

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0624**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 135008). Claimant filed a timely request for hearing. On May 22, 2018, ALJ Wyatt conducted a hearing, and on May 30, 2018 issued Order No. 18-UI-110347, affirming the Department's decision. On June 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that included documents and information that was not part of the hearing record. The employer did not explain why it did not offer the documents and information during the hearing and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from doing as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Perlenfein Inc. employed claimant as a truck driver until March 15, 2018.

(2) The employer had a written drug and alcohol policy intended to govern the effects of drug and alcohol in the workplace. The policy prohibited employees from working while under the influence of drugs. The policy allowed for random, blanket and reasonable suspicion drug testing. The policy provided that an employee's refusal to take a drug test, as instructed, would violate the policy and would be considered equivalent to a positive test result. The employer provided a copy of its drug and alcohol policy to claimant.

(3) On the night of March 14, 2018, claimant was scheduled to drive a truck route. Early in his shift, claimant called the manager on duty and stated he was unable to continue driving his truck. The manager went to the location of claimant's truck and took over its operation. With claimant sitting

beside him as passenger, the manager drove claimant's truck to Napavine, Washington and then back to the employer's site in Corvallis, Oregon, arriving at approximately 6:30 a.m. on March 15, 2015.

(4) After arriving at the employer's site on the morning of March 15, 2018, the manager informed the general manager that during the night, he had observed claimant behaving in a "paranoid" way, acting "just weird" and appearing to be under the influence of some impairing substance. Audio at ~24:40, ~26:45, ~27:32. The general manager met and spoke with claimant at the employer's site and observed that claimant was "real jittery," "sweating quite a bit" although it was not overly warm and acting "really, really, really strange." Audio at ~24:40, ~27:32. The general manager told claimant that he wanted claimant to take a drug test and that the manager would drive him to the medical clinic where the test would be administered. Claimant told the general manager that he was not submitting to the test and was going home to think over his options. Claimant went home shortly after 6:30 a.m. on March 15, 2018.

(5) Later in the day on March 15, 2018, the employer notified claimant that he was discharged for refusing to take a requested drug test on that day.

**CONCLUSIONS AND REASONS:** Claimant committed a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if claimant committed a disqualifying act. ORS 657.176(9)(a)(B) defines a disqualifying to include failing or refusing to take a drug test as required by an employer's reasonable written drug policy. A reasonable written drug policy may permissibly provide for probable cause drug testing. ORS 657.176(9)(a)(A). An employer's written drug policy is considered reasonable if, among other things, it prohibits the effects of drugs in the workplace, has been published, communicated or provided to claimant, the policy does not require claimant to pay for any portion of any required test and, if claimant was required to submit to a drug test based on probable cause, the employer actually had probable cause for testing. OAR 471-030-0125(3) (January 11, 2018).

The employer's drug policy had the purpose of governing the effects of drugs in the workplace. The employer's drug policy was written and claimant did not dispute that he was given a copy of that policy. The employer's policy allowed only the permissible forms of testing. The he employer's policy did not require claimant to pay any part of the expenses of testing. The employer's drug policy was reasonable within the meaning of ORS 657.176(9) and OAR 471-030-0125(3).

OAR 471-030-0125(4)(a) states that an employer has probable cause for requiring an individual to submit to drug test if, prior to the time of the test, the employer had observable, objective evidence that gave the employer a reasonable basis to suspect the individual may be impaired or affected by drugs, including a change in the individual's productivity or abnormal behavior by the individual in the workplace. In this case, claimant's behavior in notifying the manager that he was not physically able to continue driving his route on March 14, 2018 was unusual and abnormal. The manager, who was in close proximity to claimant throughout the night of March 14-15, 2018, observed strange, peculiar and atypical behavior on claimant's part that could have been associated with a drug-induced impairment and, upon arrival at the employer's site, the general manager also observed abnormal behavior and reactions by claimant which corroborated those of the manager. On this record and based on the

observations of both managers, the employer had probable cause to require claimant to submit to a drug test on March 25, 2018.

Although the employer's policy provided that a refusal to submit to a required test was considered a violation of the policy, claimant contended at hearing that he never told the employer outright that he was "refusing" to take the test, only that he was going home and he wanted the employer to call him to inform him of his options. Audio at ~36:16, ~36:49. However, the record does not show that the employer agreed to allow claimant to leave its site and go home, without sanction under its policy, for some indeterminate period before submitting to a drug test. Nor does it make sense that, given its strong suspicions, the employer would have withdrawn its instructions to claimant that he was required to submit to a drug test in favor of allowing claimant to go home and thereby avoid taking the test. Finally, OAR 471-030-0125(2)(b) defines "fails or refuses to take" a drug test to mean "when the individual does not take the test as directed by the employer," whether or not the individual explicitly made the statement to the employer that he was "refusing" to comply with the employer's instructions. Here, since it does not appear that the employer ever gave its permission for claimant to go home without taking the test or ever rescinded its March 15, 2018 direction to claimant that he take a drug test, by his behavior in leaving the employer's site and going home, claimant failed or effectively refused to take the required test as directed. On this record, the employer demonstrated that it discharged claimant for violating its reasonable, written drug policy by refusing to take a required drug test on March 15, 2018.

The employer discharged claimant for a disqualifying act. Claimant is disqualified from receiving employment insurance benefits.

**DECISION:** Order No. 18-UI-110347 is affirmed.

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

**DATE of Service:** July 20, 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](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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