

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0108**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for committing a disqualifying act (decision # 81348). Claimant filed a timely request for hearing. On February 12, 2015, ALJ Vincent conducted a hearing, and on February 13, 2015, issued Hearing Decision 15-UI-33513 concluding claimant was discharged, but not for committing a disqualifying act. On March 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Diamond Paymaster LLC (Diamond Parking) employed claimant as a lot checker from March 26, 2013 to December 5, 2014.

(2) The employer had a written drug and alcohol policy that prohibited the use and effects of drugs and alcohol in the workplace. The employer's policy provided for random testing for drugs and was published and communicated to claimant in writing on March 26, 2013.

(3) On November 21, 2014, claimant was one of several employees randomly selected by the employer from a pool of potential test subjects that included all employees to take a drug test. Claimant submitted a urine sample as requested and his urine sample tested positive for methamphetamine. A confirmatory test of claimant's positive urine sample was not conducted by a federal or state certified laboratory.

(4) On December 5, 2014, the employer discharged claimant because he tested positive for methamphetamine in violation of the employer's drug and alcohol policy.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. Claimant did not commit a disqualifying act under ORS 657.176(2)(h) and (9) and is eligible to receive unemployment insurance benefits.

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). In a discharge case for violation of an employer’s drug and alcohol policy, the employer has the burden to prove claimant committed a disqualifying act under ORS 657.176 (9) or (10) by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Assuming, *arguendo*, that claimant’s random urinalysis test for drugs was administered in accordance with the employer’s written policy, the employer’s policy was reasonable, and the amount of drugs in claimant’s system was detectable or exceeded the cut off level established by the employer, claimant’s positive test for methamphetamine is still not a “disqualifying act.” Here, the only evidence of claimant’s positive test for methamphetamine the employer presented at hearing was testimony about the test results that failed to show that more than a single test was performed. Audio Record ~ 19:00 to 20:00. When specifically asked by the ALJ whether he had any information regarding whether the laboratory which performed the test was federal or state certified, the employer’s witness only responded that the report “does not say.” Audio Record ~ 30:45 to 31:45. Because the failed test constituted the basis for claimant’s discharge for violation of the employer’s drug free policy, and because the employer failed to show that its testing procedures conformed to the requirements of OAR 471-030-0125(10), claimant’s single positive test for methamphetamine cannot be considered a “disqualifying act.”

In its Application for Review, the employer asserts that the ALJ erred in concluding that claimant was discharged for “failing [a] drug test” because it asserts that he was discharged for admitting to the employer “that he did, in fact, knowingly violate the terms of the employer’s drug and alcohol policy.” Employer’s Application for Review at 1. However, when specifically asked at hearing why claimant was discharged, the employer’s witness asserted claimant was discharged “for testing positive...during a random drug testing, he failed that test.” Audio Record ~ 7:25 to 7:55. The employer’s argument is not supported by the record.

The employer discharged claimant, but not for committing a disqualifying act under ORS 657.176(9). Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 15-UI-33513 is affirmed.

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

**DATE of Service: April 16, 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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.