

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0425

Modified
Disqualification (Effective Week 45-20)

PROCEDURAL HISTORY: On April 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act and that claimant was disqualified from receiving unemployment insurance benefits effective October 18, 2020 (decision # 94315). Claimant filed a timely request for hearing. On May 3, 2021 and May 17, 2021, ALJ Scott conducted a hearing, and on May 18, 2021, issued Order No. 21-UI-167026, modifying decision # 94315 by concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving benefits effective October 17, 2020. On May 31, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At the end of the May 17, 2021 hearing, the ALJ left the record open for receipt of additional documents from the employer. Transcript at 56-57. On May 17, 2021, after the hearing ended, the employer faxed a two-page document, a letter from the Oregon Department of Transportation, to OAH and the ALJ added it to the record with the following explanation:

Exhibit 1, offered by the employer, was admitted into evidence without objection. The evidentiary record was held open for an additional document. The document was timely received, has been marked as Exhibit 2, and is attached to this Order. Any party who objects to admission of Exhibit 2 must state the basis or reason for that objection by mailing or faxing the objection to the Office of Administrative Hearings within seven (7) days of this Order. A copy of the objection must also be served on the other parties to this case. If no objection is received timely, or if any objection is overruled, Exhibit 2 will remain in evidence.

Order No. 21-UI-167026 at 1. However, the ALJ previously had designated and marked claimant's documents as Exhibit 2. May 17, 2021 Audio Record at 8:45 to 9:00. To resolve this inconsistency and for clarification, EAB has re-marked the employer's document, the letter from the Oregon Department of Transportation sent after the May 17, 2021 hearing concluded, as Exhibit 3 in the record.

FINDINGS OF FACT: (1) Bob Murray Trucking employed claimant as a driver from March 10, 2020 to until November 2, 2020.

(2) The employer had a written drug and alcohol policy that prohibited the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace and which specifically prohibited being “on duty or operating a commercial motor vehicle while the driver possesses alcohol, unless the alcohol is manifested and transported as part of the shipment.” Exhibit 1 at 15. The employer provided a copy of the policy to claimant at hire, and on March 13, 2020, claimant acknowledged receiving and reviewing the policy. Exhibit 1 at 19. The policy provided for random testing for drugs and alcohol, testing based on reasonable suspicion, and post-accident testing when possible. The policy did not require an employee to pay for any portion of the test.

(3) On October 20, 2020, while operating an employer commercial vehicle near a truck stop in Utah on employer business, claimant caused a single-vehicle accident in which his vehicle hit a curb with such force that claimant was ejected from the vehicle and landed in some bushes, and the vehicle sustained damage that rendered it inoperable. Claimant contacted the employer’s dispatch unit and reported the accident. While sitting in the bushes, claimant drank “swigs” of vodka “off the bottle [he] had.” Transcript at 30. Other drivers at the truck stop came to claimant’s assistance and called a tow truck. Law enforcement responded to the scene and called paramedics to examine and treat claimant. Claimant received treatment for a mild concussion. Law enforcement observed the open container of vodka and administered an intoxilyzer test to claimant that showed a blood alcohol content of .08. Law enforcement arrested claimant for driving under the influence of alcohol, having an open container of alcohol in his vehicle and improper lane usage, and placed him in custody.

(4) On October 21, 2020, claimant’s spouse bailed claimant out of jail.

(5) On October 22, 2020 claimant stated in a text message to the employer in response to inquiries about the incident, “Yes, there was an open container.” Transcript at 11. The alcohol in claimant’s possession was not manifested and transported as part of a shipment claimant was delivering. Claimant worked for the employer on October 22, 2020 and October 23, 2020 to facilitate the release of the truck from the tow yard to the employer. Thereafter, the truck was towed back to Oregon and claimant travelled home by bus.

(6) On October 29, 2020, claimant texted the employer’s owner that he was “willing to work, and do anything.” Transcript at 53. The employer’s owner responded, “We’re kind of in a whirlwind right now, trying to figure out why you would perfectly ruin your career, do massive damage to your truck and put other people’s lives in danger.” Transcript at 53.

(7) On or about November 2, 2020, claimant sent the employer another text message inquiring about continuing work. Shortly thereafter, in a phone conversation, the employer’s operations manager told claimant that he “needed to clean his truck out, and [] he needed to talk to [the owner] about work . . . because he wasn’t working for us.” Transcript at 51.

(8) On November 2, 2020, the employer discharged claimant, in part,¹ for possessing alcohol while on duty or operating one of its commercial vehicles.

CONCLUSIONS AND REASONS: The employer discharged claimant for committing a disqualifying act under the Employment Department’s drug, cannabis, and alcohol adjudication policy.

Work Separation. If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b) (September 22, 2020). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

The parties disagreed regarding the date of the work separation. The owner asserted that the employer discharged claimant on October 22, 2020. Transcript at 5. Claimant asserted that the owner never told him that he had been terminated from his employment and that he was not discharged until sometime in April 2021, when he received his final paycheck. Transcript at 21, 33. The preponderance of the evidence shows that the employer terminated claimant’s employment on or about November 2, 2020. The employer did not dispute that claimant continued to work after the accident, on October 22 and October 23, 2020, to facilitate the release of the truck from the impound yard in Utah. The operations manager testified that she received text messages from claimant on November 2, 2020, November 6, 2020, November 12, 2020, November 17, 2020, November 27, 2020 and November 30, 2020 in which claimant inquired about available work. Transcript at 51-53. However, the operations manager explained that she did not respond to claimant’s text messages after early November 2020 because at that time, she told claimant over the phone that he “needed to clean his truck out, and [] he needed to talk to [the owner] about work . . . because he wasn’t working for us.” Transcript at 51. Claimant testified that he received no text messages from the employer after October 29, 2020. Transcript at 55. Although the record shows that claimant was willing to continue to work for the employer after November 2, 2020, the preponderance of the evidence shows that after the operations manager’s call to claimant on or around November 2, 2020, the employer was not willing to allow claimant to do so. Accordingly, more likely than not, the work separation was a discharge that occurred on or about November 2, 2020.

Discharge 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:

(A) Fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining, which may include blanket, random, periodic and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace[.]

* * *

¹ The employer also discharged claimant, in part, because they believed that claimant “was not able to drive with . . . the DUI arrest.” Transcript at 9-10. However, the record does not clearly show if claimant’s commercial driver’s license was suspended between the date of the incident on October 20, 2020 and the date of claimant’s discharge. Exhibit 3. For that reason, that basis for claimant’s discharge is not addressed in this decision.

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

* * *

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

(a) For purposes of ORS 657.176(9), “workplace” means the employer’s premises or any place at or in which an individual performs services for the employer or otherwise acts within the course and scope of employment.

* * *

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

(a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or 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 drug, cannabis, or alcohol testing, the employer has:

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

(B) The policy provides for random, blanket or periodic testing.

* * *

* * *

(6) For purposes of ORS 657.176(9), (10), and (13), no employer policy is reasonable if the employer does not follow their own policy.

* * *

(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.

* * *

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 discharged claimant, in part, for violating the employer's drug and alcohol policy by possessing alcohol while operating one of the employer's commercial vehicles. At hearing, claimant admitted that while sitting in the bushes after the accident, claimant drank "swigs" of vodka "off the bottle [he] had." Transcript at 30. He also admitted by text message to the employer in response to inquiries about the incident, that "[y]es, there was an open container," likely in reference to an accusation that he had an open container of alcohol in his vehicle. Transcript at 11. The record does not show that claimant obtained a bottle of vodka between the time of the accident and the time of his arrest on October 20, 2020, and it is implausible that he did so. Therefore, both of claimant's statements support a reasonable inference that claimant possessed a bottle of vodka while inside and operating the employer vehicle involved in the accident. At the time claimant likely possessed the alcohol in question, he was therefore in the employer's workplace as defined by OAR 471-030-0125 (2)(a), which includes "any place at or *in which* an individual performs services for the employer or otherwise acts within the course and scope of employment." (Italics added.) Accordingly, the record shows that on October 20, 2020, prior to, during, and immediately after his accident, under OAR 471-030-0125 (2)(a), claimant possessed alcohol in the "workplace" in violation of ORS 657.176(9) and the employer's drug and alcohol policy.

To be discharged for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, the disqualifying act must be a violation of a reasonable, written, employer policy. OAR 471-030-0125 (9). The record shows that the employer's drug and alcohol policy was reasonable under OAR 471-030-0125(3). The record shows that the policy prohibited the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace and did not require employees to pay for testing. Exhibit 1, Employer D&A Policy. The record also shows that the policy was in writing and a copy provided to claimant. Exhibit 1, "Drug/Alcohol Policy and Plan." Although the employer did not require drug or alcohol testing of claimant following the accident, the record shows that the policy did provide for testing based on probable cause and pursuant to random, blanket or periodic testing. Finally, the record shows that the employer followed its policy when it discharged claimant for possessing alcohol while on duty or operating a commercial vehicle. Exhibit 1, Employer "Drug/Alcohol Policy and Plan."

Because the record shows that claimant failed to comply with terms and conditions of the employer's reasonable drug and alcohol policy by possessing alcohol while operating an employer commercial vehicle on October 20, 2020, the employer established that they discharged claimant on November 2, 2020 for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy. Accordingly, claimant is disqualified from receiving unemployment insurance benefits effective November 1, 2020 (week 45-20) until he is requalified under Department law.

DECISION: Order No. 21-UI-167026 is modified, as outlined above.

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

DATE of Service: July 9, 2021

NOTE: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.