

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1155**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for an act that disqualified her from receiving benefits (decision # 90028). Claimant filed a timely request for hearing. On October 3, 2016, ALJ Triana conducted a hearing, and on October 5, 2016 issued Hearing Decision 16-UI-68595, reversing the Department's decision. On October 14, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Greater Albany Public School employed claimant as a bus driver from September 14, 2004 to June 17, 2016.

(2) The employer had a written drug and alcohol policy prohibiting the use of unlawful drugs, including amphetamines, provided for random drug testing, stated that employees who tested positive for unlawful drugs would be subject to immediate disciplinary action up to and including discharge. The policy did not specify a cut off level for a positive test for drugs. The employer published the policy, and communicated it to claimant and provided to her in writing.

(3) On June 7, 2013, the employer required claimant to submit a urine sample for random drug testing. The test was conducted by a federally licensed clinical laboratory. The employer paid for the cost of the test. Claimant tested positive for amphetamines and methamphetamines.

(4) On June 17, 2016, the employer decided to terminate claimant's employment for testing positive for amphetamines and methamphetamines. However, the employer allowed claimant to resign in lieu of being terminated by the employer.

**CONCLUSIONS AND REASONS:** Claimant is not disqualified from receiving benefits based on her discharge by the employer.

On June 17, 2016, the employer decided to terminate claimant's employment. However, the employer allowed claimant to resign in lieu of being terminated, raising the issue of whether claimant voluntarily left work or was discharged. OAR 471-030-0038(2)(a) (August 3, 2011) states if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). Here, claimant could not have continued to work for the employer after June 17, 2016. She was willing to continue working for the employer, but the employer did not allow her to do so. The work separation therefore is a discharge.

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 subsection ORS 657.176(9). ORS 657.176(9)(a)(F) provides that an individual is considered to have committed a disqualifying act when the individual tests positive for alcohol or an unlawful drug in connection with employment. For purposes of ORS 657.176(9)(a)(F), an individual "tests positive" for alcohol or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test the amount of drugs or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement, or the individual has any detectable level of drugs or alcohol present in the individual's system if the policy or agreement does not specify a cut off level. OAR 471-030-0125(2)(e) (March 12, 2006). In the case of a positive blood or urine test for drugs or alcohol, in order to determine whether an individual fails a test, is under the influence, or tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a).

A written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace, the employer follows its policy, the policy has been published and communicated to the individual or provided to the individual in writing, and when the policy provides for drug or alcohol testing, the employer has probable cause for requiring the individual to submit to the test, or the policy provides for random, blanket or periodic testing. OAR 471-030-0125(3). A "random test for drugs and/or alcohol" 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). No employer policy is reasonable if the employee is required to pay for the cost of the test. OAR 471-030-0125(6).

In the present case, the employer's written policy prohibited the use of unlawful drugs, including amphetamines, provided for random drug testing, and stated that employees who tested positive for unlawful drugs would be subject to immediate disciplinary action up to and including discharge. The employer published the policy, and communicated it to claimant and provided to her in writing. The employer also paid for claimant's June 7, 2016 drug test. In Hearing Decision 16-UI-68595, however, the ALJ concluded that the policy was not "reasonable," as defined under OAR 471-030-0125(3), because the record failed to show why the employer tested claimant, and therefore failed to establish that the employer followed its policy with respect to drug testing.<sup>1</sup> At hearing, however, claimant's own testimony showed that the test was likely a random drug test, as defined under OAR 471-030-0125(5)(a), and provided for in the employer's policy. Audio Record at 18:30, 35:00. The record

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<sup>1</sup> Hearing Decision 16-UI-68595 at 2, 4.

therefore shows that the employer followed its policy with respect to drug testing, and established that the employer's policy was reasonable, as defined under OAR 471-030-0125(3).

The remaining issue is whether claimant tested positive for an unlawful drug as defined under OAR 471-030-0125(2)(e) and OAR 471-030-0125(10)(a). Although the requirements of OAR 471-030-0125(2)(e) were met, and the test of claimant's urine sample for drugs was conducted by a federally licensed clinical laboratory, the record fails to show that the initial positive test was confirmed by a second test. Audio Record at 35:30. Claimant's positive test for amphetamines and methamphetamines therefore was not a disqualifying act for purposes of ORS 657.176(2)(h) and ORS 657.176(9) (a)(F). Claimant therefore is not disqualified from receiving benefits based on her discharge by the employer.

**DECISION:** Hearing Decision 16-UI-68595 is affirmed.

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

**DATE of Service: October 28, 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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