

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0588

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 10, 2020, 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 and alcohol adjudication policy, disqualifying claimant from receiving unemployment insurance benefits effective March 8, 2020 (decision # 114834). Claimant filed a timely request for hearing. On July 8 and 28, 2020, ALJ Frank conducted a hearing, and on August 3, 2020 issued Order No. 20-UI-152778, affirming the Department's decision. On August 23, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments in reaching this decision.

FINDINGS OF FACT: (1) Bi-Mart Corporation employed claimant as an assistant store manager from January 2017 until March 9, 2020.

(2) The employer had a written zero tolerance drug and alcohol free workplace policy. The policy provided that employees were prohibited from having "a recordable level of alcohol in their system while working." Exhibit 1. The policy also provided for alcohol testing, "when management determines at its discretion that there is reasonable suspicion." Exhibit 1. The policy stated that approval from a member of human resources was required before requesting that an employee submit to an alcohol test based on reasonable suspicion. The policy also stated that an employee who failed an alcohol test would be subject to discharge. Claimant received and read the policy.

(3) The employer had a reasonable suspicion checklist that listed odor of alcohol, slurred speech, and flushed face color as examples that could provide the employer with reasonable suspicion to test an employee. Exhibit 1.

(4) On March 6, 2020, shortly after claimant arrived at work, a district manager observed that claimant smelled of alcohol and used slurred speech. The district manager asked an assistant manager on duty to observe claimant separately. The assistant manager spoke with claimant, noticed that claimant smelled of alcohol, and told the district manager what she had observed. The district manager called a human resources representative, who instructed the two managers to each complete a reasonable suspicion checklist regarding their observations of claimant. The district manager noted on the checklist that claimant had an odor of alcohol and slurred speech. Exhibit 1. The assistant manager noted that claimant had an odor of alcohol and a flushed face. Exhibit 1.

(5) The district manager met with claimant and asked him if he would submit to an alcohol test because she believed he had violated the employer's drug and alcohol policy. Claimant agreed to take the test. The district manager called the store manager to take claimant to the testing facility.

(6) The store manager and claimant left the store to go to the testing facility at 11:30 a.m. When they arrived at the first facility, it was closed. They drove to a second testing facility, where a breath alcohol technician administered a breath alcohol test at 1:51 p.m. Exhibit 1. The air blank test taken at 1:50 p.m., before the first test, showed the testing instrument started from 0.000. Exhibit 1. The 1:51 p.m. test showed that claimant had a blood alcohol content of 0.045. Exhibit 1. Although there was a printer error during the first test, the printer was fixed during the test and printed the test results. Exhibit 1. A second breath alcohol test at 2:09 p.m. showed that claimant had a blood alcohol content of 0.041. Exhibit 1. The air blank test taken at 2:07 p.m., before the second test, showed the testing instrument started from 0.000. Exhibit 1. The breath alcohol technician signed the alcohol testing form certifying that he was qualified to perform the tests and that the results were as indicated on the form. Exhibit 1. Claimant was not required to pay for any portion of the test.

(7) Claimant complained to the store manager that the test results were inaccurate because he had not consumed alcohol that day. The store manager asked the employer's liaison with the testing facility to ask the facility if there was "anything weird or different" about claimant's tests. The liaison told the store manager that the facility stated that there was nothing unusual about claimant's tests.

(8) On March 9, 2020, the employer discharged claimant for violating its zero tolerance drug and alcohol free workplace policy by having a recordable level of alcohol in his system while working on March 6, 2020.

CONCLUSIONS AND REASONS: The employer discharged claimant for committing a disqualifying act under the Department's drug 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)(F) provides that an individual is considered to have committed a disqualifying act when the individual tests positive for alcohol in connection with employment. OAR 471-030-0125(2) (January 11, 2018) provides, in pertinent part:

* * *

(e) For purposes of ORS 657.176(9), an individual “tests positive” for alcohol . . . 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:

(A) The amount of . . . alcohol determined to be present in the individual’s system equals or exceeds the amount prescribed by such policy or agreement

* * *

OAR 471-030-0125 also provides, in pertinent part:

(3) [A] written employer policy is reasonable if:

(a) The policy prohibits the use, sale, possession, or effects of . . . alcohol in the workplace; and

(b) The policy does not require the employee to pay for any portion of the test; and

(c) The policy has been published and communicated to the individual or provided to the individual in writing; and

(d) When the policy provides for . . . alcohol testing, the employer has:

(A) Probable cause for requiring the individual to submit to the test

* * *

(6) For purposes of ORS 657.176(9) . . . no employer policy is reasonable if the employer does not follow their own policy.

* * *

Regarding testing, OAR 471-030-0125 provides:

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for . . . alcohol, or a combination thereof if:

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by . . . alcohol in the workplace.

* * *

(10) For the purposes of ORS 657.176(9):

* * *

(b) Breathalyzer tests for alcohol must be conducted in accordance with ORS 659A.300 and ORS 659.840.

The first issue is to determine if the employer had a reasonable drug and alcohol policy. The record shows that it did and that the employer followed its policy by obtaining probable cause before testing, and contacting a member of human resources before asking claimant to submit to a test. The policy prohibited claimant from having a recordable level of alcohol in his system at work, and claimant had received the written policy, which permitted the employer to subject claimant to probable cause testing upon observing objective indicators giving the employer a reasonable basis to suspect claimant was impaired or affected by alcohol at work. Claimant was not required to pay for any portion of the test. The preponderance of evidence shows the testing was completed in accordance with ORS 438.435, 659A.300 and ORS 659.840.

The employer had probable cause to test claimant for alcohol because the district manager noted claimant had an odor of alcohol and slurred speech, and an assistant manager later observed that claimant had the odor of alcohol and a flushed face. In his written argument, claimant implicitly asserted that the employer did not have probable cause to test claimant for alcohol because the assistant manager who observed claimant was prompted to observe him by the district manager. Claimant's Written Argument. However, the assistant manager's observations were evidence that could establish probable cause to test claimant, regardless of whether her contact with claimant was prompted by the district manager. The record does not show that the assistant manager invented her observations, or that they were based on anything other than her senses of sight and smell when she interacted with claimant. Moreover, the record does not show that the district manager suggested the assistant manager check for indications that claimant was affected by alcohol. At the time of hearing, the district manager testified she did not suggest concerns about alcohol to the assistant manager, and the assistant manager did not recall at hearing if the district manager suggested alcohol use was a possible concern. Transcript July 8, 2020 at 12-13, Transcript July 28, 2020 at 21-22. Claimant also asserted in his written argument that the employer did not have valid probable cause because other employees, including the manager who drove claimant to the testing sites, did not observe evidence that claimant may have been impaired or affected by alcohol. Claimant's Written Argument. However, the fact that other employees had contact with claimant without observing evidence that claimant was affected by alcohol does not invalidate the objective observations from two members of the employer's management. Their objective observations that claimant had an odor of alcohol, in conjunction with slurred speech and a flushed face, established probable cause for the alcohol test.

Claimant's two breath alcohol tests showed claimant had a recordable level of alcohol in his system, and therefore tested positive for alcohol. Claimant argued in his written argument that the test was not conducted properly because he used mouthwash shortly before the test and had chewing tobacco in his mouth during the test. Claimant's Written Argument. Claimant's assertion does not show that the test results were inaccurate, especially where the technician certified on the form that the tests were conducted properly. Exhibit 1. Nor is it likely that residual mouth alcohol would result in a breath

alcohol content of 0.041 or 0.045, which is substantially more than just a recordable level. Claimant also argued that alcohol may have been introduced into the mouthpiece during the test from hand sanitizer. Claimant's Written Argument. This is implausible where the alcohol test form shows the alcohol reading was .000 before each test. Claimant also argued that the test results were "dubious" based on his lack of demonstrable symptoms of alcohol intoxication before the tests. Claimant's Written Argument. However, two managers observed symptoms of alcohol intoxication including slurred speech, a flushed face, and the odor of alcohol coming from claimant.

The employer therefore has met its burden of proof in this matter. Claimant tested positive for alcohol in connection with work, which is a disqualifying act under ORS 657.176(9)(a)(F). 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. 20-UI-152778 is affirmed.

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

DATE of Service: September 17, 2020

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 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

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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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