

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0010

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for committing a disqualifying act (decision # 83018). The employer filed a timely request for hearing. On December 23, 2020, ALJ Monroe conducted a hearing, and on December 30, 2020 issued Order No. 20-UI-158413, affirming decision # 83018. On January 4, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Caddock Electronics Inc. employed claimant from February 28, 2018 until May 14, 2020, as an assembler.

(2) The employer had a policy that provided for termination of employment for employees who engaged in prohibited conduct including “being under the influence, possessing, selling, dispensing, purchasing or partaking of marijuana, intoxicating liquor, narcotics, barbiturates or mood-ameliorating, tranquilizing or hallucinogenic drugs, or other controlled substances, while on Company premises.” Transcript at 5–6. The employer’s policy did not provide for drug or alcohol testing. The employer provided its employees with a written copy of all policies at the time of hire. On February 27, 2018, claimant acknowledged receiving and understanding both the “Caddock Electronics Employee Handbook” and the “Caddock Electronics Drug and Alcohol Abuse Policy.”

(3) Around early May 2020, the employer received reports from employees alleging that claimant was using cannabis during work hours on company property. The employer launched an investigation during which other employees described having observed claimant using a “vape pen” at the same time as when she was smoking a cigarette while on break outside the break room; using cannabis in the restroom; spraying disinfectant in the restroom after an employee noticed an “odd” odor; admitting to using cannabis; and, after leaving the restroom, making a statement to the effect of, “I’m so high.” Transcript at 8, 10, 11, 15.

(4) On May 4, 2020, claimant’s supervisor entered the women’s restroom approximately 15 minutes after claimant exited the restroom. The supervisor reported smelling a “very strong odor of

marijuana,” and indicated that no other employees were seen entering that restroom after claimant used it. Transcript at 13. On May 5, 2020, the supervisor reported the incident to the employer’s human resources department.

(5) On May 14, 2020, the employer discharged claimant for possessing and being under the influence of cannabis in the workplace on May 4, 2020. During a discussion with claimant at the time that the employer discharged her, claimant denied that she had either used or been under the influence of cannabis at work.

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:

* * *

(D) Is under the influence of intoxicants while performing services for the employer; [or]

(E) Possesses cannabis or a drug unlawfully or in violation of the employer’s reasonable written policy during work;

* * *

OAR 471-030-0125 (January 11, 2018) provides:

* * *

(9) The employee is discharged or suspended for committing a disqualifying act if:

(a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or 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.

* * *

At hearing, the employer’s witness testified to several allegations that claimant had violated the employer’s drug and alcohol policy. However, the record shows that the employer discharged claimant because of the May 4, 2020 incident in which she allegedly used cannabis at work. Therefore, the analysis must focus on that final incident. *See e.g.* Appeals Board Decision 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); Appeals Board Decision 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

If claimant did use cannabis while at work on May 4, 2020 as alleged, the incident would likely be considered a disqualifying act under ORS 657.176(9)(a)(D), ORS 657.176(9)(a)(E)¹, or OAR 471-030-0125(9)(a). However, the record does not support the conclusion that claimant was under the influence of, or in possession of, cannabis while at work on May 4, 2020. Nor does the record show that claimant admitted to violating the employer's policy on May 4, 2020, because claimant denied that the allegations were true, both at hearing and at the time the employer discharged her. Transcript at 23.

In addition to directly denying that she had used cannabis in the restroom at work on May 4, 2020, claimant also testified that she saw two other people enter the restroom after she left it, contradicting the employer's testimony that nobody had entered the restroom for 15 minutes after claimant left it. Transcript at 23–24.² The employer did not rebut claimant's assertion. Further, the employer's witness was a human resources officer for the company, and did not appear to have directly observed the events of May 4, 2020. Instead, the employer's witness testified that claimant's supervisor, who did not testify, conducted the investigation and "smelled the marijuana when he popped his head into the bathroom." Transcript at 8. The witness further testified that she believed the supervisor had investigated the matter about 15 minutes after claimant left the restroom, and suggested that he had been able to observe who was going in and out of the restroom during that time. Transcript at 11–12.

In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer has not met their burden here. Claimant offered first-hand testimony that she had not committed the disqualifying acts that the employer alleged. The employer, by contrast, offered a speculative, second-hand account that was itself based on circumstantial evidence. Because the record does not suggest that claimant's testimony was not credible, her first-hand account should be afforded more weight than the employer's account. Therefore, the employer has not met its burden to prove that claimant committed the alleged violation of its policy on May 4, 2020.

For these reasons, claimant was discharged, but not for a disqualifying act.

DECISION: Order No. 20-UI-158413 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: February 10, 2021

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,

¹ A conclusion that an individual has committed a disqualifying act under ORS 657.176(9)(a)(E) requires a finding that the employer's written drug and alcohol policy was "reasonable," as defined in OAR 471-030-0125(3). Because the question of whether the employer's policy was reasonable is not dispositive in this case, EAB did not consider it further here.

² The ALJ asked claimant whether she had used cannabis at work on May 5, 2020, rather than May 4, 2020. Transcript at 23. However, because the employer did not specifically allege that claimant had violated their drug and alcohol policy on May 5, 2020, and because the order under review concluded that the incident in the restroom had occurred on May 5, 2020, the question and claimant's resulting denial appear to be intended to refer to the May 4, 2020 incident. Order No. 20-UI-158413 at 2.

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

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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