

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1037

Reversed
Disqualification

PROCEDURAL HISTORY: On September 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act under the Employment Department's drug, cannabis, and alcohol adjudication policy (decision # 140717). Claimant filed a timely request for hearing. On October 9, 2019, ALJ Monroe conducted a hearing, and on October 17, 2019, issued Order No. 19-UI-138312, concluding the employer discharged claimant, but not for committing a disqualifying act. On October 30, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sovereign Medical Transport employed claimant from July 14, 2018 until August 22, 2019 as a driver.

(2) The employer had a written workplace drug policy that prohibited, among other things, the use or effects of cannabis in the workplace. The policy stated that employees were not permitted to test positive for cannabis, even if the positive test result was from off-duty use. The employer had a contract governed by federal law that prohibited the use or effects of cannabis. The employer's drug and alcohol policy required that an employee submit to a drug test, at the employer's expense, if the employee was involved in a vehicle accident while working. The employer published and communicated its workplace drug policy to claimant. Claimant reviewed and signed it at hire and understood that it prohibited the use and effects of cannabis in the workplace.

(3) The afternoon of August 22, 2019, claimant was in a vehicle accident while working and driving one of the employer's vehicles. The employer's specialty vehicle sustained damage. Claimant was not injured. Claimant made several telephone calls to the employer's dispatch to provide information about the accident. The dispatcher told claimant she needed to submit to a drug test. Claimant told the dispatcher she had just used a restroom. The dispatcher told claimant that she still needed to complete the drug test and that he would send claimant the drug testing facility location. He sent claimant the location by email. Claimant called the dispatcher back and told the dispatcher that she would not pass the drug test because she had smoked marijuana on August 21, 2019. The dispatcher told claimant to call the general manager.

(4) Shortly after claimant spoke with dispatch, claimant called the general manager and told him that she would not pass a drug test because she had smoked marijuana the night of August 21, 2019. The general manager discharged claimant at that time for violating the employer's workplace drug policy.

(5) On August 22, 2019, the employer discharged claimant because she allegedly refused to take a drug test and because she admitted to using cannabis in violation of the employer's written drug policy.

CONCLUSIONS AND REASONS: The employer discharged claimant for committing a disqualifying act under the Employment Department's drug, cannabis, and alcohol adjudication policy.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act. ORS 657.176(9)(a)(A) provides, in relevant part, that an individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer, which may include blanket testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace. ORS 657.176(9)(a)(B) provides that it is a disqualifying act if an employee refuses to take a drug, cannabis or alcohol test as required by the employer's reasonable written policy. OAR 471-030-0125(9)(a) (January 11, 2018) provides in relevant part that an employee is discharged for committing a disqualifying act if the employee admits a violation of a reasonable written employer policy *governing the effects of drugs, cannabis, or alcohol* in the workplace, *unless in the case of drugs the employee can show that the violation did not result from unlawful drug use.* (Italics added.)

A written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; the policy does not require the employee to pay for any portion of the test; and the policy has been published and communicated to the individual or provided to the individual in writing. OAR 471-030-0125(3)(a), (b), (c). In addition, when the policy provides for drug, cannabis, or alcohol testing, the policy must provide for random, blanket or periodic testing. OAR 471-030-0125(3)(d)(B). A "blanket test for drugs, cannabis, or alcohol, or a combination thereof" means a test for drugs, cannabis, or alcohol, or a combination thereof applied uniformly to a specified group or class of employees. OAR 471-030-0125(5)(c).

The employer discharged claimant because she allegedly refused to submit to a drug test after being involved in an on-the-job vehicle accident, and because she admitted to having used cannabis on August 21, 2019, in violation of the employer's workplace drug policy. As a preliminary matter, Order 19-UI-138312 concluded that the employer's workplace drug policy was "reasonable" for purposes of ORS 657.176(9).¹ The record supports that conclusion. The employer's policy prohibited the effects of cannabis in the workplace. Claimant smoked marijuana less than 24 hours before working. It is therefore reasonable to presume that the effects of cannabis continued for more than 24 hours after the acute effects wore off. Moreover, the employer had a federal contract that prohibited cannabis use, so any cannabis use by employees could affect the employer's contract. The general manager testified that claimant's admission "sav[ed] \$80.00 for a drug test." Transcript at 37. This assertion shows the employer did not require claimant to pay for the test. Claimant reviewed the employer's written policy at hire, and understood it prohibited any use of cannabis. The employer's policy provided for post-accident

¹ Order No. 19-UI-138312 at 3.

cannabis testing. The employer applied the test uniformly to all employees involved in an accident, and was therefore a “blanket” test for cannabis under OAR 471-030-0125(5)(c).

Order No. 19-UI-138312 also concluded, and the record shows, that claimant did not commit a disqualifying act by refusing to take a drug, cannabis or alcohol test as required by the employer’s reasonable written policy.² See ORS 657.176(9)(a)(B). Claimant never stated that she would not take the test, and she remained in communication with dispatch about the details of where to report for the test. The dispatcher testified that claimant stated she would not be able to “go right then,” because she had just used a restroom, and that after he gave claimant the testing facility address, he assumed she was going there. Transcript at 45. The record therefore shows that claimant was not physically able to submit to the test immediately, but does not show that claimant refused to take the test, either explicitly or implicitly.

Order No. 19-UI-138312 also concluded that claimant’s admission to using cannabis on August 21, 2019 was not a disqualifying act pursuant to OAR 471-030-0125(9)(a) because that rule provides an exception for violations that do not result from unlawful drug use, and the definition of “drug,” or “controlled substance” does not include cannabis.³ However, according to the plain language of the rule, the exception for violation that do not result from unlawful drug use applies only to “drugs,” and not to “cannabis, or alcohol.” See OAR 471-030-0125(9)(a). “Drugs, cannabis, or alcohol” are separate categories. Therefore, whether cannabis is lawful or unlawful is irrelevant in this case for purposes of applying OAR 471-030-0125(9)(a). Claimant admitted to using cannabis the night before reporting to work. The employer discharged claimant for committing a disqualifying act because claimant admitted to using cannabis, which was a violation of the employer’s reasonable written policy governing the effects of cannabis in the workplace.

Pursuant to ORS 657.176(2)(h), claimant is disqualified from receiving unemployment insurance benefits because she committed a disqualifying act.

DECISION: Order No. 19-UI-138312 is set aside, as outlined above.

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

DATE of Service: December 4, 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.

² Order No. 19-UI-138312 at 3.

³ Order No. 19-UI-138312 at 3 (citing ORS 657.176(13) and 475.005(6)(b)).

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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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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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