

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0227**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act under the Department’s drug and alcohol adjudication policy (decision # 73554). Claimant filed a timely request for hearing. On February 24, 2020, ALJ Wyatt conducted a hearing, and on March 3, 2020, issued Order No. 20-UI-145525, concluding the employer discharged claimant, but not for a disqualifying act. On March 16, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wood Recovery employed claimant until it discharged him on October 21, 2019.

(2) The employer had a written drug and alcohol policy that it provided to claimant on December 24, 2018. The policy stated, “In order to provide a drug and alcohol free workplace . . . our policy prohibits employees from . . . being under the influence of a controlled substance . . . on premises, in company vehicles, during work hours including break or lunch periods.” Audio Record at 15:45 to 16:15. The policy provided that the use of an “illegal drug” or “controlled substance” in a manner that would “impair work performance” was a violation of the policy. Audio Record at 16:20 to 17:11. The policy stated, “Testing may be required at any time with or without the belief that the employee is under the influence of drugs or alcohol.” Audio Record at 15:13 to 15:22. The policy also provided that “having any detectable level of an illegal drug or controlled substance in one’s system while covered by this policy” was a violation of the policy and may result in discipline or discharge. Audio Record at 17:12 to 17:45.

(3) The employer had warned claimant “a couple times” about falling asleep while in and operating heavy equipment, including a loader and a “shovel,” at work. Audio Record at 22:49, 24:00. An employee reported to the employer that, on one occasion, a coworker knocked on the equipment window, and claimant did not wake up immediately. The employer believed claimant’s conduct might be due to drug or alcohol use and decided to require claimant to submit to a drug and alcohol test.

(4) On October 15, 2019, the employer told claimant that “it was [his] turn,” and that he needed to take a “random drug test.” Audio Record at 28:10 to 28:35. Claimant told the employer that he “would not pass the test because he had some marijuana.” Audio Record at 31:54 to 31:57. The employer told claimant, “If it comes back for marijuana, we can address that at that point” because recreational cannabis use is legal in Oregon. Audio Record at 31:58 to 32:03. The employer would have considered options other than discharge, such as a temporary layoff until claimant was able to test negative for THC, if claimant were to test positive only for THC. Audio Record at 29:46 to 30:39. On October 15, the employer took claimant to Good Samaritan laboratory in Lebanon, Oregon where claimant submitted to a drug test. After the test, the employer told claimant to “take a couple days off” until the employer received the results of the test. Audio Record at 20:26.

(5) On October 16, 2019, the employer received the results of the test. The result showed claimant tested positive for methamphetamine and THC. On October 21, 2019, the employer discharged claimant because his October 15 drug test was positive for methamphetamine.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for committing 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) provides that an individual is considered to have committed a disqualifying act when the individual:

(A) 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;

\* \* \*

(F) Tests positive for alcohol, cannabis or an unlawful drug in connection with employment \* \* \*.

OAR 471-030-0125 provides:

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

(a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; and

(b) The policy does not require the employee to pay for any portion of the test; and

(c) The policy has been published and communicated to the individual or provided to the individual in writing; and

(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; or

(B) The policy provides for random, blanket or periodic testing.”

\* \* \*

(6) For purposes of ORS 657.176(9) \* \* \*, no employer policy is reasonable if the employer does not follow their own policy.

\* \* \*

OAR 471-030-0125 provides:

\* \* \*

(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:

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or

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

(c) Such test is required by applicable state or federal law, or an applicable collective bargaining agreement that has not been declared invalid in final arbitration; or

(d) Such test is required or allowed pursuant to a reasonable agreement.

(5) Random \* \* \* testing. For purposes of ORS 657.176(9) \* \* \*:

(a) A "random test for drugs, cannabis, or alcohol, or a combination thereof" means a test for drugs, cannabis, or alcohol, or a combination thereof given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing.

\* \* \*

The first issue is to determine if the employer's drug policy was "reasonable." *See* OAR 471-030-0125(3). The terms of the employer's policy were reasonable in that it prohibited the use and effects of drugs or alcohol in the workplace, was provided to claimant in writing, and, we infer, did not require claimant to pay for testing. However, to be reasonable, when an employer's policy provides for testing, the employer must either have probable cause for requiring the employee to submit to testing, or the policy must provide for random, periodic or blanket testing. Here, the policy provided for random testing, stating, "Testing may be required at any time with or without the belief that the employee is under the influence of drugs or alcohol."

Although the employer's policy provided for random testing, and the employer told claimant he was selected for a random drug test, the record shows that the test administered to claimant on October 15, 2019 did not meet the definition of a "random drug test." The employer elected to test claimant because he had allegedly fallen asleep while operating machinery more than once while working. The record contains no evidence to show that the test was "given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing." *See* OAR 471-030-0125(5)(a). For purposes of ORS 657.176(9), no employer policy is reasonable if the employer does not follow their own policy. OAR 471-030-0125(6). Because the employer did not follow its own policy for a random drug test, the employer's policy was not reasonable.

An employer may require a drug test based on probable cause. However, although the employer had reports of claimant falling asleep while operating machinery some time before October 15, 2019, the record shows that the test given to claimant on October 15 was intended to be a random test, and not a probable cause test. The record does not show that the employer had "observable, objective evidence" serving as a "reasonable basis to suspect that [claimant] . . . was impaired or affected by drugs, cannabis, or alcohol" on October 15. There is no evidence in the record to show that on October 15, claimant exhibited abnormal behavior, a change in productivity, or was injured or involved in a workplace accident, or was required by law to submit to a drug test. *See* OAR 471-030-0125(4).

It is undisputed that claimant tested positive for methamphetamine, and that the employer discharged him for that reason. 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. However, for purposes of ORS 657.176(9), an individual "tests positive" for alcohol, cannabis, or an unlawful drug only when the test is administered in accordance with the provisions of an employer's reasonable written policy. OAR 471-030-0125(2)(e). An employer's policy is not reasonable if the employer does not follow its own policy. OAR 471-030-0125(6). Because the employer did not conduct a random test that met the definition of a random drug test, and did not have probable cause for a test, the employer did not follow its own policy. Therefore, claimant' did not "test positive" for purposes of ORS 657.176(9).

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. 20-UI-145525 is affirmed.

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

**DATE of Service: April 17, 2020**

**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](https://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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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