

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0496**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 29, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for a disqualifying act (decision # 153156). Claimant filed a timely request for hearing. On May 23, 2019, ALJ Seideman conducted a hearing, and on May 24, 2019 issued Order No. 19-UI-130502, concluding that the employer discharged claimant for misconduct and a disqualifying act. On May 29, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) Tonkin Parts Center employed claimant in its warehouse from March 29, 2017 until March 8, 2019.

(2) The employer had a written policy to control the use and effects of drugs, cannabis, and alcohol in the workplace. The policy stated that the employer could require an employee to submit to a drug, cannabis, or alcohol test if the employer reasonably suspected that the employee used or was affected by drugs, cannabis, or alcohol in the workplace. The policy further stated that if an employee refused to take a required drug, cannabis, or alcohol test, the employee could be discharged. The employer gave claimant a copy of the drug, cannabis, and alcohol policy when she was hired.

(3) On March 7, 2019, three employees reported to the employer that claimant had purchased a bottle of vodka during her lunch break. One of those employees reported that claimant had brought a cup of coffee onto the warehouse floor and the employee thought she smelled alcohol mixed in with the coffee. None of the employees reported that they had seen claimant consume alcohol that day.

(4) After receiving the reports, the employer told claimant that it wanted her to take a test under the drug, cannabis, and alcohol policy. Claimant initially understood that she would be tested only to determine if there was alcohol in her system and agreed to the test. At the testing facility, claimant

became aware that the employer intended to have her take a test that would detect the presence of drugs, cannabis, or alcohol in her system. Claimant refused to take the required test.

(5) On March 8, 2019, the employer discharged claimant for refusing to take a drug, cannabis, and alcohol test required under its policy.

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

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act. ORS 657.176(9)(a)(B) provides that an individual is considered to have committed a disqualifying act when the individual “[f]ails or refuses to take a drug, cannabis or alcohol test as required by the employer’s reasonable written policy[.]” OAR 471-030-0125 provides:

(3) [A] written employer policy is reasonable if:

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(d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:

(A) Probable cause for requiring the individual to submit to the test; \*\*\*\*

OAR 471-030-0125 provides, in part:

\*\*\*\*\*

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if:

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(b) The employer has received reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace[.]

Order No. 19-UI-130502 concluded that claimant committed a disqualifying act under the Department’s drug, cannabis, or alcohol policy. Although claimant denied the allegations, the order found based on the hearsay reports of three employees that claimant had purchased vodka during her lunch hour on March 7 and, afterward, had an “alcohol smell on her” in the workplace. Order No. 19-UI-130502 at 5. Based these findings, the order determined that the employer had probable cause for requiring claimant to take a drug, cannabis, and alcohol test on March 7 and her refusal to submit to that test was a disqualifying act. *Id.* The record does not support the conclusions.

The order was factually inaccurate when it implicitly suggested that three employees observed claimant bring a container onto the workplace floor that smelled of alcohol. It was also incorrect in finding that claimant smelled of alcohol. The actual testimony at hearing was that one employee had smelled what that employee thought was alcohol in a cup of coffee that claimant brought onto the work floor on March 7. Audio at ~12:26. There was no testimony at hearing that anyone smelled the coffee cup other than the one employee. There was no testimony at hearing that anyone smelled alcohol on claimant’s person on March 7. Although some or all of the three employees may have reported that claimant purchased a bottle of vodka during her March 7 lunch break, there was no testimony about how they knew of the purchase and whether they personally observed claimant purchase or bring that bottle of vodka into the workplace. There also was no information about whether the vodka bottle was open at

any point during the workday, whether anything about claimant's appearance or behavior that day indicated that she might have been drinking, or whether claimant said anything indicating that she intended to drink alcohol in the workplace that day.

Claimant denied at hearing that she bought a bottle of vodka during lunch on March 7 and that she brought a cup of coffee mixed with alcohol onto the warehouse floor. The issue is whether the hearsay reports of the employees were reliable information that claimant used or was affected by alcohol in the workplace. As indicated above, the hearsay reports of the employees were generally vague and impressionistic. Without more, the hearsay accounts of the employees were not sufficiently specific to constitute reliable information that claimant might have used or been affected by drugs, cannabis, or alcohol in the workplace on that day. Because those accounts were not sufficiently reliable, the employer did not have probable cause to require claimant to submit to a drug, cannabis, or alcohol test on March 7. As such, claimant's refusal to take the test could not constitute a violation of the employer's drug, cannabis, and alcohol policy and could not be a disqualifying act.

Order No. 19-UI-130502 further concluded that claimant's refusal to take the drug, cannabis, and alcohol test on March 7, in addition to violating the employer's drug, cannabis, and alcohol policy, also disqualified claimant from receiving benefits under the general misconduct provisions of ORS 657.176(2)(a) and OAR 471-030-0038(3)(a)(December 23, 2018). Order No. 19-UI-130502 at 5. However, the order was incorrect in concluding that claimant could be disqualified from benefits on this independent ground. OAR 471-030-0125(1) (January 11, 2018) provides that in cases like this one, involving the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace, OAR 471-030-0125 is the regulation that should be used to adjudicate the case. OAR 471-030-0125(11) also provides that the general misconduct provisions of OAR 471-030-0038 apply only where an employer does not have a written policy regarding the use, sale, or possession of drugs, cannabis, or alcohol in the workplace. For these reasons, it was incorrect for Order No. 19-UI-130502 to have relied on OAR 471-030-0038(3)(a) as ground for disqualifying claimant from benefits, and claimant may not be disqualified under that rule.

The employer discharged claimant but not for a disqualifying act. Claimant is not disqualified from benefits based on this work separation.

**DECISION:** Order No. 19-UI-130502 is set aside, as outlined above.

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

**DATE of Service:** July 2, 2019

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week 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

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## 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**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**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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