

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0014

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 2, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant committed a disqualifying act under the Department’s drug, alcohol, and cannabis policy, and therefore was disqualified from receiving unemployment insurance benefits effective October 13, 2024 (decision # L0007517668).¹ Claimant filed a timely request for hearing. On December 27, 2024, ALJ Micheletti conducted a hearing, and on January 2, 2025, issued Order No. 25-UI-278624, reversing decision # L0007517668 by concluding that claimant was discharged, but not for a disqualifying act, and therefore was not disqualified from receiving benefits based on the work separation. On January 6, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) High Desert Education Service District employed claimant, most recently as a human resources (HR) specialist, from February 1, 2016, through October 18, 2024.

(2) The employer maintained a written policy regarding the use of alcohol and drugs in the workplace. In relevant part, the policy permitted the employer to require employees to submit to testing for alcohol or drug use if the employer reasonably suspected alcohol or drug use at work. The employer provided claimant with a copy of this policy.

(3) In June 2023, the employer learned that claimant had been going home during her lunch break, consuming alcohol, and then returning to work with her water bottle filled with alcohol. As a result, the employer drafted a last chance agreement which permitted claimant to continue working for the employer as long as she did not “come to work under the influence of alcohol or [while] emitting the odor of alcoholic beverages.” Transcript at 5. The agreement also included the following passage: “In

¹ Decision # L0007517668 stated that claimant was denied benefits from November 17, 2024, to November 8, 2025. However, because decision # L0007517668 determined that claimant separated from work on October 18, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, October 13, 2024, and until she earned four times her weekly benefit amount. *See* ORS 657.176.

the event of a positive alcohol test I agree to resign and that my signature below and this paragraph is sufficient to operate as my resignation from the [employer] and I waive my right to seek a hearing before the Board of Directors.” Transcript at 9. On June 22, 2023, claimant signed the agreement, which was to be in effect through June 2025.

(4) On the evening of October 17, 2024, claimant stayed up late into the night and early morning, consuming alcohol in response to the recent loss of a close friend. Claimant went to sleep at approximately 3:00 a.m. after having consumed approximately five alcoholic beverages.

(5) Claimant reported to work at 8:00 a.m. on October 18, 2024. That day, two coworkers who had been working in close proximity to claimant reported to the employer that they believed that claimant was under the influence of alcohol while at work. This report was based on their observations that claimant smelled like alcohol, made an “inappropriate comment” about an executive director, and “was acting . . . very loud” while speaking to the other two employees. Transcript at 6. After receiving this report, claimant’s supervisor met with claimant and observed similar signs of alcohol impairment. The supervisor then brought claimant to a testing center, where claimant was given a breathalyzer test. The test results showed that claimant had a blood alcohol content of 0.113%.

(6) On October 18, 2024, after receiving claimant’s breathalyzer test results, the employer discharged claimant because they believed she violated the terms of her last chance agreement due to her conduct that day.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for a disqualifying act.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

On October 18, 2024, claimant separated from work because she had allegedly violated the terms of her last chance agreement. That agreement stated that if claimant violated its terms, such a violation constituted her resignation from employment. At hearing, the employer’s witness testified similarly, explaining that claimant “resigned . . . to avoid termination.” Transcript at 5. However, the employer’s witness also testified that if claimant had not agreed to resign, the employer “absolutely” would have discharged claimant. Transcript at 9. The record does not show that claimant was unwilling to continue working for the employer. Therefore, despite the fact that the employer considered claimant to have resigned, the record shows that the employer was unwilling to continue to allow claimant to continue working for them. As such, the work separation is properly characterized as a discharge, and the facts have been found accordingly.

Discharge. 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:

* * *

(G) Refuses to enter into or violates the terms of a last chance agreement with the employer. OAR 471-030-0125 (January 11, 2018) states:

* * *

(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.

(7) For purposes of ORS 657.176(13), a reasonable agreement is a document signed by the employee as a condition of continued employment and:

- (a) The agreement may require the employee to submit to drug, cannabis, or alcohol testing;
- (b) The agreement may not require the employee to pay for the test; and
- (c) The agreement may not require them to attend a rehabilitation program that causes a hardship to the individual.

* * *

(10) For the purposes of ORS 657.176(9) and (10):

- (a) Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.
- (b) Breathalyzer tests for alcohol must be conducted in accordance with ORS 659A.300 and ORS 659.840.

* * *

ORS 438.435(1) states, “In addition to duties which a clinical laboratory may perform under ORS 438.010 to 438.510, a laboratory is authorized to perform appropriate tests, examinations or analyses on materials derived from the human body for the purpose of detecting substances of abuse in the body. All laboratories performing the tests, examinations or analyses must be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests, examinations and analyses.”

The employer discharged claimant on October 18, 2024, because they believed that her conduct that day constituted a violation of the last chance agreement she signed in June 2023. That agreement required that claimant not “come to work under the influence of alcohol or [while] emitting the odor of alcoholic beverages” for a period of two years after claimant signed the agreement. On October 18, 2024, claimant’s coworkers, and later her supervisor, observed signs that they believed indicated that claimant was under the influence of alcohol at work. In particular, all three individuals found that claimant had smelled like alcohol that day. Additionally, they felt that claimant’s demeanor, such as speaking loudly, was further evidence of claimant having been under the influence.

Claimant did not rebut the employer’s assertion that she smelled like alcohol that day. However, claimant testified that she did not believe that she had been intoxicated at work, and that she was “always loud”, not just on that particular day. Transcript at 16. Thus, given that the employer bears the

burden of proof in a discharge case,² the employer has not met their burden to show that claimant's behavior on October 18, 2024, proved that she was under the influence of alcohol at work that day.

Additionally, while the record shows that claimant smelled like alcohol at work that day, the employer did not move to immediately discharge her once they discovered that. Instead, the employer brought claimant to a testing facility so that a breathalyzer test could be administered, and only discharged claimant after the test results, which showed that claimant had a blood alcohol level of 0.113%, were returned. The breathalyzer test was not necessary for the employer to determine that claimant *smelled* like alcohol, but was apparently necessary to support the employer's suspicion that claimant was *under the influence* of alcohol. As such, claimant's allegedly being under the influence of the alcohol was the alleged violation of the last chance agreement that led the employer to discharge claimant, and therefore was the proximate cause of her discharge.

Because the employer relied on the results of the breathalyzer test to determine that claimant had violated the last chance agreement, the administration of the test itself must have met the requirements of OAR 471-030-0125(10). In particular, that provision of the rule requires that "[t]esting for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435." In turn, ORS 438.435(1) requires, in relevant part, that "[a]ll laboratories performing the [drug, cannabis, or alcohol] tests, examinations or analyses must be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests, examinations and analyses."

At hearing, the employer's witness testified that she did not know whether the testing facility that performed claimant's breathalyzer test was licensed in Oregon in accordance with ORS 438.435. Transcript at 8. Further, the employer produced no documentary evidence in this case, and the record otherwise does not show that the facility in question met those statutory requirements. Because the employer did not show that claimant's test was performed in accordance with ORS 438.435, thus satisfying OAR 471-030-0125(10), the test results obtained through that test cannot be used to show that claimant committed a disqualifying act by violating the terms of her last chance agreement. For that reason, claimant was discharged, but not for a disqualifying act, and therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 25-UI-278624 is affirmed.

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

DATE of Service: February 5, 2025

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

² See e.g., *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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 تأثیر 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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