

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0782**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for committing a disqualifying act (decision # 154652). The employer filed a timely request for hearing. On June 20, 2016, ALJ Menegat conducted a hearing, and on June 23, 2016, issued Hearing Decision 16-UI-62393, affirming the administrative decision. On July 1, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) From August 18, 2012 until May 10, 2016, Jefferson County School District #509-J (District) employed claimant as an assistant custodian.

(2) The District's "Drug-Free Workplace" policy applies to employees "engaged in work in connection with a direct federal grant or contract of \$100,000 or more." Exhibit 1. The policy prohibits these employees from manufacturing, distributing, possessing or using marijuana and other drugs in the workplace. *Id.* Because the District receives over \$1,000,000 in federal funds under Title I and Title III of the Elementary and Secondary Education Act, claimant was considered to be engaged in work connected with a federal grant of over \$100,000 and therefore subject to the "Drug-Free Workplace" policy. Claimant knew about and understood that he was required to comply with this policy. Transcript at 10, 21.

(3) Claimant is a cardholder under the Oregon Medical Marijuana Program. On April 29, 2016, he ingested marijuana at approximately 10:00 a.m. He then reported for his scheduled shift at 2:15 p.m. At approximately 9:00 p.m., claimant's supervisor contacted claimant in the building where he was working and concluded that claimant appeared to be under the influence of marijuana.<sup>1</sup> When claimant's supervisor questioned claimant, claimant told his supervisor that he was "stoned." Transcript at 14.

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<sup>1</sup> Claimant's supervisor was accompanied by his son, a police officer with expertise in recognizing drug use. The son also concluded that claimant appeared to be under the influence of marijuana.

(4) After speaking to claimant on April 29, the supervisor contacted the District's Human Resources (HR) and Operations director. The HR director went to the building where claimant was working, and asked claimant if he was under the influence of marijuana. Claimant responded that he was. Transcript at 6, 20. The director then placed claimant on administrative leave.

(5) On May 2, 2016, the HR director met with claimant and his union representative; at that meeting, claimant denied that he was under the influence of marijuana on April 29. Transcript at 6. On May 5, 2016, claimant spoke again with the HR director; at that time, he told the director that he had been under the influence of marijuana on April 29. *Id.*

(6) On May 10, 2016, the District discharged claimant for violating its "Drug-Free Workplace" policy.

**CONCLUSION AND REASONS:** We disagree with the ALJ, and conclude that the employer discharged claimant for committing a disqualifying act.

An individual commits an act that disqualifies him from the receipt of unemployment benefits if the individual fails to comply with the terms and conditions of an employer's reasonable written drug and alcohol policy. ORS 657.176(2)(h) and (9)(a)(A). An individual is discharged for a disqualifying act if the individual admits a violation of "a reasonable written employer governing the use, sale, possession or effects of ...marijuana in the workplace. OAR 471-030-0125(9)(a) (March 12, 2006). An employer's drug and alcohol policy is considered 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, or provided in writing to the individual. OAR 471-030-0125(3)(a) through (c).

Here, the employer discharged claimant because he admitted he had violated its drug and alcohol policy when he stated that he had been under the influence of marijuana when working his assigned shift on April 29, 2016. We find that the employer's "Drug-Free Workplace" policy was reasonable: it prohibited the use, sale and possession of drugs in the workplace, it was communicated to claimant,<sup>2</sup> and it was followed by the employer.

Claimant, however, denies that he violated the policy by working when he was under the influence of marijuana on April 29; he asserted that on that date, he only told his supervisor he was "stoned" because he felt he was being interrogated and wanted to end the questioning by telling the supervisor "what he wanted hear." Transcript at 14. The District HR director however, testified that on two occasions – on April 29 and May 5 – claimant told him that he had been under the influence of marijuana while at work on April 29; claimant never denied making these statements. In addition, claimant admitted that he smoked marijuana at 10:00 a.m., slightly more than four hours before he began his assigned shift at 2:15 p.m. Transcript at 6, 14. Based on the totality of these circumstances, we conclude it more likely than not that claimant violated the employer's drug and alcohol policy by working on April 29 when he was under the influence of marijuana, and that he admitted this violation to the employer.

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<sup>2</sup> The "Drug-Free Workplace" policy did not explicitly prohibit the effects of marijuana and other drugs in the workplace. The employer, however, interpreted the policy as prohibiting employees from working under the influence of drugs because it viewed being under the influence of a drug as equivalent to possession of that drug. Transcript at 9. Claimant understood that the policy prohibited him from working when he was under the influence of marijuana. Although he denied that he was under the influence of the drug on April 29, he testified that he knew he was not supposed to be "high at work." Transcript at 22.

The employer discharged claimant for committing a disqualifying act. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-62393 is set aside, as outlined above.

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

**DATE of Service:** August 2, 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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