

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1194

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 104923). Claimant filed a timely request for hearing. On July 1, 2014, ALJ Holmes-Swanson conducted a hearing, and on July 8, 2014 issued Hearing Decision 14-UI-21035, concluding claimant did not commit a disqualifying act. On July 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Marion County employed claimant from February 17, 2004 to May 20, 2014 as a crew leader.

(2) The employer had a written drug policy that prohibited the use of or condition of being under the influence of drugs in the workplace, and provided for random drug testing. To test for drugs, the policy stated that the employer will use a “split sample” method of collection to test for controlled substances. A urine sample was placed into two separate specimen bottles for shipment to a licensed laboratory. The employer did not conduct a confirmatory test unless the employee requested that the second specimen be tested in a different laboratory. Employees who requested a confirmatory test were required to pay for the cost of the test. The policy set out the following cut-off levels for a positive test for marijuana metabolites: 50 nanograms per milliliter (ng/mL) for the initial test, and 15 ng/mL for a confirmation test. Exhibit 1. An employee who violated any provision of the employer’s policy was subject to discipline up to and including discharge. The employer’s policy had been published and communicated to claimant.

(3) On May 13, 2014, the employer required claimant to submit a urine sample for a random drug test. The drug test was conducted in a federal or state licensed clinical laboratory.

(4) On May 20, 2014, the testing facility notified claimant that he had tested positive for marijuana. The facility refused to tell claimant the level of metabolites. Claimant did not request a second test, and the initial test was not confirmed by a second test.

(5) On May 20, 2014, claimant's supervisor and the employer's safety supervisor told claimant the employer would discharge him when it received the results of the initial drug test.

(6) On May 20, 2014, claimant quit to avoid being discharged for testing positive on the initial drug test.

**CONCLUSIONS AND REASONS:** We conclude that claimant did not commit a disqualifying act.

Claimant quit work on May 20, 2014 because his supervisors informed him that the employer would discharge him when it received the results of the initial drug test. The Department's drug and alcohol adjudication policy establishes policy for adjudicating cases involving the effects of drugs in the workplace. OAR 471-030-0125(1) (March 12, 2006). Because claimant quit work because of the results of a drug test, the Department's drug and alcohol adjudication policy applies to this case.

ORS 657.176(2)(h) provides that an individual shall be disqualified from receiving unemployment insurance benefits if the individual has committed a disqualifying act described in subsection (9) or (10) of ORS 657.176. ORS 657.176(9)(a)(F) provides that an individual is considered to have committed a disqualifying act when he tests positive for an unlawful drug in connection with employment. For purposes of ORS 657.176(9)(a)(F), an individual "tests positive" for an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy, the amount of drugs determined to be present in the individual's system equals or exceeds the amount prescribed by such policy, and the initial urine test is confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(2)(e), OAR 471-030-0125(10)(a).

A written employer policy is reasonable if it prohibits the effect of drugs in the workplace, is followed by the employer, has been published and communicated to the individual, and when the policy provides for drug testing, the employer has probable cause for requiring the individual to take the test, or the policy provides for random drug testing. OAR 471-030-0125(3). A "random" test for drugs is a test given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing. OAR 471-030-0125(5)(a). For the purposes of ORS 657.176(9)(a), no employer policy is reasonable if the employee is required to pay for the cost of the test.

In the present case, the employer's drug policy prohibited the effect of drugs in the workplace, was followed by the employer, was published and communicated to claimant, and provided for random drug testing. However, the employer's policy was not reasonable because claimant was required to pay for a second, confirmatory test. Moreover, the record does not show the amount of drugs in claimant's system equaled or exceeded the cut-off level for a positive test for marijuana metabolites, or that the initial test was confirmed by a second test. Because the employer's test was not administered according to a reasonable written policy, and the record does not show the amount of drugs in claimant's system, or that the test was confirmed by a second test, claimant did not "test positive" for an unlawful drug under ORS 657.176(9)(a)(F) and OAR 471-030-0125(10)(a), and therefore did not commit a disqualifying act under ORS 657.176(2)(h).

ORS 657.176(10)(c) provides that an individual is considered to have committed a disqualifying act when the individual voluntarily leaves work to avoid taking a drug test under a reasonable written policy that is consistent with ORS 657.176(9)(a)(A). To the extent claimant left work to avoid taking a second drug test, he did not commit a disqualifying act for purposes of ORS 657.176(2)(h) because the

employer's policy was not reasonable. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-21035 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** August 11, 2014

**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 website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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