

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-1197**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act under the Employment Department's drug, cannabis, and alcohol adjudication policy (decision # 65000). Claimant filed a timely request for hearing. On December 11, 2018, ALJ Janzen conducted a hearing, and on December 12, 2018, issued Order No. 18-UI-121119, affirming the Department's decision. On December 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Verns & Sons, Inc. employed claimant from August 11, 2016 until September 10, 2018 as a delivery driver.

(2) The employer had a written drug, cannabis, and alcohol policy that prohibited employees from the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace. The employer gave claimant a copy of the policy at hire. The policy required that an employee submit to a drug test if the employee was involved in a vehicle accident while working. The policy also provided for drug testing based on reasonable suspicion. The employer paid for the drug tests.

(3) The employer did not enforce a specific time for drivers to begin their routes in the morning or return to the workplace at night after completing the routes. Claimant returned to the workplace later after completing his deliveries on the two days per week when he had longer routes. The employer paid claimant per load and not per hour.

(4) Beginning in May 2018, claimant began to occasionally report to work late. On about 12 occasions during the same time period, claimant returned to the workplace at 10:30 or 11:00 p.m. after completing his deliveries. Most of the employer's drivers returned to the workplace by 5:00 p.m. Claimant's manager asked claimant why he returned to the workplace so late, and claimant responded that he had dinner with friends who lived along his route. On one occasion, claimant took a nap while completing his route and woke up late. The manager was dissatisfied with claimant's explanation, but the employer

did not discipline claimant based on his attendance or having used the employer's vehicle to dine with friends.

(5) On July 12, 2018, claimant had an accident while driving an employer vehicle during work. A gust of wind hit claimant's vehicle while he was driving down a hill, and claimant lost control of the truck. Claimant "rolled over" the employer's truck and "totaled" it. Transcript at 14.

(6) On September 10, 2018, claimant reported to work and his manager asked claimant to take a drug, cannabis, and alcohol test. The employer requested the test because claimant was involved in the July 12, 2018 vehicle accident and because he returned to the workplace late repeatedly after finishing his deliveries. Claimant told the manager that he refused to take the test and that he would not pass the test at that time because he had used cannabis the prior night.

(7) On September 10, 2018, the employer discharged claimant because he refused to take the drug test.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant, but not for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if an employee has committed a disqualifying act as described in ORS 657.176(9). ORS 657.176(9)(a)(A) provides that it is a disqualifying act if an employee fails to comply with the terms and conditions of the employer's "reasonable written policy" governing the use and effects of drugs, cannabis or alcohol in the workplace, which may include probable cause testing. ORS 657.176(9)(a)(B) provides that it is a disqualifying act if an employee refuses to take a drug, cannabis or alcohol test as required by the employer's reasonable written policy. A written employer policy is reasonable if it prohibits the use or effect of drugs, cannabis or alcohol in the workplace and does not require the employee to pay for any portion of the test, has been published and communicated or provided in writing to the employee, and when the policy provides for drug, cannabis or alcohol testing, the employer has probable cause for requiring the employee to submit to the test. OAR 471-030-0125(3) (January 11, 2018).

An employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if before the test, the employer has 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. OAR 471-030-0125(4)(a). Such evidence may include, but is not limited to, repeated tardiness or behavior that causes substantial damage to property. *Id.* ORS 657.176(9)(a)(B) provides that it is a disqualifying act if the employee is under the influence of intoxicants while performing services for the employer. OAR 471-030-0125(9)(a) provides, in pertinent part, that it is a disqualifying act if the employee admits a violation of a reasonable written employer policy governing the use or effects of cannabis in the workplace.

The employer discharged claimant because claimant refused to take a drug, cannabis, and alcohol test on September 10, 2018. When claimant refused to take the test, he told his manager that he had used cannabis the night before. The ALJ concluded that in admitting to the employer that he had used

cannabis on September 9, 2018, claimant admitted to a violation of the employer's drug, cannabis and alcohol policy, which was a disqualifying act under OAR 471-030-0125(9)(a).<sup>1</sup>

We disagree that claimant admitted to violating the employer's drug, cannabis and alcohol policy. The employer's policy prohibited the use, sale, possession and effects of drugs, cannabis, and alcohol *in the workplace*. Claimant admitted to using cannabis the night before he reported to work on September 10, 2018. In admitting that he had used cannabis while not working on September 9, 2018, claimant did not admit to using or being under the influence of cannabis on September 10, 2018 in the workplace. The record does not show that the employer's drug, cannabis and alcohol policy governed the use of cannabis while claimant was not at work, or not working. Moreover, although claimant stated that he would not pass the employer's test, claimant's statement was speculation and did not constitute a failed test. Claimant's admission that he used cannabis on September 9 while not a work was therefore not a disqualifying act.

The employer had a drug, cannabis and alcohol policy that provided for testing based on probable cause. It is a disqualifying act where an employee fails to comply with the terms of the employer's policy, or refuses to take a test, provided that the policy is "reasonable." ORS 657.176(9)(a)(A), (B). The next issue is therefore whether the employer's drug, cannabis and alcohol policy was reasonable. *See* OAR 471-030-0125(3). The policy prohibited the use and effects of drugs, cannabis and alcohol in the workplace, did not require claimant to pay for the cost of his test, and claimant received the written policy at hire. However, to be reasonable, because the policy provided for probable cause drug, cannabis or alcohol testing, the employer had to have probable cause for requiring claimant to submit to the test.

The employer asked claimant to submit to the test, in part, because claimant had an accident in the employer's truck while working on July 12, 2018. Although behavior that causes substantial damage to property may be probable cause, the nearly two months that had elapsed between the accident and the request for claimant to submit to a test was too much time for the July 12 accident to be probable cause for the test.

The employer also tested claimant, in part, because he sometimes returned to the workplace later than the other drivers, and began his route later than the other drivers in the morning. However, claimant was paid by the load and not by the hour, and the employer did not enforce a start time in the morning or a time to return to the workplace at night. Claimant described the employer's attendance policy as "lax" and as being "to the drivers' discretion," with no specific start time. Transcript at 42. Claimant also asserted plausibly that the time he took to complete his route varied according to customers' preferences for when they received their deliveries and the length of particular routes, causing him to return to work later on the two days per week when he had the longest routes. Transcript at 42-43. The record shows that the employer did not enforce its attendance expectations because although claimant's manager spoke to claimant about returning to the workplace late at night, the employer did not issue claimant a formal warning or otherwise discipline him for that conduct.

As for claimant's personal use of the employer's vehicle to eat meals with friends, claimant was entitled to meal and rest breaks during his routes, and the employer did not discipline claimant for meeting friends for his meal breaks. Under the circumstances, claimant's conduct in beginning and ending his

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<sup>1</sup> Order No. 18-UI-121119 at 4.

routes later than the other drivers did not give the employer probable cause to test claimant for drugs, cannabis or alcohol. Because the employer did not have probable cause for requiring claimant to submit to the test on September 10, the employer's drug, cannabis and alcohol policy was not reasonable. Because the policy was not reasonable, claimant's failure to comply with the policy by refusing to take a drug test was not a disqualifying act.

The employer discharged claimant, but not for a disqualifying act. Claimant is not subject to disqualification from unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 18-UI-121119 is set aside, as outlined above.

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

**DATE of Service:** January 31, 2019

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

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**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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