

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0612**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's discharge was for a disqualifying act (decision # 131511). Claimant filed a timely request for hearing. On May 4, 2016, ALJ Triana conducted a hearing, and on May 5, 2016 issued Hearing Decision 16-UI-58998, concluding claimant's discharge was not for a disqualifying act. On May 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** 1. Saia Motor Freight Line, LLC employed claimant as a driver from June 26, 2014 to February 2, 2016.

2. The employer had a written drug and alcohol policy that prohibited the use of drugs. The employer's policy was consistent with Department of Transportation standards, and provided for random, reasonable suspicion and post-accident drug testing. The employer published its policy and gave claimant a copy upon hire.

3. On approximately January 11, 2016, claimant saw a white board at work upon which someone wrote "Thursday" and his name; other drivers' names were written next to other days of the week. Claimant learned that the other drivers had been drug tested on the day written next to their names, and concluded he would be drug tested on Thursday.

4. On Thursday, January 14, 2016, the employer directed claimant to take a drug test. The employer did not specify the reason why claimant was being tested. Claimant took the drug test. The employer subsequently learned that an initial test of claimant's sample was positive for drugs, and, on January 20, 2016, suspended claimant pending confirmatory testing. On February 2, 2016, the employer received confirmation that claimant's sample was positive for amphetamines and discharged him.

**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 for individuals who commit a disqualifying act. ORS 657.176(9)(a)(F) defines a "disqualifying act" to include testing positive for unlawful drugs in connection with employment. OAR 471-030-0125(2)(e) provides, in pertinent part, that an individual "tests positive" "when the test is administered in accordance with the provisions of an employer's reasonable written policy." An employer's policy is considered "reasonable" when, among other things, it prohibits the use, sale, possession or effects of drugs in the workplace, the employer follows its policy, the policy is published and communicated to the individual or provided in writing, and, when the policy provides for testing, the employer has probable cause or the policy provides for random, blanket or periodic testing. OAR 471-030-0125(3) and (4). A "random" drug test "means a test for drugs and/or alcohol given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing." OAR 471-030-0125(5)(a).

The employer discharged claimant for testing positive for drugs. In order to prove that claimant's discharge was disqualifying, however, the employer must show that the positive drug test was required under its reasonable written policy. As a component of a reasonable policy, the employer must show that it either had probable cause to test claimant or that its policy allowed "random" tests, which required that claimant was selected for testing based on a sample drawn from a population in which each member of the population has an equal chance to be selected for testing. In its written argument, the employer argued that the employer's witness and claimant both testified that "this was a *random test* which the employer had the right to request . . . and no cause was required," and that both parties agreed that "this is a required Federal regulation and not just a random requirement of the employer." Written Argument (emphasis in original). That argument is inconsistent with the employer's witness's testimony at the hearing about the specific circumstances of claimant's January 17th test. For example, although the witnesses speculated that the drug test must have been random and testified generally about how individuals were selected for random tests, when asked when claimant had been asked to submit to a drug test, the employer's witness testified, "I'm sorry, I do not have that information." Audio recording at ~8:28. When specifically asked why claimant had been asked to submit to a drug test, the employer's witness testified, "Um, I – I should have that information but I do not. It's either, um, a random, or due to, a uh, a driving-related incident, but I don't have the specifics, I'm sorry." Audio recording at ~8:45.

Although the employer provided information about the employer's general practices and policies with respect to drug testing and random drug testing, because the employer could not state the specific circumstances under which claimant was selected to submit to a drug test on January 17th, the employer did not establish by a preponderance of the evidence in this record that claimant was randomly selected for drug testing or that claimant's January 17th test was based on a "reasonable written policy", as that term is defined for purposes of unemployment insurance cases. Therefore, we must conclude claimant's positive drug test was not a disqualifying act under ORS 657.175(2)(h), and claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 16-UI-58998 is affirmed.

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

**DATE of Service: June 23, 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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