

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1370**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 7, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant committed a disqualifying act (decision # 82846). Claimant filed a timely request for hearing. On November 2, 2015, ALJ Shoemake conducted a hearing, and on November 6, 2015 issued Hearing Decision 15-UI-47331, affirming the Department's decision. On November 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

**FINDINGS OF FACT:** (1) Seven Feathers Hotel & Casino Resort Corporation employed claimant from June 21, 2010 to September 1, 2015 as a sous chef.

(2) The employer had a written drug policy that prohibited the effects of illegal drugs in the workplace or while engaged in work activities. The policy provided for probable cause testing of any employee injured at work who sought medical treatment outside work. An initial drug test providing a positive test result for illegal drugs was confirmed by a second confirmatory test. The employer's drug policy provided that a confirmatory test of 500 nanograms per milliliter (ng/ml) or higher for methamphetamines was considered a positive test result. Violating the policy would subject an employee to discipline, up to and including termination. Claimant received the employer's drug policy on July 24, 2015.

(3) On August 21, 2015, claimant accidentally cut his finger while performing his job. After the employer's security officer treated claimant's injury on site, claimant continued working until his shift ended at 11:00 p.m. After his shift, claimant sent an email to two of his supervisors stating that he would have to miss work the next day to seek medical attention if his finger did not stop bleeding by morning.

(4) The morning of August 22, 2015, claimant sent his supervisor a text stating he was unable to work and might seek further medical attention for the August 21 injury. Later that morning, claimant went to an urgent care clinic where he received medical attention for the injury. He reported to the clinic that the injury occurred in the workplace, and consented to a drug test.

(5) The medical facility collected a urine sample from claimant. The initial test was positive for methamphetamines. The initial test was confirmed by a test conducted in a clinical laboratory licensed by the State of Washington. The test result for the confirmatory test was 596 ng/ml. The employer paid for the initial and confirmatory tests.

(6) On August 27, 2015, the employer's executive chef called claimant and informed him that he had tested positive for methamphetamines. Claimant told the employer he did not use methamphetamines, and offered to be retested. The employer declined.

(7) On September 1, 2015, the employer discharged claimant for testing positive for an unlawful drug.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ and conclude that claimant committed a disqualifying act and is disqualified from receiving unemployment benefits.

ORS 657.176(2)(h) provides that an individual is disqualified from receiving unemployment insurance benefits if he has committed a disqualifying act described in subsection ORS 657.176(9). ORS 657.176(9)(a)(F) provides that an individual has committed a disqualifying act if he tests positive for an unlawful drug in connection with employment. Under OAR 471-030-0125(2)(e)(A) (March 12, 2006), 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 and, at the time of the test, the amount of drugs determined to be present in the individual's system equals or exceeds the amount prescribed by the employer's policy. To determine whether an individual tests positive for drugs for purposes of ORS 657.176(9)(a) and OAR 471-030-0125, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a).

A "reasonable" written drug policy is defined, in relevant part, as one that prohibits the effects of drugs in the workplace, is followed by the employer, has been provided to the individual in writing, and, where the policy provides for drug testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3). No employer policy is reasonable if the employee is required to pay for the cost of the test. OAR 471-030-0125(6). An employer has probable cause to require an employee to submit to a test if the employee's behavior causes an on-the-job injury. OAR 471-030-0125(4)(a). In a discharge case, the employer has the burden to establish that the claimant is disqualified from the receipt of benefits. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he tested positive for methamphetamines in violation of the employer's drug policy. We first address if the employer's drug policy was reasonable as defined by OAR 471-030-0125. The policy prohibited the effects of drugs in the workplace and had been published and was provided to claimant in July 2016. The employer's policy provided for "probable cause" testing of any employee involved in a work-related accident that resulted in an injury requiring outside

medical attention. The tests were provided at no cost to the employees. Thus, the employer followed its policy, and had probable cause to require claimant to submit to a drug test.

Claimant asserted in written argument that the record does not show his drug test results met the employer's cut off levels to test positive for methamphetamines. We disagree. Although the record does not show the level of methamphetamine that resulted in a positive result in the initial drug screen, the employer's senior risk manager testified that the initial test was positive for methamphetamines and that the initial testing facility would not have done a confirmatory test unless the initial test met the cut off level in the employer's policy. Transcript at 21. The risk manager's testimony was sufficient to establish that the initial test resulted in a positive test result. The record also shows that the initial test was confirmed by a test conducted in a state licensed facility, and the confirmatory test result of 596 ng/ml exceeded the cut off level of 500 ng/ml for a positive test result for methamphetamines under the employer's policy.

At hearing, claimant alleged he may have been exposed inadvertently to the drug or consumed it accidentally. Transcript at 28, 30. However, the initial and confirmatory tests showed claimant tested positive for methamphetamines as defined by 657.176(9)(a)(F) and OAR 471-030-0125(2)(e)(A). He therefore committed a disqualifying act under ORS 657.176(9), and is disqualified from the receipt of benefits under ORS 657.176(2)(h). Claimant also asserted in his written argument that he asked to be retested, but was not given the opportunity to do so by the employer. The employer was not obligated to retest claimant after obtaining the initial and confirmatory tests. Thus, claimant's assertion that his positive test for methamphetamines was the result of unintentional exposure and that the employer failed to retest claimant are not material to the issue of whether claimant tested positive for methamphetamines as defined by 657.176(9)(a)(F) and OAR 471-030-0125(2)(e)(A).

Because claimant committed a disqualifying act under ORS 657.176(9)(a)(F) by testing positive for methamphetamines, he is disqualified from the receipt of unemployment insurance benefits under ORS 657.176(2)(h).

**DECISION:** Hearing Decision 15-UI-47331 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: December 22, 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.

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