

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0828

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 12, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for committing a disqualifying act and was therefore disqualified from receiving unemployment insurance benefits effective April 28, 2024 (decision # L0004489930). Claimant filed a timely request for hearing. On October 22, 2024, ALJ Chiller conducted a hearing, and on November 27, 2024, issued Amended Order No. 24-UI-275085, affirming decision # L0004489930. On December 4, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Eugene Mission, Inc. employed claimant as a navigator at their facility from January 31, 2023, until April 30, 2024.

(2) The employer had a written drug and alcohol use policy that prohibited employees from being under the influence of amphetamines, cannabinoids, cocaine, opiates, phencyclidine, or alcohol while working, and provided for random and probable cause testing for the use of these substances at the employer's sole expense. Claimant acknowledged having received a copy of the policy at hire. The policy prohibited "refus[ing] the screening or the test. . . [or] refus[ing] to cooperate in the testing process in such a way that prevents completion of the test." Exhibit 2 at 1.

(3) In March 2024, claimant was selected for a random drug test. Claimant reported to the testing facility and provided a urine sample without incident. The test results were returned as "invalid." Transcript at 13. The employer's usual practice when an "invalid" result was received was to require a second test. However, claimant went on an extended period of leave before the employer learned of that result. The employer therefore required claimant to submit to a second test prior to her return from leave in late April 2024, which claimant took shortly before April 26, 2024.

(4) On April 26, 2024, at the conclusion of claimant's leave, the employer received the results of claimant's second test and told claimant that she could return to work. Claimant agreed to begin work that day at approximately 3:00 p.m.

(5) Shortly after claimant arrived at work, one of the employer's clients spoke with claimant, and then advised other employees that they suspected claimant was under the influence of drugs. Two members of management who were trained in the detection of illegal drug use observed claimant was "speaking rapidly [and] her jaw was moving. She wasn't making eye contact and her eyes looked glossed over." Transcript at 18. Based on their observations, they believed that claimant was under the influence of drugs in violation of the employer's policy. They therefore directed claimant to report to a testing facility and submit to a drug test. Claimant was told that the test was required as part of her return from leave rather than under the probable cause provisions of the testing policy.

(6) Claimant arrived at the testing facility at 3:48 p.m. Staff at that facility advised claimant that they intended to close at 5:00 p.m. and that she therefore needed to provide a urine sample before that time. Claimant was offered water to drink, which she initially refused because she was drinking a caffeinated beverage that she brought with her; and because she had undergone bariatric surgery that made it difficult to drink quickly, particularly when drinking unflavored water. Claimant had last urinated at home before leaving to begin work at 3:00 p.m.

(7) Claimant failed to provide a urine sample by 5:00 p.m. but the testing facility remained open for an additional period to allow claimant to provide a sample. At about that time, claimant began to drink water provided by the testing facility. At 5:14 p.m., the staff asked claimant to attempt to urinate, but claimant failed to produce any urine. Claimant requested that the staff turn on the faucet in the bathroom, but they declined to do so. Claimant was given a final opportunity to urinate at 5:33 p.m. before the facility closed, but she again failed to produce any urine. At 5:38 p.m., the facility ended the test, concluding that claimant failed to provide a urine sample. They informed the employer of this outcome shortly thereafter.

(8) On April 30, 2024, the employer discharged claimant because they believed that she failed to take the drug test in violation of their policy. Claimant did not work for the employer thereafter.

CONCLUSIONS AND REASONS: Claimant committed a disqualifying act.

A claimant is disqualified from receiving benefits if they have committed a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(2)(h). Under ORS 657.176(9)(a), a claimant has committed a disqualifying act if claimant:

(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;

(C) Refuses to cooperate with or subverts or attempts to subvert a drug, cannabis or alcohol testing process in any employment-related test required by the employer's reasonable written policy, including but not limited to:

- (i) Refusal or failure to complete proper documentation that authorizes the test;
- (ii) Refusal or failure to sign a chain of custody form;
- (iii) Presentation of false identification;
- (iv) Placement of an adulterant in the individual's specimen for testing, when the adulterant is identified by a testing facility; or
- (v) Interference with the accuracy of the test results by conduct that includes dilution or adulteration of a test specimen;

(D) Is under the influence of intoxicants while performing services for the employer;

* * *

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

* * *

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

* * *

(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.

* * *

(3) 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.

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if:

(a) The 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. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or

(b) The employer has received reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace; or

(c) Such test is required by applicable state or federal law, or an applicable collective bargaining agreement that has not been declared invalid in final arbitration; or

(d) Such test is required or allowed pursuant to a reasonable agreement.

* * *

(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.

* * *

The employer discharged claimant because she failed to take a drug test on April 26, 2024. The employer had a written policy, receipt of which claimant acknowledged, that prohibited employees from being under the influence of amphetamines, cannabinoids, cocaine, opiates, phencyclidine, or alcohol while working, and provided for random and probable cause testing at the employer's sole expense. The policy therefore met the requirements of OAR 471-030-0125(3) to be considered "reasonable."

When claimant reported for work on April 26, 2024, a client reported that they believed claimant to be under the influence of drugs. Two members of management, who were “trained on” evaluating others for signs of drug impairment as part of the employer’s usual operations, observed that claimant was “speaking rapidly [and] her jaw was moving. She wasn’t making eye contact and her eyes looked glossed over.” Transcript at 18, 40-41. Based on these observations, they believed that claimant was under the influence of drugs in violation of the employer’s policy. Because this was observable, objective evidence that gave the employer a reasonable basis to suspect that claimant may have been impaired or affected by drugs, the employer had probable cause under their policy and OAR 471-030-0125(4)(a) to require that claimant submit to a test. The employer directed claimant to immediately report to a third-party testing facility, entirely at the employer’s expense, to submit to a urine test. The employer therefore followed their own policy.¹

According to testing facility records, claimant arrived at the facility at 3:48 p.m. and was given a final opportunity to provide a urine sample at 5:33 p.m., but failed to provide any urine. Exhibit 2 at 1. Claimant did not rebut this information. Claimant asserted that she was unable to produce urine despite making efforts do so and therefore did not refuse to cooperate or fail to submit to the test. Transcript at 27. However, circumstantial evidence shows that, more likely than not, claimant was capable of producing a urine sample while at the testing facility but chose not to do so. Claimant was previously able to provide urine on demand for random testing and was afforded 105 minutes period to do so on this occasion. Additionally, trained professionals observed signs that claimant was impaired. This evidence, viewed as a whole, suggests that claimant had a motive to avoid submitting to the test on this occasion, and that she was able to provide a sample but failed to provide one despite the physical ability to do so. Therefore, the employer has shown by a preponderance of the evidence that claimant refused to cooperate and refused to take a drug test in violation of the employer’s policy. Accordingly, claimant committed a disqualifying act pursuant to ORS 657.176(9)(a)(B).

For these reasons, claimant was discharged for committing a disqualifying act and is therefore disqualified from receiving unemployment insurance benefits effective April 28, 2024.

DECISION: Order No. 24-UI-275085 is affirmed.

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

DATE of Service: December 30, 2024

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 stated above.** See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

¹ The record does not suggest that the policy required the employer to accurately state to the employee the justification for requiring the test. Therefore, even though the employer led claimant to believe that the test was required for reasons other than probable cause, the employer followed their own policy.

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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

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

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Website: www.Oregon.gov/employ/pages/employment-appeals-board.aspx

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