

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0708

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 28, 2020, 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 July 12, 2020 (decision # 184116). Claimant filed a timely request for hearing. On July 30, 2021, ALJ Scott conducted a hearing, and on August 6, 2021 issued Order No. 21-UI-172075, reversing decision # 184116 by concluding that claimant was discharged, but not for committing a disqualifying act, and was not disqualified from receiving benefits based on the work separation. On August 26, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's argument when reaching this decision.

Claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Columbia Empire Meat Co. employed claimant as a meat grinder and delivery driver from June 30, 2014 until July 20, 2020.

(2) The employer had a written policy that governed the use, sale, possession, or effects of drugs, cannabis and alcohol in the workplace, and was contained in the employer's employee handbook. The employer provided the policy to claimant in writing when they hired him. Under the policy, employees were prohibited from being under the influence of drugs, cannabis, or alcohol while at work. The policy called for employees to submit to testing upon reasonable suspicion of being under the influence of drug, cannabis, or alcohol. Employees were not required to pay for any portion of such tests. The policy did not specify a particular level of drugs, cannabis, or alcohol present in an employee's system

sufficient to yield a positive test result or to conclude that an employee is under the influence of drugs, cannabis, or alcohol.

(3) On July 1, 2020, claimant exhibited unusual behavior at work. Coworkers observed that claimant had dilated eyes, slurred his speech, appeared to sleep while standing over storage totes, and failed to properly punch in for work or fill out required logs. Claimant informed the employer that he was sleep-deprived from working his two other jobs but denied acting in an unusual manner. The employer suspected claimant was under the influence of drugs, cannabis, or alcohol. The employer sent claimant home with a warning relating to his slurred speech and failure to punch in and fill out logs properly. The employer also ordered claimant to submit to a drug, cannabis, and alcohol test, and suspended him indefinitely pending the test results.

(4) On July 2, 2020, claimant submitted for a urine analysis test at a laboratory run by a company that the employer used to perform medical examinations on their delivery drivers. The test returned a result negative for the presence of “anything in [claimant’s] system whatsoever.” Transcript at 11. The laboratory transmitted the test result to the employer, and the employer’s operations director contacted claimant and requested he take a breathalyzer test.

(5) On July 9, 2020, claimant submitted for a breathalyzer test, which also returned a result negative for any substances. On July 10, 2020, claimant spoke with the operations director about the negative test results and his job status. The operations director told claimant to rest and await further instructions.

(6) On July 20, 2020, the operations director called claimant and requested claimant return his company keys. On July 24, 2020, claimant received a letter from the employer that was postmarked July 20, 2020 and dated July 14, 2020. The letter stated that “[b]ased upon the events which you were previously warned about on July 1st we have concluded it is no longer safe for you to work in the plant[.]” Exhibit 1 at 51. The letter then listed the behavior claimant’s coworkers witnessed him having exhibited on July 1, 2020, including having slurred speech, dilated eyes, “[d]emeanor that was inconsistent,” “[s]lamming coffee one after another,” sleeping over storage totes, and “[g]enerally not making sense.” Exhibit 1 at 51. The letter acknowledged that claimant “completed a drug and alcohol test” but stated, “we find your actions in July to be in violation of company policy and safety standards.” Exhibit 1 at 51. The letter went on to state, “[y]ou have been asked repeatedly if you were on some form of medication and your answer was no” and “[y]ou have been given the option of seeking medical treatment for the described conditions that were witnessed on . . . July 1st[.]” Exhibit 1 at 51. The letter further stated “[i]f we do not receive any answer from you as to your condition or reasons for it we will conclude that you have been terminated from work effective July 14, 2020.” Exhibit 1 at 51. The letter concluded by stating, “[p]lease return your plant keys and we will provide your final check.” Exhibit 1 at 51.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for committing 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;

* * *

(F) Tests positive for alcohol, cannabis or an unlawful drug in connection with employment[.]

“For purposes of ORS 657.176(9) . . . an individual is ‘under the influence’ of intoxicants if, at the time of a *test administered in accordance with the provisions of an employer’s reasonable written policy* or collective bargaining agreement, the individual *has any detectable level of drugs, cannabis, or alcohol present in the individual’s system*, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement.” OAR 471-030-0125(2)(c) (January 11, 2018) (emphasis added). “For purposes of ORS 657.176(9), an individual ‘tests positive’ for alcohol, cannabis, or an unlawful drug when the *test is administered in accordance with the provisions of an employer’s reasonable written policy* or collective bargaining agreement, and at the time of the test, either (A) the amount of drugs, cannabis, or alcohol determined to be present in the individual’s system equals or exceeds the amount prescribed by such policy or agreement, or (B) the individual *has any detectable level of drugs, cannabis, or alcohol present in the individual’s system* if the policy or agreement does not specify a cut off level.” OAR 471-030-0125(2)(e) (emphasis added).

OAR 471-030-0125 provides:

(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.

* * *

An employer has probable cause to require an employee to submit to a test for drugs, cannabis, or alcohol if “[t]he 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.” OAR 471-030-0125(4)(a). “Such evidence may include . . . abnormal behavior in the workplace[.]” OAR 471-030-0125(4)(a).

The weight of the evidence shows that the employer discharged claimant for allegedly violating their written policy governing the use, sale, possession, or effects of drugs, cannabis and alcohol in the workplace. This is the case because the employer’s letter dated July 14, 2020 listed claimant’s unusual behaviors exhibited on July 1, 2020 that were consistent with suspecting him of being under the influence of intoxicants, acknowledged claimant had submitted for testing, mentioned that the employer had asked whether claimant was using medication and raised the option of allowing him to seek treatment, but concluded that it was unsafe for claimant to continue working at the employer’s plant and that the employer intended to terminate claimant absent an explanation for claimant’s condition. The language used in the letter suggests that the employer believed claimant was under the influence of intoxicants on July 1, 2020 and discharged him for that reason, notwithstanding his negative test results. Therefore, more likely than not, the employer discharged claimant for allegedly violating their drug, cannabis and alcohol policy rather than for violation of some other workplace standard of behavior. For this reason, the discharge is analyzed as a discharge for committing a disqualifying act under ORS 657.176(2)(h) and (9), rather than a discharge for misconduct under ORS 657.176(2)(a).

Claimant did not commit a disqualifying act under ORS 657.176(9). As a preliminary matter, each of the disqualifying acts that are potentially applicable in claimant’s situation require that the employer’s written drug, cannabis, and alcohol policy be “reasonable.” The record shows that the employer’s policy satisfied the elements of reasonableness. The employer’s policy prohibited the use, sale, possession, and effects of drugs, cannabis or alcohol in the workplace, was provided to claimant in writing, did not require employees to pay for any required testing, and called for testing upon reasonable suspicion of drug, cannabis, or alcohol use, which is sufficient to meet OAR 471-030-0125(3)(d)(A)’s requirement that testing under the policy be supported by probable cause. Further, the testing claimant was ordered to submit to in this case was supported by probable cause because the unusual behaviors claimant exhibited on July 1, 2020 were sufficient to supply a reasonable basis to suspect claimant was impaired.

However, claimant did not commit either disqualifying act that is potentially applicable in claimant’s situation because both of those, ORS 657.176(9)(a)(D) and (F), require claimant to have had a detectable level of drugs, cannabis, or alcohol present in his system. The record shows that the tests claimant submitted to returned results showing the presence of no drugs, cannabis, or alcohol whatsoever.

Accordingly, the employer discharged claimant, but not for a disqualifying act. Claimant is not subject to disqualification from unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-172075 is affirmed.

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

DATE of Service: September 30, 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.

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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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www.Oregon.gov/Employ/eab

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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.