

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1033**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92652). Claimant filed a timely request for hearing. On August 16, 2016, ALJ M. Davis conducted a hearing, and on August 24, 2016 issued Hearing Decision 16-UI-66188, affirming the Department's decision and concluding claimant was discharged for a disqualifying act. On September 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Trees, Inc. employed claimant from October 28, 2010 until May 9, 2016, last as the foreman of a chip crew.

(2) The employer had a written policy intended, among other things, to control the effects of drugs in the workplace. That policy prohibited employees from possessing illegal drugs or controlled substances during working hours or while on any work site or in any of the employer's vehicles. Exhibit 1 at 2, 7, 16. Claimant received a copy of the employer's policy. Exhibit 1 at 1. In 2015, the employer notified its employees that, although it was no longer illegal to possess small amounts of marijuana in Oregon, marijuana remained a controlled substance and it was still prohibited under the employer's drug policy.

(3) Sometime on or before May 3, 2016, a property owner to whom the employer had delivered wood chips offered to give a bag of marijuana to a foreman other than claimant if the foreman would arrange to have more wood chips delivered to his property. The foreman declined. On May 3, 2016, during the working day, claimant and his two person crew were stopped in one of the employer's split dumps with another of the employer's split dumps parked immediately behind them. The property owner who had offered marijuana to the other foreman drove up and parked adjacent to the split dump in which claimant and his crew were sitting, walked over to its driver's side and handed claimant a baggie of marijuana through the window. Claimant took the baggie, looked at it and placed it in his lunch box. Claimant

commented to his crew, "It sure looks like good stuff." Transcript at 43. Afterward, claimant took the baggie out of his lunch box five or six times to look it in the presence one of his crew members.

(4) On May 3, 2016, an employee who had been parked in the split dump behind claimant reported to the employer's supervisor that he had seen claimant receive and accept a baggie of marijuana that day while he was in the cab of one of the employer's trucks. That employee was familiar with the visible characteristics of marijuana.

(5) On May 5, 2016, the employer's supervisor and the area supervisor went to the job site where claimant and his crew were working. When the supervisors arrived, claimant and one crew member were in the split dump. Claimant removed the baggie of marijuana from his lunch box and asked the crew member to drop the baggie outside the truck's window. When the crew member refused, claimant dropped the baggie from the window. When the supervisors spoke to claimant, he denied having received the marijuana on May 3, 2016. The supervisors asked claimant to bring the truck to the employer's yard after his shift was over. After the supervisors left, claimant retrieved the marijuana and hid the baggie at the bottom of a nearby fence post.

(6) On May 6, 2016, the employer suspended claimant pending its investigation of whether he had possessed marijuana on the job site. On May 9, 2016, the employer discharged claimant for violating its drug policy by possession marijuana on a job site.

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

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. A disqualifying act includes possessing a drug unlawfully or in violation of the employer's reasonable written policy during work. ORS 657.176(9)(a)(E). An employer's drug policy is considered reasonable if it prohibits, among other things, the possession or effects of drugs in the workplace, the employer follows its own policy and the policy has been published and communicated to claimant or provided to claimant in writing. OAR 471-030-0125(3) (March 12, 2006).

The employer's drug policy met the requirements for reasonableness: it prohibited the possession of drugs, it was in writing, a copy of it was provided to claimant and the employer followed its own policy. The policy prohibited not only the possession of illegal drugs in the workplace, but also "controlled substances." Exhibit 1 at 2, 7, 16. Although possession of small amounts of marijuana may be legal in Oregon, there is no exception in the Department's drug and alcohol policy even for lawful use of marijuana, and marijuana is a federal Schedule 1 controlled substance and its impairing effects are well known. See OAR 471-030-0125(9)(a); 26 USC §812 Schedule 1 at (c)(10). It was reasonable for the employer's policy to include marijuana among the drugs it prohibited. If claimant possessed marijuana in the cab of the split dump or otherwise on a job site, the employer followed its own policy when it discharged him.

Here, the employer's other foreman and a member of claimant's chip crew both testified that they observed claimant receive the marijuana on May 3, 2016 while in the split dump. Transcript at 23, 26, 42, 44. While claimant denied he received and possessed that marijuana on May 3, 2016, the testimony

of the other foreman and the crew member were markedly consistent in their account of claimant's receipt of marijuana. While claimant contended the foreman could not have observed him receiving marijuana from the split dump in which he was sitting behind claimant, claimant readily conceded that the crew member who was sitting in the cab of the split dump was able to reliably observe him and his actions. Transcript at 30, 31. Claimant did not explain how, if both the other foreman and the crew member were lying about his actions, the observations they reported were so similar. It does not appear likely that both of these disinterested witnesses would have conspired against claimant to fabricate the same dishonest account of his actions on May 3, 2016, as they would have needed to do in order to account for the similarity in their reported observations. For all of those reasons, we conclude that the consistent accounts of the other foreman and the crew member outweigh claimant's denial that he engaged in the conduct alleged. The preponderance of the evidence therefore shows that claimant possessed marijuana, a controlled substance, while on the job and in a work vehicle, which violated the employer's drug policy. As such, claimant was discharged for committing a disqualifying act, and he is disqualified from unemployment benefits.

**DECISION:** Hearing Decision 16-UI-66188 is affirmed.

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

**DATE of Service:** October 4, 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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