

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1429**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's discharge was not for a disqualifying act (decision # 90454). The employer filed a timely request for hearing. On November 28, 2016, ALJ Vincent conducted a hearing, and on December 2, 2016 issued Hearing Decision 16-UI-72168, affirming the Department's decision. On December 19, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome would remain the same for the reasons explained.

**FINDINGS OF FACT:** (1) Wentworth Chevrolet Co. employed claimant as a salesperson from October 9, 2015 to July 1, 2016.

(2) The employer had a drug policy that prohibited the use and effects of drugs in the workplace. The policy provided for drug testing if the employer held a reasonable suspicion that an employee was under the influence of drugs at work. The employer provided claimant with a copy of the policy.

(3) On June 27, 2016, several managers concluded that based on their observations of his unusual behavior, pupil size, and other activities that they had reason to suspect claimant was using drugs and to subject him to drug testing. Claimant provided a urine sample, which tested positive for marijuana. The employer had the sample tested in a state certified laboratory, which provided the employer with a single set of test results.

(4) On July 1, 2016, the employer discharged claimant because of the positive marijuana drug test result.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was not for a disqualifying act.

ORS 657.176(2)(h) disqualifies individuals who commit a disqualifying act under ORS 657.176(9) from receiving unemployment insurance benefits. ORS 657.176(9)(a)(A) provides that failure to comply with an employer's reasonable policy, including testing provisions, is a disqualifying act. A policy is "reasonable" if, in pertinent part, it prohibits drugs in the workplace, the employer follows its policy, the policy is published and communicated to employees or provided to them in writing, and, when the policy provides for testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3). In all cases where an individual is discharged for reasons related to a positive urine test, however, the employer must prove that after an initial test the urine sample underwent a second test to confirm the result before an individual may be disqualified from receiving benefits based on the positive test results. OAR 471-030-0125(10)(a). The employer has the burden of proof in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

There is no dispute in this case that the employer had probable cause to subject claimant to drug testing, as provided by its reasonable written policy, or that claimant's urine sample tested positive for marijuana, in violation of the employer's drug policy. Claimant's positive test for marijuana cannot be considered a disqualifying act for purposes of disqualifying him from unemployment insurance benefits, however, unless the employer can prove by a preponderance of the evidence that the initial positive test result underwent a confirmation test, and, in this case, the employer did not prove that the confirmation test occurred. The employer's witness testified, after she spent several minutes looking at claimant's test result and having another person read the test result, that the lab only provided the employer with the results of one test, and that she did not know whether or not the result of the initial test was confirmed. Audio recording at ~ 12:40-15:55. Because the employer could not establish that a confirmation test occurred, and even though claimant's test results showed he had marijuana in his system at work, claimant's discharge was not for a disqualifying act under ORS 657.176(9), and he cannot be disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-72168 is affirmed.

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

**DATE of Service:** January 13, 2017

**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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