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

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EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1243

Order No. 23-UI-240025 ~ Affirmed ~ Request to Reopen Allowed ~ No Disqualification
Order No. 23-UI-240045 ~ Affirmed ~ Overpayment Not Assessed ~ 4-Week Penalty Disqualification

PROCEDURAL HISTORY: On December 7, 2020, 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 benefits effective April 12, 2020 (decision # 65332). Claimant filed a timely request for hearing. On January 27, 2022, notice was mailed to the parties of a hearing scheduled for February 11, 2022. On February 11, 2022, ALJ Logan convened a hearing at which claimant failed to appear, and issued Order No. 22-UI-186276, dismissing claimant's request for hearing due to his failure to appear. On March 1, 2022, claimant filed a timely request to reopen the February 11, 2022, hearing.

On December 29, 2022, the Department served notice of an administrative decision, based in part on decision # 65332, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of $1,256 in regular unemployment insurance (regular UI) benefits and $1,200 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, a $368.40 monetary penalty, and a 16-week penalty disqualification from future benefits. Claimant filed a timely request for hearing.

On October 26, 2023, ALJ Lucas conducted a consolidated hearing, and on October 31, 2023, issued Order No. 23-UI-240025, allowing claimant's request to reopen the hearing and reversing decision # 65332 by concluding that claimant was discharged, but not for a disqualifying act, and was not disqualified from receiving unemployment insurance benefits based on the work separation. Also on October 31, 2023, ALJ Lucas issued Order No. 23-UI-240045, modifying the December 29, 2022, overpayment decision by concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits and assessing a 4-week penalty disqualification from future

benefits, but that claimant was not overpaid benefits or subject to a monetary penalty. On November 8, 2023, the Department filed applications for review of Orders No. 23-UI-240025 and 23-UI-240045 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-240025 and 23-UI-240045. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-1243 and 2023-UI-1244).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), Order No. 23-UI-240045, regarding overpayment and penalties, is **adopted.** The rest of this decision addresses Order No. 23-UI-240025, regarding claimant's request to reopen and work separation.

WRITTEN ARGUMENT: EAB considered the Department's argument in reaching this decision.

FINDINGS OF FACT: (1) Dollar General employed claimant as a sales associate from March 13, 2020, until April 18, 2020.

(2) The employer had a written policy which prohibited employees from "having. . . alcohol in their system while working." Exhibit 4 at 20. Claimant was presented with a copy of this policy at hire. A summary of the employer's "Drug and Alcohol Policy" stated, "To the extent permitted by law, [the Employer] may require drug and/or alcohol testing, including pre-employment, random/suspicionless, post-accident, and reasonable suspicion testing." Exhibit 4 at 20.

(3) On April 18, 2020, claimant reported for work at approximately 1:00 P.M. feeling "hungover" from having consumed alcohol the previous day. Transcript at 27. He was "nauseous" and had "drowsiness." Transcript at 29. Despite this, claimant felt he was able to "communicate" and do his job. Transcript at 29. Claimant's manager asked claimant "if anything was going on," and claimant told her, "[Y]eah, I think I'm hungover. I had probably a little too much to drink last night." Transcript at 30. The manager, after consulting with her supervisor, discharged claimant for violating the Drug and Alcohol Policy. Claimant was not offered a test to detect the presence of alcohol.

(4) On December 7, 2020, the Department issued decision # 65332, disqualifying claimant from benefits due to the work separation. Claimant filed a request for hearing on December 28, 2020.

(5) On January 27, 2022, the Department mailed notice of a hearing on decision # 65332 scheduled for February 11, 2022, to claimant at claimant's post office box. Claimant did not receive the notice and did not attend the hearing for that reason.

CONCLUSIONS AND REASONS: Claimant had good cause to reopen the February 11, 2022, hearing. Claimant was discharged, but not for a disqualifying reason.

Request to reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012). The party requesting

reopening shall set forth the reason(s) for missing the hearing in a written statement, which the Office of Administrative Hearings (OAH) shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

Claimant did not appear at the February 11, 2022, hearing because he was unaware it was being held. Claimant offered conflicting explanations for why he was unaware of the hearing. In his March 1, 2022, request to reopen, claimant wrote, "I had lost my mailbox key so I failed to see the notice on time. I was also sick that week." Exhibit 3 at 2. At hearing, claimant testified regarding what he wrote in the request to reopen that he "put that down because I honestly felt it was like a good excuse to have missed it." Transcript at 6. He further testified he actually "did check the mail" and "never saw the notice." Transcript at 6. He explained, "So I made up that story that I lost the keys just so it sounded better on my behalf. And, no, I didn't receive it." Transcript at 6. Claimant also testified to difficulties receiving mail generally, such as receiving mail in his post office box addressed to other boxes. Transcript at 5-6. Claimant's admittedly false original explanation for missing the hearing calls into question claimant's credibility in considering the alternate explanation given at hearing. However, the record evidence does not rebut claimant's sworn testimony that he did not receive the hearing notice at all, perhaps due to it being misdelivered. Therefore, more likely than not, claimant was prevented from attending the hearing because he did not receive the hearing notice due to factors beyond his reasonable control. Good cause to reopen the hearing has therefore been shown.

Discharge. 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;
>
> (B) Fails or refuses to take a drug, cannabis or alcohol test as required by the employer's reasonable written policy[.]
>
> * * *

OAR 471-030-0125 (January 11, 2018) 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.

* * *

(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.
>
> (b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.

* * *

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 because they believed he was under the influence of alcohol while at work on April 18, 2020, in violation of their written policy, which prohibits an employee from working with alcohol in their system. Claimant received a copy of the policy at hire. The text of the employer's Drug and Alcohol Policy is not in evidence, but the record contains a summary of the policy. That summary states that the employer "may require" random or "reasonable suspicion" testing of employees for alcohol. Exhibit 4 at 20. The employer's witness testified that the policy does not require employees to pay for any testing. Transcript at 13. It can reasonably be inferred from this evidence that the employer's policy provided for alcohol testing of employees, at the employer's expense, based on probable cause. Therefore, more likely than not, the employer had a "reasonable" written alcohol use policy as defined in OAR 471-030-0125(3)(A), provided the employer followed that policy in discharging claimant, as required by OAR 471-030-0125(6).

The parties gave conflicting evidence as to whether probable cause existed for the employer to require claimant submit to an alcohol test pursuant to the policy and whether such a test was offered and refused by claimant. The employer's witness, who was not present for the events of April 18, 2020, testified he heard from the store manager where claimant worked that claimant was "intoxicated… incoherent and… had been drinking." Transcript at 15. The witness did not learn from the manager what specifically she observed that led her to describe claimant in this way. Transcript at 15. The witness further testified that the employer's policy required testing an employee in such a situation, and continued, "I don't know if [the manager] talked to [claimant] about the testing, but that's our policy. As I – as I understand it he was offered to – to take the test and refused to." Transcript at 16. The manager asked permission of the witness to immediately discharge claimant for violating the employer's alcohol policy, which was granted, and claimant was discharged.

In contrast, claimant testified he had not consumed any alcohol on April 18, 2020, but that he had consumed alcohol just prior to midnight on the preceding day. Transcript at 26, 28. As a result, he felt "hungover" at work when he arrived for his 1:00 P.M. shift and told the store manager as much. Transcript at 26. He testified that he was nonetheless able to "still run registers and stuff" and that he had a "sit down" conversation with the manager to discuss how he felt. Transcript at 29. Claimant further testified that he could not recall the manager asking him to submit to an alcohol test, and "to [his] knowledge," did not refuse such a test. Transcript at 29.

Where the accounts conflict, claimant's first-hand account of his condition on April 18, 2020, is entitled to greater weight than the employer's hearsay account, and the facts have been found accordingly. Claimant's lack of recollection as to being offered an alcohol test and refusing it is similarly entitled to greater weight than the employer's witness' "understanding" that claimant was offered and refused a test, since that understanding was apparently based only on an assumption that the store manager followed policy, rather than by confirming this assumption with the manager. Therefore, more likely than not, the employer's policy required that claimant be offered an alcohol test based on perceived probable cause, but the employer failed to offer claimant the test. While claimant admitted to being hungover, the employer has not proven that such an admission was tantamount to an admission of violating policy, since such a state does not necessarily involve the *current* presence of alcohol in a person's system. Accordingly, the employer has not shown that their alcohol policy was reasonable pursuant to OAR 471-030-0125(6) because they have not shown by a preponderance of evidence that they followed their own policy by offering claimant an alcohol test, and did not show that claimant admitted to a policy violation.

However, OAR 471-030-0125(9)(b) provides that even in the absence of a test, an employee is discharged for a disqualifying act if "there is clear observable evidence that the employee is under the influence of alcohol in the workplace." The store manager's hearsay account did not report clear observable evidence of claimant being under the influence because it was conclusory and lacked specificity as to why she believed claimant was "incoherent" and "intoxicated." As the specific facts regarding claimant's condition at work have been found in accordance with claimant's testimony, the record shows that claimant was able to communicate, "run registers," and otherwise perform his job, and that, more likely than not, any apparent illness was attributable to the aftereffects of alcohol consumed the previous day and eliminated from his

system prior to arriving at work. Accordingly, the employer did not meet their burden of showing clear observable evidence that claimant was under the influence of alcohol in the workplace.

For these reasons, claimant's request to reopen is allowed. Claimant was discharged, but not for a disqualifying act, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Orders No. 23-UI-240025 and 23-UI-240045 are affirmed.

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

DATE of Service: December 22, 2023

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.

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