift for the employer starting at 10:00 p.m.

(2) The employer had a written policy governing the use and effects of alcohol, drugs and cannabis in the workplace. At hire, the employer gave a copy of the policy to claimant. The policy allowed for the random drug testing of employees.

(3) The employer's alcohol, drug and cannabis policy had "shy bladder" procedures to follow if an employee was unable to produce a urine specimen for testing. If the "shy bladder" procedures did not result in the production of a sufficient urine specimen for testing, the policy required that the employer send the employee home with instructions to make and keep an in-person appointment with the medical review officer (MRO) of the third-party administering the test. At the appointment, the MRO would determine if there was a valid medical reason for the employee's failure to produce an adequate urine sample upon request.

(4) On December 16, 2018 at around 10:00 p.m., claimant was notified that her shift had been randomly selected for alcohol, drug and cannabis testing. Claimant initially was not able to produce a urine specimen of sufficient volume for testing. Thereafter, as the employer's "shy bladder" procedure provided, claimant was given eight ounces of water to drink every half hour for three hours in an attempt to have her generate a urine specimen of sufficient volume. During the three hours, claimant produced an adequate specimen, but it was unusable because claimant dropped the specimen cup and it spilled. At the end of three hours, claimant had not successfully submitted a specimen for testing. At approximately 3:00 a.m. on December 17, 2018, claimant was sent home. Claimant was instructed to contact OccuHealth, the administrator of the test, and to make an appointment to meet with the MRO. Claimant was given the phone number for OccuHealth and was told that she needed to make the call to OccuHealth within 48 hours. Claimant was not given any deadline by which she needed to meet with the MRO.

(5) On December 17, 2018, less than 48 hours later, claimant called OccuHealth and made an appointment with the MRO for December 20, 2018 at 12:30 p.m. The MRO was located in Roseburg, which was approximately 68 miles from claimant's home in Coquille and required a drive of one and one-half hours.¹ However, on the day of the appointment, it was raining heavily and winds were gusting. At around 10:30 a.m., claimant called OccuHealth to reschedule the appointment with the MRO because she did not want to drive to Roseburg under the weather conditions. Claimant understood from the OccuHealth employee with whom she spoke that her appointment had been rescheduled to December 21, 2018 at 12:30 p.m. However, an OccuHealth representative informed the employer that day that claimant had, without notice or explanation, failed to attend the appointment that she had scheduled with the MRO.

(6) On December 21, 2018 at 12:30 p.m. claimant appeared at OccuHealth to meet with the MRO. The OccuHealth who assisted claimant told claimant that there was no record that she had scheduled an appointment for that day with the MRO, and the MRO was not available to meet with her. The OccuHealth employee also told claimant that OccuHealth would not allow her to make another appointment with the MRO without a referral from the employer.

(7) On December 21, 2018, claimant returned to her home in Coquille. That day, claimant called the employer's human resources director and left a message. Not hearing from the human resources director, claimant left other messages for her on December 26, 2018 and January 2, 2019.

(8) Around this time, the employer discharged claimant effective December 20, 2019 for violating its alcohol, drug and cannabis policy by allegedly failing without notice to attend the appointment with the MRO that was scheduled first scheduled for December 20.

CONCLUSIONS AND REASONS: Claimant did not commit a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act as defined in ORS 657.176(9) or (10). ORS

¹ See <https://www.distance-cities.com/distance-coquille-or-to-roseburg-or>. EAB takes notice of this generally cognizable fact, which may be readily determined from sources commonly recognized as accurate. Any party who objects to EAB doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of the mailing this decision. Unless such objection is received and sustained, the noticed fact will remain in the record.

657.176(9)(a)(A) provides that an individual has committed a disqualifying act if the individual fails to comply with the term and conditions of a reasonable employer policy governing the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace. ORS 657.176(9)(a)(C) provides that an individual has committed a disqualifying act if the individual refuses to cooperate with or subverts or attempts to subvert a drug, cannabis or alcohol test required by an employer's reasonable written policy. The employer had the burden to show by preponderance of the evidence that it discharged claimant for a committing a disqualifying act. *See generally Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's position was that claimant failed to comply with its drug, cannabis or alcohol policy when she did not show up for the appointment with the MRO that she initially scheduled for approximately December 20, 2018 and allegedly neither notified OccuHealth that she was not attending nor tried to reschedule the appointment. Transcript at 6, 8, 10-11, 12, 13, 18. However, claimant explained at hearing why she did not attend the initially scheduled appointment with the MRO and stated that she both notified OccuHealth that she was canceling and rescheduled the appointment for the next day. Transcript at 24, 25, 26, 27, 28, 35. Representative(s) from OccuHealth did not testify at hearing, and neither party offered documentary or other evidence that might have independently corroborated the testimony of one of them and provided a basis for finding that one party's evidence was more reliable than that of the other. There was no basis in the record to doubt the truthfulness of the testimony of either party, and the evidence is evenly balanced on the issue of whether claimant notified OccuHealth that she was canceling the December 20 appointment with the MRO and whether claimant rescheduled that appointment for December 21. Because the employer had the burden of persuasion in this matter, the conflict in the evidence must be resolved against the employer. As such, the employer did not show that claimant failed to appear without notice for the scheduled appointment with the MRO or failed to reschedule that appointment and thereby violated the employer's drug, cannabis or alcohol policy.

Claimant also may be disqualified from benefits if the circumstances surrounding the drug test, as well as her failure to appear for the December 20 appointment with the MRO, establish that she was failing to cooperate with or attempting to subvert the testing process. While claimant may have dropped the cup and spilled the urine specimen she produced on December 17, the evidence was insufficient to show, more likely than not, that she did so to avoid having that specimen tested, which would likely have been a failure to cooperate with or an attempt to subvert the testing process. While claimant may have missed the first appointment she scheduled with the MRO on December 20, which under appropriate circumstances also could have been a failure to cooperate with an attempt to subvert the employer's testing process, she testified that she did so due to the heavy rain, wind gusts and generally poor driving conditions. Transcript at 19, 26, 35, 36. The employer's witness disagreed and contended that there were no weather issues in and around Coquille on December 20. Transcript at 18, 35, 36. Had it been demonstrated that claimant's testimony about the weather on December 20 was false, the inference might have been drawn that claimant deliberately missed the appointment with the MRO and her contentions about the weather were a pretext. However, as above, no independent evidence was presented by the parties about the weather on December 20 to corroborate the testimony of one party or discredit that of the other. As such, and also as above, the conflict in the evidence as to weather conditions on December 20 must accordingly be resolved against the employer. The evidence in the record was insufficient to show that claimant failed to cooperate with or subverted or attempted to

subvert the employer's alcohol, drug and cannabis testing process when she failed to report for the December 20 appointment with the MRO.

Claimant was not discharged for committing a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-126016 is affirmed.

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

DATE of Service: April 26, 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الاستئناف 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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