

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0335

Reversed & Remanded

PROCEDURAL HISTORY: On March 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, disqualifying claimant from receiving unemployment insurance benefits effective May 24, 2020 (decision # 133437). Claimant filed a timely request for hearing. On April 20, 2021, ALJ Murdock conducted a hearing, and on April 21, 2021 issued Order No. 21-UI-165271, reversing decision # 133437 and concluding that the employer discharged claimant, but not for a disqualifying act. On April 27, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer 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 the employer'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).

The parties may offer new information, such as information the employer included in their written argument or the document that claimant offered at hearing that was not admitted because he did not serve a copy of it on the other party, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Morgan Millwright Service Inc. employed claimant as a journeyman pipe fitter from May 18, 2020 until May 25, 2020.

(2) On May 18, 2020, the employer gave claimant a copy of their substance abuse policy, which included the employer's written drug and cannabis testing policy. Under the written testing policy, all employees were tested for drugs and cannabis on their first or second day of work and their continued employment was conditioned upon the result of such tests being negative. Under the policy, any employee who substituted or manipulated their testing sample was subject to discharge.

(3) On May 19, 2020, the employer had claimant take a drug and cannabis test pursuant to the policy. Because claimant had smoked cannabis prior to starting work for the employer and was concerned he would not pass the test if he submitted a sample of his urine, claimant submitted a sample of synthetic urine.

(4) On May 22, 2020, the testing clinic returned a result stating that claimant's urine sample was invalid and was considered to be a substituted sample because it did not have the characteristics of human urine.

(5) On May 25, 2020, the employer discharged claimant for providing a substituted testing sample in violation of the employer's written drug and cannabis testing policy.

CONCLUSIONS AND REASONS: Order No. 21-UI-165271 is reversed and this matter remanded for further development of the record.

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:

* * *

(C) Refuses to cooperate with or subverts or attempts to subvert a drug, cannabis or alcohol testing process in any employment-related test required by the employer's reasonable written policy, including but not limited to:

* * *

(v) Interference with the accuracy of the test results by conduct that includes dilution or adulteration of a test specimen[.]

A written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; the policy does not require the employee to pay for any portion of the test; and the policy has been published and communicated to the individual or provided to the individual in writing. OAR 471-030-0125(3)(a), (b), (c) (January 11, 2018). In addition, when the policy provides for drug, cannabis, or alcohol testing, either (A) the employer must have probable cause for requiring the individual to submit to the test, or (B) the policy must provide for random, blanket or periodic testing. OAR 471-030-0125(3)(d). A "blanket test for drugs, cannabis, or alcohol, or a combination thereof" means a test for drugs, cannabis, or alcohol, or a combination thereof applied uniformly to a specified group or class of employees. OAR 471-030-0125(5)(c). No employer policy is reasonable if the employer does not follow their own policy. OAR 471-030-0125(6).

The order under review concluded that claimant did not commit a disqualifying act under ORS 657.176(9). The order reasoned, correctly, that to establish that claimant had committed a disqualifying act, the record needed to show that the employer's written policy was reasonable. The order concluded that the policy was not reasonable because, to be reasonable, the employer needed to have probable cause to test claimant on May 19, 2020, and probable cause was lacking in that there was no evidence to suspect claimant was impaired or affected by drugs or cannabis on that day. Order No. 21-UI-165271 at 5.

The record supports the conclusion that the employer lacked probable cause to test claimant on May 19, 2020. However, the record shows that the employer's written policy provided for blanket drug and cannabis testing for all employees on their first or second day of work. Because the employer's policy provided for blanket testing, and claimant was tested pursuant to such a blanket test, probable cause to require claimant to submit to the May 19, 2020 test was not required for the employer's written drug and cannabis testing policy to be reasonable. Thus, the record fails to support the order's conclusion that claimant did not commit a disqualifying act because the employer's written policy was not reasonable due to their being no probable cause to test claimant on May 19, 2020.

The record contains evidence that satisfies most of the elements necessary to establish that claimant committed a disqualifying act under ORS 657.176(9)(a)(C). The fact that claimant attempted to falsify his test results by submitting a sample of synthetic urine shows that claimant attempted to subvert a cannabis testing process in the employer's employment-related test by interfering with the accuracy of the test results by conduct that included adulteration of the test specimen. ORS 657.176(9)(a)(C) also requires that the employment-related test be required by the employer's written policy and that the written policy was reasonable. The record indicates that the employer's written drug and cannabis testing policy required claimant to be tested. To determine whether that policy was reasonable, the elements set forth by OAR 471-030-0125(3) must be applied.

Applying those elements, the record supports an inference that the employer's policy prohibited the effects of drugs or cannabis in the workplace given that all employees were tested on their first or second day of work, and the testing policy was specified under the employer's substance abuse policy. The record shows that a copy of the policy was provided to claimant in writing on his first day of work, May 18, 2020. Also, as discussed above, the record indicates that the policy's drug and cannabis testing provided for blanket testing because all employees were drug and cannabis tested on their first or second day of work.

However, the record must be developed as to whether the employer's policy required claimant to pay for any portion of the drug and cannabis testing. OAR 471-030-0125(3)(b). On remand, the ALJ should ask questions to develop the record on this point.

Also, OAR 471-030-0125(10)(a) provides that, for purposes of ORS 657.176(9) and (10), "[t]esting for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435." On remand, the ALJ should ask questions to develop the record as to whether the employer's drug and cannabis testing of claimant was conducted in accordance with ORS 438.435, which requires, among other things, that laboratories performing tests be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests.

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 committed a disqualifying act under ORS 657.176(9), Order No. 21-UI-165271 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-165271 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: June 3, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-165271 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 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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