

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0443

*Hearing Decision 16-UI-56102 Affirmed
Disqualification*

*Hearing Decision 16-UI-56099 Affirmed
Ineligible for Week 4-16*

PROCEDURAL HISTORY: On March 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 104239) and an administrative decision concluding claimant did not actively seek work from January 24 through 30, 2016 (decision # 103050). Claimant filed timely requests for hearings on both decisions. On March 29, 2016, ALJ Holmes-Swanson conducted separate hearings. On March 30, 2016, ALJ Holmes-Swanson issued Hearing Decision 16-UI-56099, affirming decision # 103050, and on March 31, 2016, he issued Hearing Decision 16-UI-56102, affirming decision #104239. On April 14, 2016, claimant filed applications for review of Hearing Decisions 16-UI-56099 and 16-UI-56102 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-56099 and 16-UI-56102. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0442 and 2016-EAB-0443).

EVIDENTIARY MATTERS: Claimant submitted written argument regarding Hearing Decisions 16-UI-56099 and 16-UI-56102 that contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Claimant also requested that EAB consider Exhibit 1, which was offered into evidence at the beginning of the hearing. The ALJ did not admit it because claimant failed to provide a copy to the employer before the hearing. Transcript at 29-30. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. Because claimant testified to the relevant portions of Exhibit 1 at hearing, it is not necessary to admit Exhibit 1, or any portion thereof, to complete the record. Under ORS 657.275(2) and OAR 471-041-0090, we considered only information received into evidence at the hearing when reaching a decision regarding Hearing Decisions 16-UI-56099 and 16-UI-56102.

FINDINGS OF FACT: (1) Jackson Food Stores employed claimant from March 7, 2014 until January 20, 2016 as a customer service representative.

(2) Claimant had a valid Oregon Medical Marijuana Program (OMMP) card on January 17, 2016.

(3) The employer had a written drug-free workplace policy that prohibited employees from possessing, using or being under the influence of illegal drugs while at work. The employer's policy did not exempt medical marijuana card holders from its prohibition against possessing illegal drugs at work. The policy had been published and communicated to claimant. Claimant understood the employer did not permit her to possess marijuana at work.

(3) On January 17, 2016, a customer gave claimant a bag of marijuana outside the employer's store. The customer had been claimant's medical marijuana grower through the OMMP in the past. Claimant was not forced to take the bag. Claimant knew the bag contained marijuana, hid it under her shirt, and brought it into the employer's store, where she stored it in the backpack she had brought with her to work. Later during her shift, claimant told her manager that the customer had given her marijuana and that she had stored it in her backpack. Claimant's manager asked claimant why she did not call the police, and claimant responded, "Because you're the manager." Transcript at 26. Claimant took the marijuana home with her after her shift.

(4) On January 20, 2016, the employer discharged claimant for violating its drug policy by possessing marijuana at work.

CONCLUSIONS AND REASONS: In regard to Hearing Decision 16-UI-56099, the decision concluding that claimant did not actively seek work during the week of January 24 through 30, 2016 (week 4-16), EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), Hearing Decision 16-UI-56099 is **adopted**.

In regard to Hearing Decision 16-UI-56102, we agree with the Department and the ALJ and conclude that the employer discharged claimant for committing a disqualifying act.

ORS 657.176(2)(h) provides that an individual shall be disqualified from the receipt of benefits if the individual has committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(A) and (E) provide that an individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer that governs the possession of drugs in the workplace; or possesses a drug unlawfully or in violation of the employer's reasonable written policy during work. ORS 657.176(9)(c) provides, "It is no defense or excuse under this section that the individual's separation resulted from . . . marijuana use."

A written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs in the workplace; the employer follows its policy; and the policy has been published and communicated to the individual or provided to the individual in writing. OAR 471-030-0125(3) (March 12, 2006). An employee is discharged for committing a disqualifying act if the employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects

of drugs, marijuana, or alcohol in the workplace, unless in the case of drugs, other than marijuana, the employee can show that the violation did not result from unlawful drug use. OAR 471-030-0125(9)(a).

The employer had a written drug-free workplace policy. The policy was reasonable because it prohibited the use, possession or effects of drugs in the workplace, the employer followed its own policy and provided claimant with its written policy at hire.

Claimant asserted at hearing that she did not throw the bag of marijuana away when the customer gave it to her because she was not permitted to throw away a “prescription.” Transcript at 15. The Oregon Medical Marijuana Act (OMMA) does not contain such a prohibition. Moreover, claimant provided no plausible explanation for why she did not contact the police or immediately report the incident to her employer, instead of concealing the marijuana under her shirt, taking it into the employer’s store, putting it in her backpack, and waiting until later in her shift to tell her employer about the incident.

Claimant also implied at hearing that she did not call the police or commit a disqualifying act by possessing marijuana at work because she was an OMMP card holder entitled to possess marijuana. Transcript at 17-18. However, Employment Department law, including ORS 657.176(9)(c) and OAR 471-030-0125(9)(a), does not excuse possession of marijuana, even by an OMMP card holder, and specifically provides that even lawful possession of marijuana can be considered a disqualifying act. The OMMA authorizes OMMP card holders to use marijuana for medical purposes. ORS 475.306(1). Under the OMMA, the “medical use of marijuana” includes the possession of marijuana. ORS 475.302(8). The OMMA does not require an employer to accommodate the medical use of marijuana in any workplace. ORS 475.340. Nor may the Control and Regulation of Marijuana Act regarding recreational marijuana be construed to affect state or federal law pertaining to employment matters. ORS 475B.020(1) (2015). The employer had the right to prohibit the use, possession or effects of any drugs, including legal or prescribed drugs, in the workplace. Where, as here, the employer’s drug policy did not exempt medical marijuana card holders from its prohibition against possessing illegal drugs¹ at work, claimant was not exempt from the employer’s drug-free workplace policy because she had a medical marijuana card. By possessing marijuana at work, claimant violated the employer's reasonable written policy and committed a disqualifying act described in ORS 657.176(9). She is, therefore, disqualified from the receipt of benefits under ORS 657.176(2)(h).

DECISION: Hearing Decisions 16-UI-56099 and 16-UI-56102 are affirmed.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: May 18, 2016

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

¹ The Federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, classifies marijuana as a schedule I controlled substance. See 21 U.S.C. § 812 Schedule I (c)(10). This classification prohibits, among other things, the possession of marijuana outside of approved research projects. See 21 U.S.C. §§ 812, 823(f), 829.

'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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