

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0534

Reversed & Remanded

PROCEDURAL HISTORY: On February 9, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for a disqualifying act and was therefore disqualified from receiving unemployment insurance effective January 8, 2023 (decision # 80538). Claimant filed a timely request for hearing. On April 12, 2023, ALJ Blam conducted a hearing, and on April 20, 2023 issued Order No. 23-UI-222670, reversing decision # 80538 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On May 5, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring 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).

FINDINGS OF FACT: (1) CH2M Hill Inc. employed claimant as a chemist from approximately 2018 until January 9, 2023.

(2) The employer had a written policy governing their employees' use of alcohol connected to their work. Part of this policy applied by its terms to only certain employees, largely those who worked in or with commercial vehicles. Claimant's position did not involve working in or with commercial vehicles. Other portions of the policy may have applied to other employees including those working in "safety-sensitive positions." Exhibit 1 at 5. Claimant worked in a "safety-sensitive position." Exhibit 1 at 5.

(3) On December 21, 2022, claimant was working at a jobsite in New Mexico. That morning, claimant awoke feeling ill with what would later be diagnosed as a COVID-19 infection. At approximately 4:00 a.m. to 5:00 a.m., claimant began drinking alcohol as a form of self-medication.

(4) Between approximately 6:00 a.m. and 8:00 a.m., claimant reported for work. At approximately 10:15 a.m., a client at the worksite detected the odor of alcohol coming from claimant and reported it to

claimant's supervisor. Claimant's supervisor directed that claimant be driven to another location to submit to a breath test for the presence of alcohol.

(5) At 1:40 p.m., a breath test was administered to claimant which detected a blood alcohol concentration of approximately 0.10 grams per deciliter. Claimant was sent home to Oregon because of his alcohol use and placed on short-term disability beginning the following day because of the COVID-19 infection.

(6) On January 9, 2023, at the conclusion of the short-term disability period, the employer discharged claimant for violating their alcohol use policy.

CONCLUSIONS AND REASONS: Order No. 23-UI-222670 is set aside and the matter remanded for further proceedings.

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[.]

* * *

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

* * *

(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.

(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.

(c) For purposes of ORS 657.176(9) and 657.176(13), 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.

(d) "Performing services for the employer" as used in ORS 657.176(9) and "during work" as used in ORS 657.176(9) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration.

(e) 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:

(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.

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.

(g) For purposes of ORS 657.176(9) and 657.176(13), "unlawful drug" means a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law.

(h) "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.

* * *

The order under review concluded that the employer did not test claimant for alcohol in accordance with the provisions of their written alcohol use policy because, by its terms, the policy that was submitted into evidence did not apply to claimant since he did not meet the policy's definition of a "covered employee." Order No. 23-UI-222670 at 6-7. While the record supports this conclusion, the record also suggests that the employer had additional written alcohol use policies which may have been applicable to claimant, and attempted to offer them into evidence at hearing. The record must be further developed

to determine whether such an applicable policy existed and, if so, whether the employer tested claimant for alcohol in accordance with the employer's reasonable written policy.

The employer discharged claimant because he was under the influence of alcohol while performing services for the employer and because he tested positive for alcohol in connection with employment. Claimant did not dispute that he knowingly and voluntarily consumed alcohol immediately prior to beginning work. Transcript at 23. He agreed that, as a result, he had a blood alcohol concentration of at least 0.10 grams per deciliter during his work shift as confirmed by a breath test. Transcript at 22. However, to be considered disqualifying conduct under ORS 657.176(2)(h) paragraph (D) or (F), the employer must show that the alcohol use was detected pursuant to a "test administered in accordance with the provisions of an employer's reasonable written policy." OAR 471-030-0125(2). Further development of the record is needed to make this determination.

The employer submitted into evidence a portion of their written alcohol policy. This portion stated that it only applied to "covered employees." Exhibit 1 at 10. It defined "covered employees" as those whose positions required a commercial driver license or performing a "safety-sensitive function," which it defined as involving operating, maintaining, or conducting shipping activities related to commercial vehicles. Exhibit 1 at 10-11. The record shows that the employer considered claimant to have a "safety-sensitive *position*," even though he did not perform a "safety-sensitive *function*" as that term was defined in the employer's written policy. Exhibit 1 at 5, 10-11. Therefore, claimant's work as a chemist did not bring his position within the definition of a "covered employee." The alcohol testing procedure set forth in the policy in evidence was therefore inapplicable to claimant. Accordingly, to the extent the employer's testing of claimant for alcohol was done in accordance with that policy, such testing did not meet the requirements of OAR 471-030-0125(2).

However, the employer's letter discharging claimant, which was also admitted into evidence, cited an apparently different portion of the employer's written alcohol use policy. The letter quoted portions of that policy which implied that it was applicable to employees including those in "safety-sensitive *positions*," such as claimant. Exhibit 1 at 5. The full text of that written policy is not in evidence, though the employer's witness read portions of what was likely that policy into the record. Transcript at 12-14. Further inquiry must be made to determine if that written policy, if applicable to claimant, was reasonable, and whether the alcohol test which led to claimant's discharge was administered in accordance with that policy.

In assessing whether the policy was reasonable and whether the test was administered in accordance with it, inquiry should be made as to whether the client's suspicion of claimant's alcohol use alone was sufficient cause for testing to be ordered, and whether the multiple-hour delay between when claimant was suspected to be under the influence of alcohol and when the test was administered comported with the policy. The parties may offer new information, such as any written alcohol use policy believed to be applicable to claimant, 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.

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 was tested for alcohol in accordance with a reasonable written alcohol use policy applicable to him, Order No. 23-UI-222670 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-222670 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 12, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-222670 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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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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