

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0580**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, disqualifying claimant from receiving unemployment insurance benefits effective April 19, 2020 (decision # 101725). Claimant filed a timely request for hearing. On June 23, 2021, ALJ Wyatt conducted a hearing, and on July 1, 2021 issued Order No. 21-UI-169718, affirming decision # 101725. On July 20, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant submitted two written arguments on July 20, 2021, one by email and one via EAB's online portal. As to the argument submitted by email, claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB therefore did not consider claimant's argument submitted by email. As to claimant's argument submitted via EAB's online portal, claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument submitted via EAB's online portal to the extent it was based on the record.

**FINDINGS OF FACT:** (1) KA Designs LLC employed claimant as an office manager from March 9, 2020 to April 22, 2020.

(2) The employer had a written policy that governed the use, sale, possession, or effects of drugs, cannabis and alcohol in the workplace, and was contained in the employer's employee handbook. Under the policy, employees were prohibited from being under the influence of cannabis while performing

services for the employer. The policy stated that the employer “reserve[d] the right to test any employee for the use of . . . [cannabis] . . . in accordance with the applicable law.” Transcript at 9. Under the policy, returning a test result positive for cannabis or working under the influence of cannabis could result in an employee’s termination.

(3) On March 9, 2020, claimant started working for the employer. That day, the employer sent claimant to the office of their third-party administrator to complete new hire paperwork. The employer expected claimant to take and pass a cannabis test that day. Claimant was not aware she had to take a cannabis test, and did not know about or receive a copy of the employer’s written drug, cannabis, and alcohol policy. Claimant submitted to the test, which was administered via a rapid results testing kit. The kit yielded an inconclusive result so the administrator sent the sample to a state-licensed testing laboratory.

(4) A few days later, the employer told claimant that the employee handbook and written drug, cannabis, and alcohol policy contained therein was available in a file on claimant’s work computer and suggested claimant should read the file. The employer did not provide the handbook or policy contained therein to claimant in writing.

(5) On April 7, 2020, the testing laboratory returned a result that claimant’s March 9, 2020 testing sample was positive for cannabis. The test result surprised claimant, because she did not use cannabis. Claimant thought the positive test result may have been the result of an over-the-counter CBD product she used to treat anxiety and pain.

(6) On April 15, 2020, the employer decided to give claimant “a second chance for a negative result,” and asked claimant submit to another cannabis test. Transcript at 11. Claimant did so, and on April 21, 2020 the testing laboratory returned a result that claimant’s April 15, 2020 testing sample was also positive for cannabis. On April 22, 2020, the employer discharged claimant for violating their written drug, cannabis, and alcohol policy.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-169718 is reversed. 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 as described in ORS 657.176(9) or (10). 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;

\* \* \*

(D) Is under the influence of intoxicants while performing services for the employer;

\* \* \*

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

“For purposes of ORS 657.176(9) . . . an individual is ‘under the influence’ of intoxicants if, at the time of a test administered *in accordance with the provisions of an employer's reasonable written policy* or collective bargaining agreement, the individual has any detectable level of drugs, cannabis, or alcohol present in the individual’s system, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement.” OAR 471-030-0125(2)(c) (January 11, 2018) (emphasis added). “For purposes of ORS 657.176(9), an individual ‘tests positive’ for alcohol, cannabis, or an unlawful drug when the test is administered *in accordance with the provisions of an employer's reasonable written policy* or collective bargaining agreement, and at the time of the test, either (A) the amount of drugs, cannabis, or alcohol determined to be present in the individual’s system equals or exceeds the amount prescribed by such policy or agreement, or (B) the individual has any detectable level of drugs, cannabis, or alcohol present in the individual’s system if the policy or agreement does not specify a cut off level.” OAR 471-030-0125(2)(e) (emphasis added).

OAR 471-030-0125 provides:

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

\* \* \*

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

\* \* \*

The order under review concluded that claimant committed a disqualifying act under ORS 657.176(9) by testing positive for cannabis in violation of the employer’s written policy. Order No. 21-UI-169718 at 7-8. The record does not support that conclusion

Claimant did not commit a disqualifying act under ORS 657.176(9). Each of the disqualifying acts that are potentially applicable in claimant’s situation require that the employer’s written drug, cannabis, and alcohol policy be “reasonable.” The record shows that the employer’s policy was not reasonable because the employer did not publish and communicate their policy to claimant, or provide the policy to claimant in writing, as required by OAR 471-030-0125(3)(c).

Claimant never received a copy of the employer’s drug, cannabis, and alcohol policy in writing. At hearing, claimant testified that she did not receive it, and the employer’s witness testified that the policy was contained in the employer’s employee handbook and conceded to having no acknowledgement by claimant of ever having received the handbook or policy contained therein. Transcript at 19, 10. Nor does the record show that the policy was communicated to claimant. The employer informed claimant, only after she submitted to the first cannabis test, that the handbook and policy were available in a file on claimant’s work computer and suggested that claimant should read the file. However, that does not amount to communicating the policy to

claimant, because the employer did not communicate the content of the policy to her, such that she gained knowledge of or information about the policy, making it known to her.<sup>1</sup> The employer's invitation for claimant to read the policy on a computer file did not communicate the policy to claimant.

The employer's drug, cannabis, and alcohol policy therefore was not reasonable. Because the employer's policy was not reasonable, it cannot be concluded that claimant committed a disqualifying act by failing to comply with the terms and conditions of the employer's reasonable written policy. *See* ORS 657.176(9)(A). Nor can it be concluded that claimant committed a disqualifying act under ORS 657.176(9)(D) or (F) because OAR 471-030-0125(2)(c) and (e) require the cannabis testing contemplated under those provisions to be administered in accordance with the provisions of a reasonable employer policy.

The employer therefore 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. 21-UI-169718 is set aside, as outlined above.

S. Alba and D. Hettle;  
A. Steger-Bentz, not participating.

**DATE of Service:** August 24, 2021

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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<sup>1</sup> The Merriam-Webster online dictionary similarly defines "communicate," in pertinent part, as "to convey knowledge of or information about: make known." *See* <https://www.merriam-webster.com/dictionary/communicate>.



# 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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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