

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0497**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 115658). Claimant filed a timely request for hearing. On April 6, 2016, ALJ Vincent conducted a hearing, and on April 12, 2016 issued Hearing Decision 16-UI-57032, affirming the Department's decision. On April 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Jeld-Wen, Inc. employed claimant as a door expeditor from February 14, 2006 until January 22, 2016.

(2) The employer had a written substance abuse policy governing the effects of drugs and alcohol in the workplace. The policy prohibited employees from reporting for work while under the influence of, or impaired by, drugs or alcohol. Exhibit 1 at 3. The policy provided for periodic, random and blanket drug and alcohol testing. Exhibit 1 at 4. The policy stated that an employee would be considered under the influence of or impaired by alcohol if a breathalyzer test registered that he or she had a blood alcohol content of 0.04 percent or more. Exhibit 1 at 5. The policy also stated that if upon testing an employee exceeded allowable levels of drugs or alcohol in his or her system, the employee was subject to discharge, but "may be allowed the opportunity for rehabilitation." Exhibit 1 at 2, 4. The policy further stated that an eligible employee who tested positive on a drug or alcohol test would be allowed to participate in the employer's EAP counseling program in lieu of discharge. Exhibit 1 at 6. Claimant received copies of the employer's substance abuse policy and signed acknowledgments when he was hired on March 26, 2008, and again in June 2011.

(3) On August 29, 2013, the employer randomly selected claimant for drug and alcohol testing. The level of marijuana metabolites detected in claimant's system exceeded those allowed under the employer's substance abuse policy. As a result, claimant was suspended from work for seven days and permitted to enter into the EAP counseling program as rehabilitation in lieu of discharge. Claimant was evaluated by an EAP counselor and cleared to return to work on September 12, 2013 upon his agreement

that he would remain in the EAP counseling program as the EAP counselor recommended. Upon his return to work, claimant was advised that since he had taken advantage of the second chance allowed under the employer's policy to avoid discharge, he would be discharged if he failed another drug or alcohol test in the future. Claimant understood what he was told.

(4) On January 15, 2016, the administrator for the employer's drug and alcohol testing program randomly selected 16 of the employer's 230 employees for random drug and alcohol tests. Claimant was one of the selected employees. On the evening of January 21 into January 22, 2016, claimant drank "quite a bit" of alcohol. Audio at ~ 25:09. Shortly after he arrived at work on January 22, 2016, claimant was notified he was selected for the random drug and alcohol testing. On January 22, 2016, claimant submitted to a drug and alcohol test.

(5) On January 22, 2016, sometime around 8:30 a.m., claimant's mouth was swabbed and alcohol was detected in his system. Claimant was administered a breathalyzer test at 8:51 a.m. The breathalyzer registered that claimant had a blood alcohol content (BAC) of 0.09 percent. A second breathalyzer test was administered to claimant at 9:08 a.m. The second test registered a BAC of 0.083 percent. When claimant was notified of the breathalyzer test results, he did not dispute them but asked to be allowed to enter the EAP counseling program to avoid being discharged.

(6) On January 22, 2016, the employer discharged claimant for violating its substance abuse policy by having a concentration of alcohol in his system that day that exceeded the allowable level.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for committing a disqualifying act.

ORS 657.176(2)(h) states that an individual who commits a disqualifying act is disqualified from receiving unemployment insurance benefits. ORS 657.176(9)(a)(A) states that an individual who fails to comply with an employer's reasonable written drug and alcohol policy has committed a disqualifying act, and ORS 657.176(a)(F) provides that an individual who tests positive for alcohol in connection with employment has also committed a disqualifying act. OAR 471-030-0125(3) (March 12, 2006) states that an employer's written drug and alcohol policy is considered reasonable if it governs the effects of drugs or alcohol in the workplace, the employer follows its own policy, the policy has been published or communicated to the individual or the individual has been given a written copy of the policy and, if the policy allows for testing, the employer has probable cause to test the individual or the policy provides for random, blanket or periodic testing.

Here, the employer's substance abuse policy met all requirements for a reasonable policy. It governed the effects of drugs and alcohol in the workplace, it was written, copies of that policy, as it was revised, were given to claimant, and it provided only for random, blanket, periodic or probable cause testing. There is no evidence in the record that the employer did not follow its own policy.

As the employer described the drug and alcohol test administered to claimant on January 22, 2016, his selection appeared to be wholly on a random basis. The alcohol concentration in claimant's system at the time of the breathalyzer tests significantly exceeded the levels allowed under the employer's substance abuse policy, and claimant did not dispute the accuracy of the result. Although the employer was not required to do so, it confirmed the accuracy of the results of the first breathalyzer test by

administering a second breathalyzer test to claimant. OAR 471-030-0125(10)(a). When the tests were administered, claimant had reported for a regular day of work, from which it is inferable that claimant had reported for work and had worked with an impermissible concentration of alcohol in his system that day. Given that the employer's policy was reasonable and the test that detected the level of alcohol was a permissible test, claimant failed to comply with the employer's substance abuse policy on January 22, 2016.

The remaining issue is whether the employer followed its own policy when it discharged claimant rather than allowing him to participate in the employer's EAP program as an alternative to discharge. While the employer might have interpreted its substance abuse policy to require it to offer the EAP alternative to an individual the first time he or she violated the policy, this was claimant's second positive test result and he had already gone through the EAP counseling program once before in lieu of being discharged. Audio at ~13:30. Since this was claimant's second violation, the employer's interpretation of its substance abuse policy did not require it to offer EAP counseling to claimant, nothing in the policy, as written, required it to offer the EAP counseling alternative for second violations, and there was no evidence that the employer had ever done so in the past in connection with any individual. The employer demonstrated that it discharged claimant for violating its reasonable written substance abuse policy when his breathalyzer test result on January 22, 2015 exceeded the allowable level for alcohol.

The employer discharged claimant for committing a disqualifying act. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-57032 is affirmed.

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

**DATE of Service: June 6, 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](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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