

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0094

*Late Request for Hearing Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On November 8, 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 Department's drug, cannabis, and alcohol laws and rules (decision # 120625). On December 2, 2019, decision # 120625 became final without claimant having filed a request for hearing. On December 18, 2019, claimant filed a late request for hearing. On December 26, 2019, ALJ Kangas issued Order No. 19-UI-141730, dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by January 9, 2020. On December 31, 2019, claimant responded to the questionnaire. On January 2, 2020, the Office of Administrative Hearings (OAH) mailed a letter vacating Order No. 19-UI-141730. On January 15, 2020, OAH mailed notice of a hearing scheduled for January 28, 2020 to address the timeliness of claimant's hearing request and, if appropriate, the merits of decision # 120625. The notice included the drug and alcohol issue and the general misconduct issue. On January 28, 2020, ALJ Snyder conducted a hearing, and on January 30, 2020 issued Order No. 20-UI-143603, allowing claimant's late request for hearing and applying the general misconduct provision, ORS 657.176(2)(a), to conclude that claimant was discharged but not for misconduct. On February 3, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**.

FINDINGS OF FACT: (1) Estacada School District # 108 employed claimant from August 26, 2019 through August 30, 2019 as a school bus driver.

(2) On August 19, 2019, claimant consumed brownies that she did not know contained cannabis.

(3) The employer had a written drug and alcohol policy. Pursuant to the employer's drug policy and Department of Transportation regulations, claimant was required to test negative for cannabis to drive a school bus for the employer. On August 26, 2019, claimant submitted to a drug test.

(4) On August 30, 2019, the employer received claimant's drug test showing claimant tested positive for cannabis. The same day, the employer discharged claimant because she tested positive for cannabis.

CONCLUSIONS AND REASONS: Order No. 20-UI-143603 is reversed and this matter is remanded for further development of the record.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c).

ORS 657.176(2)(h)(A) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act. ORS 657.176(9)(a) provides 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 or through collective bargaining, which may include blanket, random, periodic and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace. OAR 471-030-0125(2)(e)(B) (January 11, 2018) provides that, for purposes of ORS 657.176(9), an individual "tests positive" for cannabis when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test the individual has any detectable level of cannabis present in the individual's system if the policy or agreement does not specify a cut off level.

Order No. 20-UI-143603 found as fact that the employer had a written drug policy that required claimant be free of drugs and cannabis, that claimant submitted to a drug test to begin work, and that the "offer of work was withdrawn" because claimant tested positive for cannabis.¹ However, despite the finding that the employer ended the employment relationship because claimant tested positive for cannabis, Order No. 20-UI-143603 adjudicated the work separation under ORS 657.176(2)(a), the misconduct provision used for cases that do not involve drug and alcohol issues. For this reason, this case is being reversed and remanded to OAH for a full inquiry under the Department's drug and alcohol adjudication policy.

The record shows that the employer's drug policy prohibited the use of cannabis unless a written prescription was provided, and provided for testing "prior to the new . . . employee's performance of safety-sensitive functions." Exhibit 1. The policy provides that the employer will withdraw immediately an offer of employment to an individual who tests positive for drugs, including cannabis. Exhibit 1. The record does not show if or when the policy was communicated or provided to claimant, or if the policy was reasonable. The record does not show if the employer followed its policy. The record does not show

¹ Order No. 20-UI-143603 at 1-2.

what was done with the sample claimant provided on August 26, and if the initial result was confirmed by a test done in a federal or state licensed lab. The record does not show if claimant admitted to using cannabis before the employer discharged her.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant is disqualified from receiving unemployment insurance benefits because she committed a disqualifying act, Order No. 20-UI-143603 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-143603 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 10, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-143603 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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