

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0188**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's discharge was for committing a disqualifying act (decision # 112408). Claimant filed a timely request for hearing. On January 20, 2017, ALJ Meerdink conducted a hearing, and on January 25, 2017 issued Hearing Decision 17-UI-75392, affirming the Department's decision. On February 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Eugene Water & Electric Board employed claimant as a shopkeeper from March 21, 2005 to December 2, 2016.

(2) The employer had a written policy prohibiting employee drug use. The policy specifically prohibited intentional misuse and/or abuse of prescription medications. The policy provided for random drug testing, and the employer used a third party service that randomly selected employees for testing. In 2013, the employer provided claimant with a copy of the policy.

(3) In November 2016, claimant had a valid prescription for Ritalin. On November 8, 2016, claimant was out of Ritalin. His wife had a prescription for Adderall, a medicine claimant had previously been prescribed to treat the same condition the Ritalin treated, and, since he was out of his own medication, claimant took a dose of his wife's Adderall. At all relevant times, claimant did not have a valid prescription for Aderall. On November 8, 2016, claimant also took a dose of cough syrup.

(4) On November 8, 2016, claimant was selected for random drug testing and provided a urine sample. On November 10, 2016, the employer received notice that claimant's drug test was positive for amphetamine. During subsequent interviews with the employer and review of claimant's test results by two medical doctors, claimant disclosed that he had taken Ritalin and cough syrup prior to the drug test. Both doctors concluded that neither Ritalin nor cough syrup, when metabolized, produced amphetamine as a byproduct.

(5) On November 22, 2016, the employer held a pre-termination meeting with claimant to allow him the opportunity to present any additional information. Claimant disclosed at that time that he had run out of his own prescription Ritalin on November 8<sup>th</sup> and had taken his wife's Adderall instead. Claimant responded "Yes" when asked by the employer if he "intentionally took your wife's medication that you do not have a prescription for." Exhibit 1. Claimant responded "Yes" when asked by the employer "if intentionally taking your wife's prescription violated" the employer's policy prohibiting intentional misuse and/or abuse of prescription medications.

(6) Effective December 1, 2016, the employer discharged claimant for violating its drug policy.

**CONCLUSIONS AND REASONS:** Claimant's discharge was for a disqualifying act.

ORS 657.176(2)(h) requires disqualification from the receipt of unemployment insurance benefits when an individual has committed a "disqualifying act" as described in ORS 657.176(9). ORS 657.176(9)(a)(A) defines a "disqualifying act" to include the failure to comply with the terms of an employer's "reasonable written policy." OAR 471-030-0125(3)(a) (March 12, 2006) defines a "reasonable written policy" as one that prohibits the use, sale, possession or effects of drugs in the workplace, that is published and communicated to the individual or provided in writing, is followed by the employer, and, when the policy provides for drug testing, the employer either has probable cause for testing or the policy provides for random, blanket or periodic testing. In addition, a "reasonable" policy must not require the individual to pay for the cost of the test. OAR 471-030-0125(6). OAR 471-030-0125(9)(a) provides, in pertinent part, "The employee is discharge or suspended for committing a disqualifying act if: The employee violates or admits a violation of a reasonable written employer policy . . . unless in the case of drugs . . . the employee can show that the violation did not result from unlawful drug use."

In this case, there is no factual dispute that the employer's policy was reasonable: it prohibited the use and effects of drugs in the workplace; the employer provided it to claimant in writing; the employer followed its own policy; the policy did not require claimant to pay for the cost of the drug test; and the policy provided for random drug testing. Nor in this case is there any factual dispute that claimant's urine test was positive for amphetamines or that claimant's positive test for amphetamines violated the employer's drug policy. Claimant admitted to the employer, and did not dispute at hearing, that he violated the employer's reasonable written policy by consuming his wife's prescription medication. Claimant argued that he thought the Adderall he took was identical to his prescription for Ritalin, and that he thought it was okay to take it because he used to have an Adderall prescription and was told by a doctor that the medicines were used interchangeably to treat claimant's condition. Transcript at 21. However, claimant did not have a valid prescription for the medication, and taking another person's prescription medication is an unlawful act under Oregon and Federal law. *See* ORS 475.752(3); 21 U.S. Code § 844(a). Since claimant admitted violation of the employer's drug policy, and his violation resulted from unlawful drug use, claimant's discharge was for committing a disqualifying act under ORS 657.176(9) and OAR 471-030-0125(9)(a), and his discharge was therefore disqualifying under ORS 657.176(2)(h).<sup>1</sup>

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<sup>1</sup> In reaching this decision we note that if the evidence had only established that claimant was discharged for "testing positive" for drugs under ORS 657.176(9)(a)(F) and OAR 471-030-0125(2)(e) – without his subsequent admission that he violated the policy – his discharge would not have been for a disqualifying act. The testing procedure requirements set forth in OAR 471-030-0125(10) require that a confirmatory test take place before an individual is considered to "test[] positive,"

**DECISION:** Hearing Decision 17-UI-75392 is affirmed.

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

**DATE of Service:** March 3, 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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and the employer did not establish that any such confirmatory test took place. *See* Transcript at 13-14, 31. However, OAR 471-030-0125(9)(a) does not include any requirement, or reference any requirement, that the employer prove a confirmatory test occurred. Since this case was decided under OAR 471-030-0125(9)(a), and there is sufficient evidence in the record upon which to base a conclusion that claimant’s discharge was for a disqualifying act under that rule, the employer’s failure to establish that confirmatory testing occurred did not affect the outcome of this decision.