

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0179

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective August 9, 2020 (decision # 84726). Claimant filed a timely request for hearing. On February 3 and 10, 2021, ALJ Murdock conducted a hearing, and on February 18, 2021, issued Order No. 21-UI-161173, modifying decision # 84726 by concluding that claimant was discharged for a disqualifying act and disqualified from benefits effective August 9, 2020. On March 9, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that he provided a copy of his 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 him 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) Legacy Emanuel Hospital & Health Center employed claimant as an anesthesia aide from December 30, 2013 until August 14, 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 a copy of the policy to claimant upon his hire, and reviewed the policy with him annually.

(3) One of claimant's legs is shorter than the other, and as a result he "wobble[s] a little bit" when he walks. Transcript February 3, 2021 at 8.

(4) On August 9, 2020, claimant arrived to work after sleeping little the previous night. Claimant typically worked night shifts, but on that day was called into work at a time different from his typical shift. As claimant approached the entrance to the hospital, COVID-19 symptom screeners and a security officer noticed that claimant appeared to “run into a barrier . . . in the parking lot,” and one of the screeners observed that claimant “had tilted over the table . . . and had to hold himself upright against the table” as she was checking his temperature. Transcript February 10, 2021 at 9–10. Security personnel subsequently reported to the nursing supervisor that claimant “appeared to be impaired [and] was stumbling and running into things on the way in.” Transcript February 10, 2021 at 4. Claimant then spoke to the charge nurse, who informed claimant of the suspected impairment and instructed him to wait for the nursing supervisor, who would require claimant submit to drug and alcohol testing.

(5) During his meeting with the charge nurse, claimant told her that he wasn’t feeling well. The charge nurse told claimant that he would be permitted to go home after the nursing supervisor came. The charge nurse then left claimant alone in a conference room. After about ten minutes, claimant still was not feeling well, and left. The employer subsequently suspended claimant while they investigated the issue.

(6) On August 14, 2020, the employer discharged claimant for failing to comply with the employer’s drug and alcohol policy’s testing requirement.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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:

* * *

(2) Definitions. For the purpose of this rule:

* * *

(b) For purposes of ORS 657.176(9), an individual “fails or refuses to take” a drug, cannabis, or alcohol test when the individual does not take the test as directed by the employer in accordance with the provisions of an employer’s reasonable written policy or collective bargaining agreement.

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

* * *

(d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:

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

* * *

(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.

* * *

The order under review concluded that the employer had probable cause to test claimant for drugs or alcohol “based upon his difficulty walking and his difficulty standing unsupported when the COVID-19 screener needed to check his temperature.” Order No. 21-UI-161173 at 3. The record does not support that conclusion.

The employer’s witness testified that claimant “was stumbling and running into things” on his way into the hospital. Transcript February 10, 2021 at 4. Claimant disputed that he had stumbled, and testified that the path he took into the building “has rocks and a couple of bushes, and maybe that’s what [the COVID-19 screeners] saw. Transcript February 10, 2021 at 11. Because the employer’s witness did not directly observe the events to which he testified, but was instead reading narrative accounts from witnesses who were not present at hearing, the employer’s testimony is hearsay, and accordingly given less weight than claimant’s first-hand account.

In sum, the uncontroverted evidence on the record shows that claimant had some measure of difficulty in walking into the hospital and that he held himself up on a table while a COVID-19 screener checked his temperature. Although these behaviors may be indicators of intoxication, other plausible explanations exist, such as fatigue, illness and/or an uneasy gait resulting from a disability or other physical characteristics. Claimant testified that his sleep was disturbed the prior night as a result of working a different shift than typical, and that one of his legs was shorter than the other, which caused him to “wobble.” Transcript February 3, 2021 at 8. Claimant established that both of these factors may have led to his observed behaviors, and it does not strain credulity to imagine that they would lead to similar behaviors in other individuals so affected. Further, the employer’s witness testified that their

notes on the subsequent investigation did not indicate that the charge nurse—who was in the same room with claimant—made any observations about claimant’s behavior or appearance. Transcript February 10, 2021 at 5–6. Similarly, the employer did not offer any evidence to suggest that any of their personnel observed other signs of intoxication, such as an odor of alcohol, bloodshot or glassy eyes, dilated pupils, or the like.

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. For that reason, the employer lacked probable cause to require claimant to submit to drug or alcohol testing. Because the employer required claimant to submit to testing when they lacked probable cause, the employer’s policy was not “reasonable” per OAR 471-030-0125(6). Therefore, claimant did not fail to take a test in accordance with the provisions of a “reasonable” written policy under OAR 471-030-0125(2)(b), or fail or refuse to take a test as required by a “reasonable” written policy under ORS 657.176(9)(a).

For the above reasons, the employer failed to establish that claimant committed a disqualifying act under ORS 657.176(9)(a), and is not disqualified from receiving benefits based on his discharge by the employer.

DECISION: Order No. 21-UI-161173 is set aside, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: April 14, 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, 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.

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.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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