

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0391

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 28, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision #92829). Claimant filed a timely request for hearing. On April 3, 2019, ALJ Wyatt conducted a hearing, and on April 11, 2019, issued Order No. 19-UI-127981, concluding that claimant's discharge was not for a disqualifying act. On April 22, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Umpqua Dairy Products Co. employed claimant as a yard hustler, moving tractor-trailers throughout the employer's facility, until January 17, 2019.

(2) The employer had a policy that prohibited the use and effects of drugs and alcohol in the workplace. The policy provided for post-accident drug and alcohol testing if an employee was in an accident that resulted in injury or caused damage in excess of \$200 to the employer's property. The employer considered any amount of methamphetamine to be a positive test result under its policy. The employer provided claimant with a copy of its policy when it hired claimant.

(3) On January 9, 2019, claimant was in a work-related accident while he was moving a trailer. Claimant was pulling a trailer away from a loading dock as another employee was about to drive a pallet jack into the trailer. The pallet jack fell off the dock, as the driver jumped to safety. The accident did not result in injury, but caused more than \$200 damage to the employer's property.

(4) On January 10, 2019, the employer sent claimant to Occupational Health for a post-accident urinalysis drug test. Occupational Health is a certified laboratory in Oregon. On January 15, 2019, Occupational Health called the employer and told it that claimant "tested positive," for methamphetamine, but its medical review officer would make a conclusion about the test result. Transcript at 10. The medical review officer normally asked the employee about his medications before making a conclusion, because some medications could result in a "false positive" test result. Transcript at 11.

(5) Before the medical review officer reached a conclusion about claimant's test result, claimant provided Occupational Health with information about his medications. Occupational Health did not perform a second, confirming test to determine if claimant's specimen contained methamphetamines.

(6) On January 16, 2019, the employer received claimant's drug test result from Occupational Health, and it showed claimant's test was positive for methamphetamines. On January 17, 2019, the employer discharged claimant for testing positive for drugs.

CONCLUSIONS AND REASONS: Claimant's discharge was not for 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. ORS 657.176(9)(a)(F) provides that testing positive for an unlawful drug is considered a disqualifying act. The drug test must be conducted in accordance with ORS 438.435. OAR 471-030-0125(10)(a) (January 11, 2018). ORS 438.435 provides that when a drug test result is positive, "the laboratory shall perform a confirming test . . . 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."

The order under review concluded that the employer did not establish that grounds existed for post-accident testing because the record did not show there was a causal connection between claimant's driving and the damage to the pallet jack. Order No. 19-UI-127981 at 4. However, the record shows that claimant was driving a trailer and a pallet jack fell off the loading dock as it moved toward the trailer that claimant pulled away from the dock. Regardless of fault, which is not at issue here, the record shows that claimant was in an accident that caused damage in excess of \$200 to the employer's property. The employer's application of a blanket post-accident test to claimant under its policy was reasonable.

However, although the drug test was reasonable and valid, and yielded a positive test result, the employer did not show that it discharged claimant for committing a disqualifying act because claimant's positive test for methamphetamine was not confirmed by another test in accordance with ORS 438.435. The employer's witness testified that Occupational Health did "split samples" of the specimens it tested. Transcript at 11-12. However, the employer's witness did not know, and the record does not otherwise show, that the laboratory performed a second test to confirm the methamphetamine was present in claimant's specimen. When asked if the laboratory would have tested the second sample, the employer's witness testified that she "would assume that's what they did. . . . I can't tell you that for sure. . . [T]he procedure that we have is that they take a urine sample, they split [sic] in two, send one to the lab and then I can't guarantee you what the medical review officer did." Transcript at 12. The employer's witness also testified that she did not know what the laboratory's process was after claimant provided it with information about his medications, but knew that the employer was notified of the positive result on January 16. Transcript at 11. Claimant testified that his test sample was not a split sample because the test sample receipt he received when he provided his sample said that the "type of test was . . . a single." Transcript at 25-26. In the absence of evidence that claimant's sample underwent a second, confirmatory test, his initial positive drug test cannot be considered a disqualifying act for purposes of an unemployment insurance benefits determination.

Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 19-UI-127981 is affirmed.

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

DATE of Service: May 28, 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 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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