EO: 200
BYE: 202228

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

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EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0976

Reversed & Remanded

PROCEDURAL HISTORY: On September 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 90648). The employer filed a timely request for hearing. On September 12, 2022, ALJ Scott conducted a hearing, and on September 14, 2022 issued Order No. 22-UI-202659, affirming decision # 90648. On September 21, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wireless Structures Consulting Inc. employed claimant as a welder from February 11, 2021 to July 19, 2021.

(2) Prior to working for the employer, claimant had sustained injuries over the course of his career that caused him severe pain. Claimant had used prescription pain medications to treat the pain initially but, with time, those medications were ineffective. Claimant started using heroin to address the pain, and became addicted to it. In January 2018, claimant began a rehabilitation program for heroin addiction that involved receiving doses of methadone.

(3) On February 11, 2021, the employer hired claimant. Upon hire, claimant disclosed to the employer that he was in an addiction rehabilitation program that involved receiving doses of methadone.

(4) When the employer onboarded claimant, they provided him a copy of the employer's written drug, alcohol, and cannabis policy. The employer's written policy governed the use, sale, possession, or effects of drugs, cannabis and alcohol in the workplace. The policy prohibited employees from working under the influence of an illegal drug, which it defined as any detectable level of an illegal drug. The policy also called for random testing or probable cause testing of employees for illegal drugs, which was paid for by the employer.

(5) In June 2021, claimant completed the rehabilitation program he had started in January 2018. Thereafter, over the July 4th holiday, claimant injured his ribs, and began using heroin again to address the pain.

(6) In early July 2021, the employer decided to do a random drug screen of their employees "based off of some . . . conversations that [they] were hearing." Transcript at 6. Thereafter, the employer selected a group of employees to be drug tested over the course of a couple of weeks. Senior management chose the method used to select which employees would be tested. Claimant's production manager received a list of the selected employees, which included claimant.

(7) On July 13, 2021, the employer's safety manager administered a test of claimant's saliva that was positive for heroin. On July 14, 2021, the employer sent the sample to a laboratory to confirm the positive result. On July 16, 2021, the laboratory confirmed that claimant's saliva sample was positive for heroin and reported the positive test result to the employer. The employer paid for the laboratory testing.

(8) On July 19, 2021, after receiving the positive test result from the laboratory, the employer discharged claimant for violating their written drug, cannabis, and alcohol policy.

(9) At some point in 2022, claimant began a different addiction rehabilitation program.

CONCLUSIONS AND REASONS: Order No. 22-UI-202659 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:

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

"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* . . . , 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) (January 11, 2018) (emphasis added). "'Connection with employment' as used in ORS 657.176(9) means where such positive test affects or has a reasonable likelihood of affecting the employee's work, the employer's interest, or workplace." OAR 471-030-0125(2)(h).

OAR 471-030-0125(3) provides that for purposes of ORS 657.176(9), (10), and 657.176(13), 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.
> >
> > * * *

No employer policy is reasonable if the employer does not follow their own policy. OAR 471-030-0125(6). Subject to some exceptions, an individual is not considered to have committed a disqualifying act if the individual, on the date of separation, or within ten days after the date of the separation, is participating in a recognized drug, cannabis or alcohol rehabilitation program and provides documentation of the same to the Department. ORS 657.176(9)(b)(A).

The order under review concluded that claimant did not commit a disqualifying act under ORS 657.176(9) because the positive test result for heroin was not administered in accordance with the employer's reasonable written policy in that the testing was not shown to be random. Order No. 22-UI-202659 at 5. The record as developed does not support this conclusion.

As an initial matter, the record shows that most of the criteria necessary to establish that claimant committed a disqualifying act under ORS 657.176(9)(a)(F) were satisfied. First, ORS 657.176(9)(b)(A), which, if applicable, would mean that claimant would not be considered to have committed a disqualifying act, does not apply to claimant's circumstances. Claimant was in a rehabilitation treatment program from January 2018 through June 2021, and then again in 2022 after his discharge. This evidence is sufficient to show that claimant was not participating in a recognized drug, cannabis or alcohol rehabilitation program on the date of his July 19, 2021 discharge or within ten days after the date of the discharge occurred, and therefore that ORS 657.176(9)(b)(A) does not apply.

Next, under OAR 471-030-0125(2)(e), the employer was required to establish that the test they administered to claimant was administered in accordance with a written drug, cannabis, and alcohol policy that was reasonable. The record shows that the employer's written policy was reasonable. 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, and did not require employees to pay for any required testing. The written policy also called for drug testing that was random or based on probable cause.

However, remand is necessary because the record was not sufficiently developed to determine whether the test administered to claimant was actually random. Per OAR 471-030-0125(2)(e), administering the test "in accordance with the provisions of an employer's reasonable written policy" is required for a test result to count as one that "tests positive" for an unlawful drug for purposes of ORS 657.176(9). The employer's policy called for random or probable cause testing so if the test actually administered was not random or supported by probable cause, that would mean the test would not have been administered in accordance with the employer's reasonable policy, and therefore would not constitute a positive test result within the meaning of ORS 657.176(9).

Per OAR 471-030-0125(5)(a), "A 'random test for drugs, cannabis, or alcohol, or a combination thereof" means a test for drugs, cannabis, or alcohol, or a combination thereof given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing." At hearing, claimant's production manager testified that "conversations" the employer "w[as] hearing" regarding workplace drug use prompted them to institute a random drug screen. Transcript at 6. The production manager further testified that claimant was selected for testing at random along with other employees but that the random selection occurred via an unknown method developed by senior management. Transcript at 6, 7. When asked if claimant was selected randomly or because he was the subject of the conversations, the production manager testified that he was not privy to the information his superiors used to make their selections but believed claimant's selection was random. Transcript at 11. However, the employer's other witness, their human resources (H.R.) administrator, exhibited familiarity with the employer's drug testing processes but was not asked any questions regarding the method used to select claimant for the test. Transcript at 21-23. On remand, the ALJ should ask questions of the employer's H.R. administrator about the method senior management used to select the employees who were tested, and should otherwise develop the record as to whether the test administered was random per the definition set forth by OAR 471-030-0125(5)(a).

Note that if the test the employer administered was not random but was supported by probable cause, it would have been administered in accordance with the employer's reasonable policy, and therefore claimant's test result that was positive for heroin would constitute a positive test result within the meaning of ORS 657.176(9). Therefore, should the record on remand show that claimant's test was not random, the ALJ should inquire as to whether the employer's testing of claimant was supported by probable cause.[1]

Finally, 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." ORS 438.435 sets forth certain minimum standards for substance abuse testing. At hearing, the production manager did not know whether the laboratory that returned claimant's positive test result was operating per state and federal licensing requirements, but stated that he "could get that answer" for the ALJ. Transcript at 8. The H.R. administrator was not asked about this

[1] 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). Probable cause may also be supplied via "reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace[.]" OAR 471-030-0125(4)(a).

subject. Transcript at 21-23. On remand, the ALJ should ask questions to develop the record as to whether the employer's 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. 22-UI-202659 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-202659 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: December 9, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-202659 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل 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
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