

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1888

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not commit a disqualifying act (decision # 121658). The employer filed a timely request for hearing. On September 25, 2014, ALJ Wyatt conducted a hearing at which the Department did not appear, and issued Hearing Decision 14-UI-25898, reversing decision # 121658. On October 15, 2014, the Department filed an application for review with the Employment Appeals Board (EAB). On October 28, 2014, EAB issued Appeals Board Decision 2014-EAB-1643, remanding this matter for lack of a complete record. On November 26, 2014, ALJ Wyatt conducted a further hearing at which the Department, claimant and the employer appeared, and on December 14, 2014 issued Hearing Decision 14-UI-29729, affirming decision # 121658. On December 11, 2014, the employer filed an application for review with EAB.

EAB considered the Department's and the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Clint Newell Motors, Inc. employed claimant as a metal technician from May 13, 2013 until July 29, 2014.

(2) The employer had a written drug and alcohol policy that prohibited the effects of drugs and alcohol in the workplace. At the time claimant was hired and throughout his employment, the policy prohibited employees from using drugs, whether illegally obtained or medically prescribed, if the drugs might "adversely affect the employee's job performance or safety." Exhibit 2 at 11. The policy further stated that the employer "reserves the right to conduct drug or alcohol tests . . . on any employee at any time, with or without notice." Exhibit 2 at 7. The policy also stated that the employer's drug testing "may also be done at random at any time the employer feels an employee's behavior indicates his or her ability to do the job safely may be impaired." Exhibit 2 at 6. Claimant received a copy of the drug and alcohol policy when he was hired. At that time, claimant signed a form consenting to any drug testing that the employer required. Exhibit 1 at 2.

(3) On July 24, 2014, the employer randomly selected claimant and seven other employees for drug testing. Claimant provided a urine sample that day. The urine sample was sent to a state and federally licensed laboratory for analysis. On July 25, 2014, the laboratory detected a level of marijuana in claimant's urine that was above the screening cut-off for marijuana. The same laboratory conducted a second test on claimant's urine and confirmed that it was positive for marijuana.

(4) On July 29, 2014, the employer discharged claimant for violating its drug and alcohol policy by testing positive for marijuana.

**CONCLUSIONS AND REASONS:** Claimant was discharged but did not commit a disqualifying act under the Department's drug and alcohol adjudication policy.

ORS 657.176(9)(a) states that an individual is disqualified from benefits if the individual was discharged for committing a disqualifying act. A "disqualifying act" includes an individual's failure to comply with the terms of an employer's reasonable, written policy to prohibit the effects of drugs in the workplace. ORS 657.176(9)(a)(A). A reasonable written drug policy may include drug testing that is administered on a blanket, random, periodic and probable cause basis. ORS 657.176(9)(a)(A); OAR 471-030-0125(d)(A) (March 12, 2006); OAR 471-030-0125(d)(B). An employer's drug and alcohol policy is considered reasonable if, among other things, the employer follows its own policy when administering the policy, including selecting individuals to submit to drug tests. OAR 471-030-0125(3)(b).

The employer's witness consistently and clearly testified that the employer selected and required claimant to submit to drug testing on July 24, 2014 as part of a random testing process and had no basis for suspecting that claimant was impaired in the workplace. Audio of October 20, 2014 Hearing (Audio 1) at ~17:21, ~18:42, ~19:27; Audio of December 12, 2014 Hearing (Audio 2) at ~23:37, ~24:20. Although the employer's drug policy stated that drug testing was authorized "at random any time the employer feels an employee's behavior indicates his or her ability to do the job safely may be impaired," that provision did not by its language authorize "random" drug testing as that term is understood under the Department's drug and alcohol adjudication policy. Exhibit 2 at 6. OAR 471-030-0125(5)(a) states that a "random" drug test means a test "given to a sample drawn from a population in which each member of the population has an equal chance to be selected." Since the employer's drug policy referred to "random" testing only if it believed that an employee was "impaired," it did not set out the random selection process for testing permitted under the regulation, but testing for probable cause. OAR 471-030-0125(4). Because the employer's written drug policy at the time claimant was selected for testing did not contain a provision authorizing it to randomly test employees within the meaning of the regulation and the employer did not have probable cause to require claimant to submit to drug test on July 24, 2014, its administration of a drug test to claimant was not within the scope of its own drug policy. *See* Exhibit 2 at 6, 7, 11. As a result, the employer did not follow its own written policy when it required claimant to submit to the drug test on July 24, 2014 and its drug policy was therefore, by definition, unreasonable. *See* OAR 471-030-0125(3)(b). Although claimant tested positive for marijuana on the drug test that was administered to him, that result was invalid and cannot support his disqualification from benefits because it was obtained pursuant to an unreasonable written drug policy.

In its written argument, the employer argued that claimant should be disqualified from benefits because he tested positive for marijuana and he signed a consent form authorizing the employer to test him for drugs "at any time, with or without notice." Employer's Written Argument at 1. Exhibit 1 at 2, 5.

However, OAR 471-030-0125 sets out the permissible types of drug testing under an employer's drug policy, and neither it nor ORS 657.176(9) and (10) creates an exception where an employee arguably consented to additional grounds for testing that were not set specified in the policy or where an otherwise invalid test actually detected the presence of prohibited drugs. Because the language of the statute and its implementing regulation is plain and does not allow for discretion in applying them to particular situations, there is no authority to adopt the approach that the employer urges.

The employer discharged claimant but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-29729 is affirmed.

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

**DATE of Service:** February 2, 2015

**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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