

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1347**

*On Remand, Hearing Decision 15-UI-47659 is Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 71924). Claimant filed a timely request for hearing. On October 28, 2014, ALJ Murdock conducted a hearing, and on October 31, 2014 issued Hearing Decision 14-UI-27956, affirming the Department's decision. On November 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On November 17, 2014, claimant submitted a written argument to EAB. On December 4, 2014, EAB issued Appeals Board Decision 2014-EAB-1779 in which it affirmed the hearing decision under review. On December 8, 2014, claimant filed a request for reconsideration with EAB. On December 18, 2014, EAB issued Appeals Board Decision 2014-EAB-1779-R, denying claimant's request for reconsideration.

On January 16, 2015, claimant filed a Petition for Judicial Review with the Oregon Court of Appeals (CA A158643). On April 29, 2015, claimant filed an opening brief with the Oregon Court of Appeals. The Department filed a motion to take additional evidence. On August 13, 2015, the Court issued an "Order Granting Leave to Take Additional Evidence," remanding the case to the Department "to take additional evidence regarding whether a confirmatory test could have been performed on the test strip to confirm the presence of alcohol" in claimant's system. On September 25, 2015, the Department referred the case to the Office of Administrative Hearings (OAH) for a hearing and new hearing decision based upon the Court's Order. On October 7, 2015, OAH mailed notice of a hearing scheduled for October 21, 2015. On October 21, 2015, ALJ Murdock conducted a hearing, and continued the hearing to November 5, 2015. On November 5, 2015, ALJ Murdock conducted a continued hearing, and on November 13, 2015, issued Hearing Decision 15-UI-47659, concluding the employer discharged claimant, but not for committing a disqualifying act. On November 13, 2015, OAH referred the case to EAB pursuant to the Court's August 13, 2015 Order.

**FINDINGS OF FACT:** (1) ESCO Corporation employed claimant as a team lead from May 24, 2007 to August 20, 2015.

(2) The employer had a written zero tolerance policy that prohibited the use and effects of alcohol in the workplace. The employer followed its own policy, published it, and communicated it to claimant. The policy permitted the employer to subject its employees to random tests for alcohol. The employer selected employees for random testing on a monthly basis using a method under which all employees had an equal chance of being selected for testing.

(3) The employer used ALCO saliva test strips to conduct its blood alcohol tests. The testing process included wetting a test strip with the test subject's saliva and comparing the strip against a color-coded blood alcohol content chart included with the test strip packaging. The color-coded blood alcohol content chart was designed to indicate the approximate range of blood alcohol content. The instructions for testing included, among others, the following precautions, directions and limitations:

- DO NOT place anything into mouth for 15 minutes before testing.
- Using a clean dry [] Cup . . . simply spit into the cup.
- Wet test pad with saliva for 5 seconds then remove. Start the timer immediately.
- At 2 minutes compare color of test pad to the color chart on the test package.
- **Note: Results read after 2 minutes, 30 seconds may not be accurate.**
- Confirm positive results using an acceptable evidentiary alcohol test.
- Results from this test may not be used for legal proceedings.

See Exhibit 1 (emphasis in original). The instructions recommended confirming proper performance of the test strips by wetting strips with a solution consisting of measured amounts of distilled spirits and water. *Id.*

(4) On August 20, 2015, the employer selected claimant for random alcohol and drug testing. The employer conducted its alcohol and drug testing in an on-site health services department that was a state-certified testing lab. The employer's technician was trained to administer ALCO saliva tests, and considered it important to follow the test process instructions the manufacturer provided. October 28, 2014 hearing, Transcript at 25.

(5) Claimant was summoned to the employer's health services department at an unknown time. He consumed between 8 and 12 cups of water almost immediately before undergoing testing. At 8:08 a.m., a technician handed an ALCO test strip to claimant, instructed him to place the test strip on his tongue for an unknown period of time, then to set the strip on a color-coded blood alcohol chart. The technician then had claimant provide a urine sample for drug testing. After claimant completed both tests, the technician read the ALCO alcohol test strip results and interpreted them as showing that claimant had a blood alcohol content that ranged between .02 and .04.

(6) After reading the positive result for alcohol, the technician gave claimant a cup of water, instructed him to swish the water around his mouth while drinking it, then waited 20 minutes to conduct a second ALCO saliva test, during which time claimant did not have anything in his mouth. At 8:28 a.m., the technician handed claimant a new ALCO test strip, instructed him to place the strip on his tongue for an

unknown period of time, then set it on the color-coded chart. After an unknown period of time, likely approximating two minutes, the technician read the results as showing that claimant had a blood alcohol content of 0.0.

(7) At 8:33 a.m., within five minutes after claimant had the second ALCO saliva test strip in his mouth for the second test, the technician prepared a third ALCO saliva test and administered it to claimant. She instructed claimant to "get it very sloppy." October 28, 2014 hearing, Transcript at 21. After an unknown period of time, the technician read the results as showing that claimant had a blood alcohol content of approximately .02.

(8) The employer considered the third test as a definitive confirmation that claimant had a blood alcohol content of at least .02 while on duty. Claimant denied having consumed alcohol and requested additional testing. Because claimant had denied using alcohol, and because the three tests that the employer had administered to claimant all had different results, the employer's human resources manager opened a fourth ALCO saliva test kit and placed the test strip in her own mouth as a confirmatory test. When the results of the human resource manager's test showed no blood alcohol content, the employer concluded that the ALCO tests were working properly and denied claimant's request to be re-tested.

(9) On August 20, 2015, the employer discharged claimant for testing positive for alcohol based on the three ALCO saliva tests.

(10) The ALCO saliva test strips the employer used to test claimant's blood alcohol content were incapable of being retested after the initial testing was complete. The employer had claimant provide each saliva sample directly on the test strip, and did not retain a portion of the saliva claimant produced to be used for confirmatory testing.

(11) Although the Department's drug and alcohol policy does not require confirmatory testing for positive initial saliva tests and does not include provisions requiring any particular validity testing for other than blood and urine testing procedures, the Department's position is that, in the event that an alcohol test kit manufacturer has one set of clear testing instructions and recommended those instructions be followed, and an employer failed to follow those testing instructions, the Oregon Employment Department would probably consider any testing results following from those tests to be invalid. October 21, 2015 hearing, Audio recording at ~ 13:50.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was not for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(F) defines a disqualifying act to include testing positive for alcohol in connection with employment. OAR 471-030-0125(2)(e) provides, in pertinent part, that, for purposes of ORS 657.176(9)(a)(F), an individual "tests positive" for alcohol or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy, and at the time of the test, when the policy provides for zero tolerance, the individual has any detectable level of alcohol present in the his system. A "reasonable written policy" means one that prohibits the use, sale, possession, or effects of alcohol in the workplace,

the employer follows its policy, the policy is published and communicated to the individual or provided to him in writing, and the policy does not require employees to pay the cost of their own tests. OAR 471-030-0125(3). Additionally, when the policy provides for drug testing, the employer has probable cause for requiring the employee to submit to the test, or, in the alternative, the policy provides for random, blanket or periodic testing. *Id.* A "random" test is one where the test is given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing.

There is no real dispute in this case that the employer had a reasonable written policy that provided for random drug testing, and that the employer required claimant to submit to a random test for alcohol on August 20, 2015. Nor is there any dispute that the employer administered three ALCO saliva tests to claimant, two of which yielded a positive result, and one of which was negative, after which the employer discharged claimant for testing positive for alcohol in violation of its zero tolerance alcohol policy. At issue is whether claimant's positive test results can be considered a disqualifying act under the Department's drug and alcohol adjudication policy as set forth in OAR 471-030-0125.

Claimant's argument is, in essence, that the blood alcohol content tests the employer used were not reliable indicators of claimant's blood alcohol content at the time of the tests, primarily because the employer did not follow the test kit instructions when testing him, and no confirmatory testing was performed on claimant's saliva. Claimant further argues that, in the absence of a reliable indicator that claimant had a blood alcohol content at the time he was tested for alcohol, his discharge based on the positive test should not be considered a disqualifying act. OAR 471-030-0125(10) establishes procedures for validating drug and alcohol test results under the Department's drug and alcohol adjudication policy, as follows:

Procedures for testing. For purposes of ORS 657.176(9)(a) and 657.176(10):

- (a) In the case of a positive blood or urine test for drugs or alcohol, in order to determine whether an individual fails a test, is under the influence, or tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory.
- (b) In the case of a positive breathalyzer test for alcohol, a confirming test is not required.

The Department's policy does not require confirmatory testing in cases where saliva test kits are used. However, according to the Department's witness, the Department's position on the validity of drug and alcohol testing methods that are not specified in the administrative rule is as follows: if the employer used a testing method for which the manufacturer had one set of clear testing instructions, and the employer did not follow those instructions when administering the test to the claimant, the Department would probably consider test results following from such a test to be invalid. October 21, 2015 hearing, Audio recording at ~ 13:50.<sup>1</sup> It logically follows that the Department would not consider a positive test result based on an invalid test to constitute a disqualifying act.

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<sup>1</sup> The Department's witness presented that testimony as a hypothetical, stating that she could not speak to whether that was true in this case based on her belief that the facts in this case did not establish that there was a single testing method. However, the record on remand includes Exhibit 1, a copy of the ALCO saliva test manufacturer's instructions, which establish a single proper testing technique for ALCO saliva testing.

It is apparent on this record that the employer did not follow the manufacturer's testing instructions with respect to any of the three tests its technician administered to claimant. The technician did not have claimant spit into a cup, and the record fails to show whether claimant wet the test pad for five seconds versus a shorter or longer amount of time, or whether the technician used a timer or otherwise ensured she checked the test results at two minutes, and did not rely on results viewed two and a half minutes or more after claimant wet the test strips. Not only is it implausible that three properly administered, reliable tests for alcohol would show results ranging from 0.0 to .04 blood alcohol content over a 25-minute period. With respect to the two positive test results, it is more likely than not that, contrary to the manufacturer's instructions, claimant had something in his mouth within the 15 minutes immediately preceding the *positive* tests (water prior the first test and a test strip prior to the third test). By comparison, however, claimant had swished with water 20 minutes prior to the second alcohol test and, consistent with the manufacturer's instructions, had not placed anything in his mouth for the 15 minutes immediately preceding the second *negative* test. The ALCO saliva test was not administered to claimant in accordance with the manufacturer's instructions, and the preponderance of the evidence suggests that the improper administration of the tests affected the reliability of the test results.

In sum, because the employer did not follow the manufacturer's testing instructions when administering the ALCO saliva tests to claimant on August 20, 2015, and consistent with evidence of the Department's policy regarding determining the validity of other than blood and urine tests for drugs and alcohol, we cannot conclude that claimant's alcohol test results were a reliable indicator of his blood alcohol content at the time of the test. In the absence of reliable evidence of a positive test for alcohol, the record fails to show that claimant's discharge was for committing a disqualifying act.

**DECISION:** On remand from the Oregon Court of Appeals, Hearing Decision 14-UI-27956 is reversed, and Appeals Board Decisions 2014-EAB-1779 and 2014-EAB-1779-R vacated. Hearing Decision 15-UI-47659 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** November 24, 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. 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.

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