

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0909**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for committing a disqualifying act (decision # 112856). The employer filed a timely request for hearing. On June 29, 2017, ALJ Shoemake conducted a hearing, and on July 11, 2017 issued Hearing Decision 17-UI-87659, affirming the Department's decision. On July 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Chinook Winds Casino employed claimant as a table games dealer from March 14, 2016 until November 3, 2016.

(2) The employer had a written policy regarding drugs and alcohol in the workplace. The policy prohibited employees from being under the influence of illegal, illicit or controlled substances or alcohol while at work. The policy permitted the employer to administer drug or alcohol tests to employees on a pre-employment or random basis or when there was reasonable suspicion that an employee was under the influence of drugs or alcohol while at work. The policy provided that it was grounds for termination if an employee who was selected for testing "refused" to submit a specimen for testing after being requested to do so. Upon hire, claimant read the employer's drug and alcohol policy. On May 9, 2016, claimant signed an acknowledgement that he had been informed of and understood the employer's drug and alcohol policy.

(3) As of October 31, 2016, claimant was taking the prescription medication Oxycodone. One of the side effects that claimant experienced from Oxycodone was urinary retention and the inability to urinate at will.

(4) On October 31, 2016, while claimant was at work, the employer observed that claimant was sweating profusely, and moving his arms around quickly; the employer also observed that claimant speech was accelerated, slurred, and difficult to understand. A supervisor told claimant that he was required to submit to a reasonable suspicion drug test. Claimant reported to the employer's onsite testing room, where he was asked to produce a urine specimen.

(5) After reporting to the onsite testing area, claimant entered the restroom, but after ten minutes came out and told the employer he was unable to urinate and needed to drink some water. The employer allowed claimant to have some water, and then claimant again entered the restroom with a specimen collection cup. After ten minutes, claimant came out of the restroom and told the employer he had dropped the specimen cup into the toilet. Claimant was given another collection cup and went back into the restroom. After twenty minutes, claimant came out of the restroom and asked to have more water. Claimant was then given two bottles of water and drank them. After approximately thirty minutes, claimant entered the restroom again to produce a urine specimen. Claimant left the restroom shortly after entering it and asked to have more water. The employer did not allow claimant to have additional water. After ten minutes, claimant entered the restroom again and remained in the restroom for another ten minutes. Claimant then came out of the restroom and stated he had again dropped the collection cup in the toilet. Claimant was given another collection cup and went into the restroom for approximately twenty minutes. Claimant left the restroom shortly after entering it, stating he was still unable to produce a urine specimen and that he had flushed the toilet, which he had been instructed not to do during the urine collection process. The employer did not allow claimant any additional attempts to provide the requested urine sample. Claimant had been trying to produce a urine specimen for testing for approximately two hours. In the process of trying to produce a urine specimen, claimant had asked the employer if another form of a drug test that did not require him to produce urine specimen could be administered such as a blood test, a hair test or a mouth swab test. The employer did not allow claimant's request for an alternate form of testing since it had the onsite capacity to collect a urine sample. Claimant attributed his inability to urinate to side effects from the prescription Oxycodone he was taking. At the end of claimant's attempts to produce a urine specimen, the employer told claimant he was going to be suspended pending an investigation as to whether his failure to produce the requested urine specimen was properly considered a refusal to submit a specimen for a requested drug test.

(6) After the employer refused to allow claimant any additional attempts to produce a urine specimen, claimant went to the employer's human resources office. Claimant asked the human resources representative if he could be sent to the hospital. Claimant intended to seek a form of drug testing that would not require him to produce a urine specimen while at the hospital. The employer did not allow claimant's request. The human resources representative told claimant he was being suspended immediately because his inability to produce a urine sample appeared to constitute a refusal to submit to the reasonable suspicion drug test that the employer had required that day.

(7) On November 3, 2016, the employer discharged claimant for refusing to submit to the employer's October 31, 2016 drug test because he did not produce a urine specimen that day.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act as described in ORS 657.176(9) or (10). ORS 657.176(9)(a)(A) provides that an individual is considered to have committed a disqualifying act if the individual fails to comply with the terms and conditions of an employer's reasonable written policy that governs the effects of drugs and alcohol in the workplace. ORS 657.176(9)(a)(B) provides that an individual is considered to have committed a disqualifying act if the individual fails or refuses to take a drug or alcohol test as required by the employer's reasonable policy. OAR 471-030-0125(2)(b) (March 12, 2006) states that an individual "fails or refuses to take" a drug or alcohol tests when the individual does not take a drug or alcohol test as directed by the employer in accordance with the provisions of an employer's reasonable written policy. OAR 471-030-0125(3) states that a written employer drug and alcohol testing policy is reasonable if it governs the effects of drugs and alcohol in the workplace, the employer follows its own policy, the policy has been published or communicated to the individual or it has been provided to the individual in writing and, if it provides for testing, it allows only random, blanket, periodic or probable cause testing. The employer carries the burden to show by a preponderance of the evidence that claimant violated the employer's drug and alcohol policy. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Based on its apparent purpose, the types of drug testing that it allowed and since claimant signed an acknowledgement that he had read and understood the employer's drug and alcohol policy, the employer's written drug and alcohol policy met the first parts of the test for it to be considered a "reasonable written policy." As well, the employer's observations of claimant on October 31, 2016 and his unusual behavior gave the employer an objective basis to suspect that claimant might have been impaired or affected by drugs or alcohol in the workplace. On this record, the employer had probable cause to require claimant to submit to a drug or alcohol test to claimant. *See* OAR 341-030-0125(4)(a.). However, it does not appear that the employer followed the terms of its own drug and alcohol policy when it discharged claimant based on his inability to produce a urine specimen.

The employer's policy, as well as the Department's drug and alcohol policy, provide that they are violated if an individual "refuses" to submit a specimen for drug or alcohol testing or "refuses" to take a test. Exhibit 1 at 4; ORS 657.175(9)(a)(B); OAR 471-030125(2)(b). "Refuse" is customarily defined to mean "to show or express unwillingness to do or comply with." <http://www.merriam-webster/dictionary/refuse>; see also <http://en.oxforddictionaries.com/definition/refuse>. This definition assumes that it is within an individual's capacity and control to undertake an action and that the individual has voluntarily chosen not to do so. In this case, claimant contended he unable to produce the urine specimen the employer requested for its drug and alcohol test as an involuntary side effect of the prescription Oxycodone he was taking. In short, it was beyond claimant's control to comply with the employer's preferred testing protocol. In addition, claimant expressed willingness to submit to a drug and alcohol test when he asked the employer to use an alternate form of testing that did not require him to produce the urine specimen that he was incapable of producing at that time. While the employer's witness suggested claimant did not inform the employer of the reason for his inability to produce a urine specimen on October 31, 2016 or ask outright for an alternate form of testing that did not involve urine testing, claimant testified that he did. Audio at ~20:01, ~22:00, ~23:39, ~25:10. Because there is no reason in the record to doubt the testimony of either party or to prefer that of one party over the other, this disputed issue must be resolved against the employer since it carries the burden of proof in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

On this record, claimant was physically unable through no fault of his own to produce a urine specimen for drug testing on October 31, 2016. The nature of this inability coupled with claimant's willingness to submit to alternate forms of drug and alcohol testing that did not involve producing a urine sample establish that he was not "refusing" on October 31, 2016 to produce a urine sample or to submit to a drug and alcohol test within the common meaning of the word "refuse." As such, the employer did not follow the plain meaning of its own drug and alcohol policy when it discharged claimant for allegedly violating its drug and alcohol policy by "refusing" to produce a urine specimen for testing on October 31, 2016.

The employer did not show that it discharged claimant for committing a disqualifying act on October 31, 2016. Claimant is not disqualified for receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-87659 is affirmed.

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

**DATE of Service:** August 23, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.