

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0080**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 64408). Claimant filed a timely request for hearing. On January 10, 2017, ALJ Holmes-Swanson conducted a hearing, and on January 11, 2017 issued Hearing Decision 17-UI-74467, affirming the Department's decision. On January 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Papa's Pizza employed claimant, last as an assistant manager, from approximately 1997 to July 8, 2016.

(2) The employer had a written drug and alcohol policy that prohibited employees from using drugs, whether on or off duty. The employer published and communicated the policy to claimant. The employer's policy required drug testing except where the employee admitted use.

(3) Claimant experienced insomnia and underwent medical testing and treatment for his condition. A medical treatment provider advised claimant to use marijuana to help induce sleep. Claimant was reluctant to do so because he knew using marijuana, even off-duty, violated the employer's drug policy, but, in late June 2016, used it on a single occasion.

(4) On July 8, 2016, the employer's president asked claimant about his use of marijuana. Claimant knew that he would be admitting violation of the employer's drug policy but wanted to be honest, so he admitted to the president that he had used marijuana on one occasion. The president discharged him, effective July 8, 2016, for violating the employer's drug policy.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was for a disqualifying act.

ORS 657.176(2)(h) requires disqualification from unemployment insurance benefits if claimant committed a disqualifying act. ORS 657.176(9)(a)(A) includes violation of an employer's reasonable

written drug policy as a disqualifying act. OAR 471-030-0125(3) (March 12, 2006) defines a “reasonable” written policy to include, in pertinent part, a policy that prohibits the use, sale, possession or effects of drugs in the workplace, is followed by the employer, and is published and communicated to the employee. OAR 471-030-0125(9)(a) states that an individual has committed a disqualifying act if he admits violation of a reasonable written employer drug policy, “unless in the case of drugs, other than marijuana, the employee can show that the violation did not result from unlawful drug use.”

The employer had a written policy, published and communicated to claimant, prohibiting on- or off-duty drug use, and it appears more likely than not that the employer followed its own policy. The fact that the employer prohibited off-duty drug use did not make the policy unreasonable, as we infer that the effect of such a policy was to prohibit the effect off-duty drug use could have in the workplace, thereby making the policy work-related and reasonable. Whatever claimant’s reasons for using marijuana, there is no dispute that claimant used marijuana with the knowledge that doing so violated the employer’s policy, and admitted his drug use to the employer’s president with the knowledge that he was admitting to a violation of the employer’s drug policy.

We note that claimant’s off-duty use of marijuana was done at a time when both medical and recreational marijuana use were legal in the State of Oregon under certain circumstances, and he used marijuana upon the recommendation of a medical treatment provider for the purpose of achieving a therapeutic effect. However, OAR 471-030-0125(9)(a), adopted by the Department at a time when at least some limited medical use of marijuana was considered lawful in the State of Oregon, specifically excluded lawful marijuana use from the “lawful drug use” exception, meaning that even lawful use of marijuana remains a disqualifying act. Applying OAR 471-030-0125(9)(a) to the facts of this case, we must conclude that despite the legality of claimant’s marijuana use within the State of Oregon, claimant’s admission to violating the employer’s drug policy by lawfully using marijuana remains a disqualifying act for purposes of unemployment insurance benefits. Claimant must, therefore, be disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-74467 is affirmed.

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

**DATE of Service:** February 10, 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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