

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0040**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged but not for committing a disqualifying act (decision # 125031). The employer filed a timely request for hearing. On January 9, 2015, ALJ Triana conducted a hearing, and on January 13, 2015 issued Hearing Decision 15-UI-31747, affirming the Department's decision. On January 16, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Lane County School District 97J employed claimant as a classified educational aide from October 23, 2014 until October 31, 2014.

(2) The employer had several different written policies prohibiting the use, possession and effects of drug and alcohol in the workplace. One of those written policies stated that all newly hired classified employees were required to take and pass a drug and alcohol test as a condition of their continued employment. This policy also stated that "the cost of the drug test shall be paid by the candidate and reimbursed by the [employer] upon the receipt of negative test results. The [employer] will not reimburse individuals who test positive for drugs." Transcript at 10. Although the employer did not provide a copy of its written drug and alcohol policies to claimant when she was hired, an employer representative told claimant that the employer's policies required all newly hired classified employees, including her, to take and pass a drug test or the employer would withdraw its offer of employment. The complete text of the employer's drug and alcohol policies was available to claimant and all other employees on the employer's website.

(3) On October 28, 2014, claimant took a drug test that the employer arranged. At that time, claimant still had not received a copy of the employer's written drug and alcohol policies. The urine sample that claimant provided was sent to Legacy MetroLab for evaluation to determine whether it was positive for various controlled substances and marijuana. Legacy MetroLab was a federal or state licensed clinical laboratory. On October 30, 2014, Legacy MetroLab tested claimant's urine sample and detected a

concentration of marijuana metabolite that was above its cut-off level for marijuana use. The employer paid Legacy MetroLab for the cost of the drug test that was administered to claimant.

(4) On October 31, 2014, the employer received a report of the results of claimant's drug test. On October 31, 2014, the employer discharged claimant for having a detectible quantity level of marijuana in her system when the drug test was administered to her on October 28, 2014.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for committing a disqualifying act.

ORS 657.176(2)(h) states that an individual is disqualified from benefits if the individual was discharged for committing a disqualifying act. ORS 657.176(9)(a)(A) states that an individual has committed a disqualifying act if the individual has violated the terms and conditions of a reasonable written employer policy that governs the use, sale, possession or effects of drugs or alcohol in the workplace. OAR 471-030-0125(3) (March 12, 2006) sets out the requirements for determining whether an employer's drug and alcohol policy is reasonable, including that the employer must follow its own policy. *See* OAR 471-030-0125(3)(b). OAR 471-030-0125(6) further defines what constitutes a reasonable written drug policy and states that "no employer [drug and alcohol] policy is reasonable if the employee is required to pay the cost of the test." *See generally also* OAR 471-030-0125(7)(a) (it is not a reasonable condition in a last chance agreement for an employer to require an employee to pay the cost of any required drug or alcohol testing); OAR 471-030-0125(8)(b), (c) (it is not a disqualifying act for an individual to fail to apply for or to accept an offer of suitable work because the employer requires a drug test if the drug policy requires the tested individual to pay the costs associated with the drug test).

The results of claimant's drug test cannot form the basis for claimant's disqualification from benefits unless that test was administered pursuant to a reasonable employer alcohol and drug policy. As written, the employer's policy requiring drug tests for newly hired employees required those employees to pay the costs for the testing, subject to reimbursement if they passed the test. Transcript at 10. Given the plain language of this provision, the employer's drug and alcohol policy was unreasonable under OAR 471-030-0125(6), and any ostensible violation of it therefore cannot be used to disqualify claimant from benefits. Although the employer pointed out that, in fact, it and not claimant paid the costs of claimant's drug test, this behavior did not cure the fatal flaw in the language of the written policy. Transcript at 15, 16, 27. OAR 471-030-0125(6) provides that it is the written language that must be viewed to assess whether a particular drug and alcohol policy was reasonable and does not set out any exceptions when the manner in which the policy was actually implemented ignored the policy's offending provision. Because the drug and alcohol policy under which the employer administered the drug test to claimant was unreasonable on its face, claimant's positive test result does not constitute a disqualifying act within the meaning of ORS 657.176(9)(a)(A).

The employer discharged claimant but not for committing a disqualifying act. Claimant is not discharged from receiving unemployment benefits based on her discharge arising from a positive drug test.

**DECISION:** Hearing Decision 15-UI-31747 is affirmed.

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

**DATE of Service: March 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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