

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0613

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for a disqualifying act and was disqualified from receipt of benefits effective March 1, 2020 (decision # 140207). Claimant filed a timely request for hearing. On September 2, 2020, ALJ Janzen conducted a hearing, and on September 3, 2020 issued Order No. 20-UI-153607, affirming the Department's decision. On September 14, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Albertson's LLC employed claimant as a deli clerk from July 13, 2019 until March 4, 2020.

(2) The employer's written drug and alcohol policy prohibited employees from being under the influence of drugs or alcohol while working. The policy provided for drug and alcohol testing upon reasonable suspicion. The employer provided claimant a copy of its policy on July 20, 2019.

(3) On March 2, 2020, claimant reported for work at 4:30 am. During that shift, some coworkers reported to the assistant store manager that claimant appeared to have bloodshot and droopy eyes, appeared tired and disheveled, and that his demeanor was combative and aggressive. The assistant store manager also observed that claimant had bloodshot eyes and appeared tired and disheveled, and notified the store manager of the situation.

(4) The store manager and a loss-prevention associate asked claimant to meet with them, and claimant complied. The store manager subsequently felt that claimant's body language became more aggressive and argumentative, and placed another employee outside her office door "as a precautionary measure in case [claimant] became... extremely upset." Transcript at 17.

(5) The loss-prevention associate asked claimant if he had used drugs or alcohol, which claimant denied. The loss-prevention associate then asked claimant if he would be willing to take a drug and alcohol test, which claimant refused. The loss-prevention associate told claimant that he could be discharged if he refused to take the test. Claimant again refused to take the test. The employer dismissed claimant from the meeting and suspended him pending an investigation.

(6) On March 4, 2020, the employer discharged claimant for refusing to take the drug and alcohol test on March 2, 2020.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(9)(a) provides that an individual is considered to have committed a disqualifying act when the individual:

* * *

(B) Fails or refuses to take a drug, cannabis or alcohol test as required by the employer's reasonable written policy;

* * *

OAR 471-030-0125 (January 11, 2018) 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 drugs, cannabis, 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 drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or

* * *

The order under review concluded that the employer had probable cause to test claimant for drugs or alcohol on the basis of their observations of his appearance and behavior; and that

because the employer had probable cause for testing claimant, claimant's refusal to submit to testing was a disqualifying act. The record does not support this conclusion.

The employer testified to having observed claimant with bloodshot and droopy eyes, a tired and disheveled look, abnormal behavior, and a combative and aggressive demeanor. Although bloodshot and droopy eyes can be a sign of intoxication, several other plausible explanations exist for why a person's eyes may appear as such. Indeed, claimant testified at the hearing that at the time he was discharged, he awoke daily at 2:00 am to care for his blind father before going to work at 4:30 am; and that among other factors, he was "under a lot of stress" due to caring for his father. Transcript at 24, 28. Claimant also indicated that he wears an "aggressive" contact lens prescription and suggested that his eyes were bloodshot and droopy every day. Transcript at 27.

Neither of the employer's witnesses offered testimony that detailed their subjective assertions that claimant had been behaving abnormally or looked tired and disheveled, and employer gave no indication of how claimant had been acting abnormally or with what baseline set of behaviors this assessment was contrasted. Given this lack of detail, these assertions have little weight. Again, several other plausible explanations exist, on this record, for a person looking "tired and disheveled" besides the suggestion that they may be intoxicated—chief among them that the person was simply tired due to a lack of sleep.

Finally, while both of the employer's witnesses gave detailed testimony of their firsthand observations of claimant's aggressive behavior, their testimony also indicated that such behavior was not unusual for claimant. For instance, the assistant store manager testified that during a different disciplinary action, claimant "got... aggressive" and used "multiple vulgar words towards" the store manager and assistant store manager," which is what led to the store manager to station another employee outside of her office during the meeting on March 2, 2020. Transcript at 21.

Similarly, OAR 471-030-0125(9)(b) requires a disqualification from benefits if, "in the absence of a test, there is clear observable an employee is under the influence of alcohol in the workplace." To any extent that the employer decided to discharge claimant in part because they thought he was intoxicated, the record did not establish, for the reasons explained above, that the employer had clear observable evidence that claimant was intoxicated.

Taken as a whole, the above evidence does not amount to observable, objective evidence that gave the employer a reasonable basis to suspect that claimant might have been impaired or affected by alcohol or drugs. Because the employer therefore lacked probable cause to suspect that claimant was impaired by drugs or alcohol, claimant's refusal to take the test was not a disqualifying act under ORS 657.176(9)(a)(B) or OAR 471-030-0125(9)(b).

DECISION: Order No. 20-UI-153607 is set aside, as outlined above.

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

DATE of Service: October 21, 2020

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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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