

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-1124

Reversed
Disqualification

PROCEDURAL HISTORY: On October 29, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for a disqualifying act (decision # 83756). The employer filed a timely request for hearing. On November 21, 2019, ALJ M. Davis conducted a hearing, and on November 22, 2019 issued Order No. 19-UI-140174, affirming decision # 83756. On December 2, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Myrtle Point School District #41 employed claimant as a custodian from December 2017 until June 10, 2019.

(2) The employer has a federally mandated drug-free workplace policy, which prohibits employees from unlawfully manufacturing, distributing, dispensing, possessing, or using a controlled substance or alcohol in the workplace. Claimant received a copy of this policy upon hire.

(3) Claimant uses marijuana daily. Audio Recording at 19:45 to 19:47.

(4) On June 5, 2019, two of claimant's coworkers observed claimant exhibit behavior at work that was odd and out of character for him.

(5) On June 6, 2019, claimant's coworkers reported claimant's odd behavior to the school superintendent. The superintendent confirmed the coworker's observations via a video feed of claimant's work area during his June 5, 2019, work shift. The superintendent met with claimant and his union representative, and questioned claimant about his odd behavior. At this meeting claimant admitted to using marijuana and cocaine recently. Claimant also stated he had attended a rave recently and was not sure of the substance he ingested there. Based on the video and claimant's statements, the superintendent told claimant that she had reasonable suspicion to believe that claimant was under the influence of a controlled substance while at work on June 5, 2019. With claimant's consent, the employer drove claimant to a nearby hospital to get a drug test administered. Claimant provided a urine

sample. The employer covered the cost of the drug test and placed claimant on administrative leave pending the drug test results.

(6) On June 10, 2019, the drug test came back positive for marijuana and methamphetamine. The laboratory ran confirmatory tests on claimant's urine sample per the drug test report. In addition to employee drug screening, the employer uses the hospital to conduct its federal motor carrier and pre-employment drug tests. The hospital used the laboratory services of a major healthcare provider to conduct claimant's drug test.

(7) On June 10, 2019, the employer discharged claimant for failing a drug test and violating its drug-free workplace 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 probable cause 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. A written employer policy is reasonable if it prohibits the use or effect of drugs, cannabis or alcohol in the workplace and does not require the employee to pay for any portion of the test, has been published and communicated or provided in writing to the employee, and when the policy provides for drug, cannabis, or alcohol testing, the employer has probable cause for requiring the employee to submit to the test. OAR 471-030-0125(3) (January 11, 2018).

An employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if before the test, the employer has observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs or alcohol in the workplace. OAR 471-030-0125(4)(a). Such evidence may include, but is not limited to, repeated tardiness or behavior that causes substantial damage to property. *Id.* ORS 657.176(9)(a)(B) provides that it is a disqualifying act if the employee is under the influence of intoxicants while performing services for the employer. OAR 471-030-0125(9)(a) provides, in pertinent part, that it is a disqualifying act if the employee admits a violation of a reasonable written employer policy governing the use or effects of cannabis in the workplace.

The employer discharged claimant because he was working under the influence of a controlled substance during his work shift on June 5, 2019. Claimant had exhibited odd behavior during his work shift on June 5, 2019, that caught the attention of two coworkers. The coworkers reported their observations to the employer the following day and the employer broached claimant about his odd behavior after reviewing video footage that supported the coworkers' observations. During the meeting with the employer, claimant admitted to having used marijuana and cocaine recently, and suggested that he may have used a controlled substance at a rave event he attended. Claimant made these admissions with his union representative present, which suggests that they were voluntarily made. Neither the

coworker statements nor the video feed showed claimant actually use drugs at the workplace, but they helped the employer form the reasonable suspicion that the effects of drug use were in play during claimant's shift. Having reasonable suspicion that claimant had violated the employer's drug-free workplace policy is a prerequisite to asking claimant to submit to a drug test and complies with the reasonable written policy requirements outlined in OAR 471-030-0125(3).

Claimant's positive drug test validated the employer's reasonable suspicion. The record shows that claimant anticipated testing positive for marijuana, but was somewhat surprised by the methamphetamine found in his sample. Claimant knew that even if he had only tested positive for marijuana, recreational use of which is legal in Oregon, that working under its influence was a violation of the employer's zero-tolerance drug policy. At the hearing, claimant admitted that he had come to work under the influence of marijuana and made the mistake of doing so again on June 5, 2019. Audio Recording at 24:51 to 25:54. This admission, by itself, qualifies as a disqualifying act per OAR 471-030-0125(9)(a) and refutes the finding in the administrative decision and Order No. 19-UI-140174.

Order No. 19-UI-140174 also concluded that while the employer had reasonable suspicion to test claimant on June 5th, the employer did not have reasonable suspicion to subject claimant to a drug test the next day on June 6, 2019, and therefore, violated its own policy. The record does not support that conclusion, however. Claimant's erratic behavior was reported immediately to the superintendent upon her return to work and claimant's urine sample was collected less than a day after claimant's workplace drug policy violation occurred. The record does not show that the employer's drug policy required it to form reasonable suspicion or conduct a drug test contemporaneously with claimant's drug policy violation, nor need ORS 657.176 and OAR 471-030-0125 be read so narrowly. Although some proximity between the events giving rise to reasonable suspicion and the drug test is needed, there is nothing in law or rule that requires the testing be done immediately. In this case, the urine sample was collected in close proximity to the events that gave the employer reasonable suspicion to test and to claimant's drug policy violation. Furthermore, claimant did not allege using methamphetamine or marijuana after his June 5th work shift ended, which eliminates the possibility that the drugs found in his sample were ingested after his coworkers' observations of his odd behavior at work.

Order No. 19-UI-140174 also concluded that it was unknown whether a confirmatory test was performed on claimant's urine sample and whether the testing facility was state or federally licensed. The record does not support this conclusion. The drug test report listed both initial and confirmatory cutoff values for the two drugs found in the urine sample, which suggests it is more likely than not that confirmatory tests were performed. Furthermore, the hospital the employer used to perform all of the employer's drug tests – including tests of school bus drivers regulated by federal motor carrier law and the Oregon Department of Transportation (ODOT) – was appropriately licensed. The record does not show that the employer was noncompliant with federal or ODOT regulations in the way that it handled bus driver tests, or that the employer deviated from its normal regulated testing procedures when handling claimant's drug test. It is therefore reasonable to infer that the hospital and laboratory the employer used to collect and test claimant's urine sample was appropriately credentialed or licensed.

The employer has met its burden of proof in this matter. Claimant was subject to a reasonable workplace drug policy that claimant violated, and his drug testing was performed in accordance with state and federal law. Therefore, pursuant to ORS 657.176(2)(h), claimant is disqualified from receiving unemployment insurance benefits because he committed a disqualifying act.

DECISION: Order No. 19-UI-140174 is set aside, as outlined above.

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

DATE of Service: December 31, 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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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