

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0006

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 84945). Claimant filed a timely request for hearing. On December 12, 2017, ALJ Frank conducted a hearing, and on December 14, 2017 issued Hearing Decision 17-UI-99025, reversing the Department's decision. On January 3, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but did not certify that it was served on the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For that reason, EAB did not consider the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Autozoners, LLC employed claimant as a delivery driver from June 26, 2010 until September 22, 2017.

(2) The employer had a written policy that governed the effects of drugs, cannabis or alcohol in the workplace. The policy prohibited employees from reporting to work or operating the employer's vehicles while under the influence of alcohol, illegal drugs, narcotics, other intoxicants. The policy required employees to submit to an alcohol breath test and a urine drug screen immediately after being involved in a collision while operating one of the employer's vehicles, regardless of whether medical attention was sought or who was at fault in the collision. Exhibit 1 at 4. Claimant received a copy of the employer's drug and alcohol policy and he was aware of it.

(3) Claimant had leg pain. The medication that claimant's physician prescribed for that pain made claimant nauseous. Sometime around approximately September 12 or 13, 2017, claimant used marijuana as an alternative to his prescribed pain medication. Claimant did not have a prescription for marijuana.

(4) On September 15, 2017, claimant was on duty and operating one of the employer's vehicles in a parking lot. Claimant stopped at a stop sign in the parking lot that was adjacent to some parking spaces.

While claimant was stopped, a vehicle backed out of a parking space and struck the rear passenger side of the vehicle that claimant was driving. The driver of the vehicle that struck claimant admitted that the accident was her fault.

(5) Very shortly after the collision, at around 2:25 p.m. on September 15, 2017, the employer required claimant to submit to a post-accident drug and alcohol test. Claimant gave a urine sample at a collection site operated by Bio-Med. At some point, claimant's urine sample was analyzed by Quest Diagnostics. Exhibit 1 at 7. The urine sample that claimant produced was found to be positive for marijuana.

(6) Sometime around September 18, 2017, the employer received a report that claimant's urine sample had tested positive of marijuana. On September 22, 2017, the employer discharged claimant for having tested positive for marijuana on September 15, 2017.

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

ORS 657.176(2)(h) provides that an individual is disqualified from benefits if the individual committed a disqualifying act. An individual is considered to have committed a disqualifying act if the individual fails to comply with the terms and conditions of a reasonable written policy, which may include blanket, random, periodic and probable cause testing, that is established to govern the effects of drugs, cannabis or alcohol in the workplace, if the individual is under the influence of intoxicants while performing work for the employer or if the individual tests positive for alcohol, cannabis or an unlawful drug in connection with employment. ORS 657.176(9)(a)(A); ORS 657.176(9)(a)(D); ORS 657.176(9)(a)(F). Notwithstanding that the use of cannabis or marijuana in recreational amounts is not unlawful in Oregon, it is no defense or excuse to a violation of a reasonable employer drug and alcohol policy that the violation arose from otherwise legal cannabis use. ORS 657.176(9)(c). An individual is considered to be "under the influence" of intoxicants if the individual has any detectable level of drugs or alcohol present in the individual's system, unless the employer's policy or an applicable collective bargaining agreement specifies a different level and, similarly, an individual "tests positive" for alcohol or unlawful drugs if the individual has any detectable level present in the individual's system if the employer's policy or a collective bargaining agreement does not specify a different cutoff level. OAR 471-030-0125(2)(c) (March 12, 2006); OAR 471-030-0125(2)(e).¹

The ALJ found that claimant's positive drug test results were not disqualifying because the employer's lack of "probable cause" to test claimant based upon the no-fault vehicle accident "rendered the employer's policy unreasonable . . . and invalidates the test result." Hearing Decision 17-UI-99025 at 5. We disagree with the ALJ because the employer's policy requiring drug and alcohol testing was not a "probable cause" test. As the ALJ concluded, a no-fault accident cannot supply probable cause for testing under the applicable rules. It was, however, a valid "blanket test," which is defined as "a test . . . applied uniformly to a specified group or class of employees." OAR 471-030-0125(5)(c). The employer's application of a blanket test to claimant under its policy was, therefore, reasonable, and the test results were not invalid.

¹ OAR 471-030-0125 was amended January 11, 2018; however, the version of the rule in effect at the time of claimant's claim filing is the version applicable to this case. OAR 471-010-0015(1) (November 22, 1993). We therefore applied the pre-amendment version of OAR 471-030-0125 when reaching this decision.

Although the blanket test for drugs was reasonable and valid, and yielded positive test results, the outcome of this decision must remain the same because the positive drug test was not disqualifying under OAR 471-030-0125(10). OAR 471-030-0125(10)(a) states that, for purposes of disqualifying an individual from receiving unemployment insurance benefits, tests for the presence of drugs or alcohol in an individual's system must be confirmed by a test conducted in a federal or state licensed clinical laboratory. In this case, the employer's witness admitted he did not know if Bio-Med, Quest Diagnostics or both actually analyzed the urine specimen that claimant gave on September 15, 2017, if either or both were licensed clinical laboratories or on-site screening facilities, or if a second test was performed to confirm the positive result that was reported to the employer. Audio at ~12:54, ~13:24. Since the applicable version of OAR 471-030-0125(1) requires that a confirmatory test be performed by a licensed laboratory and this record fails to show that such testing occurred, claimant's positive test result for marijuana was not a disqualifying act under the Department's drug, cannabis and alcohol adjudication policy. For those reasons, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-99025 is affirmed.

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

DATE of Service: February 7, 2018

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. 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.