

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1126**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 142856). Claimant filed a timely request for hearing. On August 31, 2017, ALJ M. Davis conducted a hearing, and on September 8, 2017 issued Hearing Decision 17-UI-92166, affirming the Department's decision. On September 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant, submitted a written argument, but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). However, even had EAB considered claimant's new information, the result would have been the same for the reasons detailed below.

**FINDINGS OF FACT:** (1) Williams Controls Industries, Inc. employed claimant from November 2, 2006 until April 25, 2017, last as a document control specialist.

(2) The employer had a written drug and alcohol policy governing the effects of drugs and alcohol in the workplace. That policy prohibited employees from being under the influence of drugs or alcohol while on the workplace premises. The policy was "zero tolerance" one, which defined being under the influence as having any level of drugs or alcohol in the employee's body. Audio at ~13:40. The policy permitted the employer to require employees to submit to drug or alcohol testing based on reasonable suspicion that they were under the influence. Claimant received a copy of the employer's written policy when she was hired and was aware of its requirements.

(3) On April 25, 2017, one of claimant's coworkers reported to a supervisor that he had observed claimant walking to work and had noticed that claimant was not walking in a straight line, but

“weaving” on the sidewalk. Audio at ~10:59. The coworker also reported that he had accompanied claimant after she arrived at the workplace and, while on the way to her cubicle, claimant had “stumbled” into the sides of cubicles she passed as well as into office walls. *Id.* The supervisor reported the coworker’s observations to the engineering director.

(4) Soon after, the engineering director approached claimant in her cubicle and asked her to come to his office. The director smelled an odor of alcohol on claimant. After reaching the director’s office, the director informed claimant of the coworker’s report as well as his own observation. The director told claimant she needed to submit to a drug and alcohol test. Although claimant told the director she would not pass the test, the director informed her that she still needed to take one.

(5) Later on April 25, 2017, the director transported claimant to a medical facility. Two breathalyzer tests were administered to claimant and both showed that alcohol was present in claimant’s body. On that day, after receiving the results of the breathalyzer tests, the employer discharged claimant for violating its drug and alcohol policy by having detectible levels of alcohol in her body while on the workplace premises.

(6) On April 27, 2017, two days after claimant was discharged, she began participating in an inpatient drug and alcohol treatment program at Cedar Hills Hospital. On May 1, 2017, claimant was discharged from that program. Claimant did not produce a signed statement from a representative of the program documenting her participation in it.

**CONCLUSIONS AND REASONS:** Claimant is disqualified from receiving benefits based on her work separation from the employer.

ORS 657.176(2)(h) requires a disqualification from benefits if the employee committed a disqualifying act under ORS 657.176(9)(a). ORS 657.176(9)(a)(D) states that an employee is considered to have committed a disqualifying act if the employee is under the influence of intoxicants while performing services for the employer, and ORS 657.176(9)(a)(F) states that an employee is considered to have committed a disqualifying act if the employee tests positive for alcohol or an unlawful drug in connection with employment. OAR 417-030-0125(2)(c) (March 12, 2006) states, in relevant part, that an employee is “under the influence” of intoxicants if, at the time of a test administered in accordance with an employer’s reasonable written policy, the employee has “any detectible level of drugs or alcohol” present in his or her system. OAR 417-030-0125(2)(e) states, in relevant part, that an employee “tests positive” for drugs or alcohol when the test is administered in accordance with the provisions of an employer’s reasonable written policy, and the employee has “any detectible level of drugs or alcohol” in the employee’s system.

OAR 471-030-0125(3) states, in relevant part, that a written employer drug or alcohol policy is reasonable if it prohibits the effects of drugs or alcohol in the workplace, the employer follows its policy, the policy has been published and communicated to the employee or provided to the employee in writing, and where, here, the policy it provides for drug or alcohol testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(4) states, in relevant part, that an employer has probable cause to require an employee to submit to a test for drugs and/or alcohol if the employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs or alcohol in the

workplace, or the employer has received credible information that a worker uses or may be affected by drugs or alcohol in the workplace.

The employer's policy met all requirements to be considered reasonable. It prohibited the effects of drugs and alcohol in the workplace, it was published and provided to claimant in writing, it allowed for probable cause drug and alcohol testing, and the record shows the employer followed its policy. The independent observations of claimant's coworker and the engineering director were credible and constituted objective evidence that gave the employer a reasonable basis to suspect claimant might be affected by drugs or alcohol in the workplace, as did claimant's subsequent admission to the engineering director that she did not think she would pass a test for alcohol. The employer therefore had probable cause to require claimant to submit to the drug and alcohol test on April 25, 2017. And although a confirmatory test was not required since a breathalyzer test was administered to claimant, claimant was tested twice, with a positive result on each test. *See* OAR 471-030-0125(10)(b). Claimant therefore was under the influence of alcohol while performing services for the employer and tested positive for alcohol in connection with employment.

ORS 657.176(9)(b)(A) provides that an individual who would otherwise have been considered to have committed a disqualifying act will not be found to have done so if, within 10 days after the date of separation, the individual is participating in a "recognized" drug or alcohol rehabilitation program *and* provides "documentation" of that participation to the Department. OAR 471-030-0125(2)(i)(B) states that the type of "documentation" that will meet this requirement is a "signed statement by an authorized representative of the recognized program" in which claimant participated. While claimant provided documents related to her entry into an alcohol treatment program at Cedar Hills Hospital two days after the date of separation, she did not supply a signed statement from a *representative of the treatment program*. Audio at ~20:49. Absent producing such a signed statement, claimant's alcohol test result on April 25, 2017 is not excused under ORS 647.176(9)(b)(A), and therefore is a disqualifying act.

Claimant therefore is disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 17-UI-92166 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** October 19, 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.