

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0604**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for a disqualifying act (decision # 124739). The employer filed a timely request for hearing. On June 17, 2019, ALJ Snyder conducted a hearing, and on June 25, 2019, issued Order No. 19-UI-132256, affirming the Department's decision. On July 1, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Dubose Strapping Inc. employed claimant as a field technician from December 9, 2009 to February 21, 2019.

(2) The employer had a written drug and alcohol policy that prohibited the use, possession and effects of illegal drugs and alcohol in the workplace and established the responsibilities, procedures and guidelines for application of the policy. Exhibit 1. The policy provided for pre-hire, random, reasonable-suspicion and post-accident drug testing. One provision of the policy established the guidelines to be followed when testing for illegal drugs. That provision provided, in relevant part:

If the verification test indicates the presence of an illegal drug, the [Medical Review Officer (MRO)] will contact the employee and provide him/her the opportunity to justify the positive test result...If the MRO determines that the employee's justification for the positive test result is not sufficient, the findings are forwarded to the [Drug Program Manager (DPM)] for further action. Upon receipt of MRO findings the DPM shall advise the employee that he/she may request a second test of the specimen and will arrange contact with the MRO, if desired. The second test will be conducted at the same Dubose contracted laboratory, at Dubose's expense. The employee can also request a second test at another certified laboratory. In such instances, the contracted laboratory used by Dubose will send a portion of the original sample to the laboratory designated by the employee. The cost of this test shall be paid by the employee.

Exhibit 1 at 17.

(3) On January 28, 2019, while at work, claimant felt a “pop” in his shoulder but continued working without notifying the employer that he had potentially injured his shoulder. Audio Record ~ 25:00 to 26:00.

(4) On February 14, 2019, claimant continued to experience shoulder pain and notified his supervisor about it. Claimant then spoke with the employer’s safety manager and requested the opportunity to have his shoulder medically examined. The safety manager sent claimant to a nearby urgent care clinic, where he had his shoulder examined by a physician. While there, claimant was told that the employer also wanted claimant to undergo a post-accident urinalysis test for drugs. Claimant submitted to the employer’s requested drug test.

(5) The urine sample that claimant submitted was sent to an Alere laboratory in Virginia for evaluation to determine whether it was positive for various controlled substances and marijuana. Alere was a federally certified urine drug-testing laboratory.<sup>1</sup> On or about February 15, 2019, Alere tested claimant’s urine sample and detected a concentration of marijuana metabolite that was above the employer’s zero tolerance cut-off level for marijuana use. The employer paid for the cost of the initial and confirmatory testing of the urine sample that was collected from claimant.

(6) On February 20, 2019, the employer received a report of the results of claimant’s drug test. On that same day, the MRO contacted claimant and notified him about the positive drug test results. Claimant did not request a reanalysis of his urine specimen.

(7) On February 21, 2019, the employer discharged claimant for having a detectible level of marijuana metabolites in his system when the drug test was administered to him on February 14, 2019.

**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)(A) provides that an individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining, which may include blanket, random, periodic, and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace. ORS 657.176(9)(a)(F) provides that an individual is considered to have committed a disqualifying act when the individual tests positive for alcohol, cannabis or an unlawful drug in connection with employment. OAR 471-030-0125(3) (January 11, 2018) sets out the requirements for determining whether an employer’s drug and alcohol policy is reasonable, including a requirement that states, “[T]he policy does not require the employee to pay for any portion of the test.” OAR 471-030-0125(3)(a).

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<sup>1</sup> <https://www.samhsa.gov/sites/default/files/state-certified-labs-list-feb-2019.pdf>

Here, the results of claimant's drug test cannot form the basis for a disqualification from benefits unless that test was administered pursuant to a *reasonable* employer alcohol and drug policy. As written, although the employer's policy allowed employees who failed an initial verified test for drugs to have a second test of their sample conducted by a certified laboratory, other than the one used by the employer, that policy stated, "The cost of this test shall be paid by the employee." Given the plain language of this provision, the employer's drug and alcohol policy was unreasonable under OAR 471-030-0125(3)(A)(b), and any ostensible violation of it therefore cannot be used to disqualify claimant from benefits. Although the employer showed that, in fact, it and not claimant paid the costs of claimant's drug testing, and claimant did not request a reanalysis of his test sample at a different certified laboratory, these facts do not cure the flaw in the language of the written policy. OAR 471-030-0125(3) provides that it is the written language of the policy must be assessed to determine whether a particular drug and alcohol policy was reasonable, and does not provide any exceptions when the manner in which the policy was actually implemented did not relate to the policy's offending provision. Because the drug and alcohol policy under which the employer administered the drug test to claimant was unreasonable on its face, claimant's positive test result does not constitute a disqualifying act within the meaning of ORS 657.176(9)(a)(A).

The employer discharged claimant but not for committing a disqualifying act. Claimant is not disqualified from receiving unemployment benefits based on his discharge arising from a positive drug test.

**DECISION:** Order No. 19-UI-132256 is affirmed.

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

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

**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 desisyon.

## 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 الاستئناف 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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