

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0457**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 7, 2021, 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 July 5, 2020 (decision # 65017). Claimant filed a timely request for hearing. On March 23, 2022, ALJ Logan conducted a hearing, and on March 30, 2022 issued Order No. 22-UI-189992, reversing decision # 65017 by concluding that claimant was discharged, but not for committing a disqualifying act, and was not disqualified from receiving benefits based on the work separation. On April 11, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer did not declare that they provided a copy of their 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 the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Autozoners LLC employed claimant as a driver from 2016 until July 11, 2020.

(2) The employer had a written policy, contained in the employer's employee handbook, which governed the use, sale, possession, or effects of drugs, cannabis and alcohol in the workplace. The employer provided an electronic copy of the policy to claimant in writing when they hired her. The policy called for all employees involved in an accident while driving an employer vehicle to submit to drug, cannabis, and alcohol testing. Employees did not have to pay for any portion of the test. If the testing yielded a result positive for drugs, alcohol, or cannabis, the employee was subject to discharge.

(3) In late June 2020, claimant was involved in an accident while driving one of the employer's vehicles. After the accident occurred, claimant went to the employer's store to submit to a urine analysis test for drugs, cannabis, and alcohol. Claimant arrived at the store at 2:00 p.m. and drank a substantial amount of water in anticipation of having to provide the test sample. However, the nurse who was responsible for obtaining the test sample did not arrive at the store promptly. As a result, claimant relieved herself several times while waiting for the nurse and drank more water. The nurse finally arrived at 7:00 p.m. and claimant submitted a test sample.

(4) The employer sent the sample to a state certified laboratory for analysis. The laboratory returned a result that the sample was diluted.

(5) In early July 2020, the employer interviewed claimant regarding the test result and asked claimant why the sample was diluted. Claimant advised that it was diluted because of the water she drank while waiting for the nurse. Claimant also stated that if the employer thought claimant "smoked weed," claimant would ask her daughter whether she had inadvertently eaten one of her daughter's cannabis edibles the weekend before the accident. Audio Record at 25:35. The employer interpreted claimant's statement as an admission that claimant had used cannabis the weekend before the accident.

(6) Following their interview with claimant, the employer treated the diluted test result as a positive result for cannabis. On July 11, 2020, the employer discharged claimant for violating their written drug, cannabis, and alcohol policy.

**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 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:

\* \* \*

(C) Refuses to cooperate with or subverts or attempts to subvert a drug, cannabis or alcohol testing process in any employment-related test required by the employer's reasonable written policy, including but not limited to:

\* \* \*

(v) Interference with the accuracy of the test results by conduct that includes dilution or adulteration of a test specimen;

\* \* \*

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

A written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; the policy does not require the employee to pay for any portion of the test; and the policy has been published and communicated to the individual or provided to the individual in writing. OAR 471-030-0125(3)(a), (b), (c) (January 11, 2018). In addition, when the policy provides for drug, cannabis, or alcohol testing, either (A) the employer must have probable cause for requiring the individual to submit to the test, or (B) the policy must provide for random, blanket or periodic testing. OAR 471-030-0125(3)(d). A “blanket test for drugs, cannabis, or alcohol, or a combination thereof” means a test for drugs, cannabis, or alcohol, or a combination thereof applied uniformly to a specified group or class of employees. OAR 471-030-0125(5)(c). No employer policy is reasonable if the employer does not follow their own policy. OAR 471-030-0125(6).

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(10)(a) provides that, for purposes of ORS 657.176(9) and (10), “[t]esting for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.” ORS 438.435, requires, among other things, that laboratories performing tests be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests.

The record does not show that claimant committed a disqualifying act under ORS 657.176(9)(a)(C)(v). Under that provision, an individual commits a disqualifying act if they subvert or attempt to subvert a drug, cannabis, or alcohol test required by a reasonable written policy. As an initial matter, the employer satisfied the elements necessary to establish that the written policy was reasonable. The policy governed the use, sale, possession, or effects of drugs, cannabis and alcohol in the workplace. The policy was in writing, and the employer provided it to claimant when they hired her. The policy called for blanket testing, in that the testing was applied uniformly to a specified class of employees since the policy required all employees involved in an accident while driving an employer vehicle to submit to drug, cannabis, and alcohol testing. The policy also did not require claimant to pay for any portion of the test and used a state certified laboratory to perform the test, which shows, more likely than not, that the testing was performed in accordance with ORS 438.435.

Although the employer’s policy was a reasonable written policy, the employer did not meet their burden to show that claimant subverted or attempted to subvert the test by diluting the test specimen. The record shows that claimant inadvertently gave a diluted urine sample because she arrived at the employer’s store at 2:00 p.m., drank substantial amounts of water in preparation for providing the urine sample, and had to wait until 7:00 p.m. for the nurse to arrive to take the sample. During the five hours that claimant waited for the nurse, she relieved herself, then drank more water to be ready to provide a sample. While this resulted in claimant providing a diluted sample, more likely than not, claimant gave the diluted sample by mistake because of her long wait time for the nurse and not for the purpose of subverting or attempting to subvert the testing process. Accordingly, claimant did not commit a disqualifying act under ORS 657.176(9)(a)(C)(v).

The record also does not show that claimant tested positive for alcohol, cannabis or an unlawful drug in connection with employment as set forth by ORS 657.176(9)(a)(F). The employer treated claimant's diluted test result as a result positive for cannabis. The record suggests that the employer's decision to treat claimant's diluted result as a result positive for cannabis was not called for by the written policy, but was due to the employer interpreting claimant's interview statement that she would check with her daughter regarding whether she had inadvertently eaten a cannabis edible as an admission of cannabis use. In any event, as the record does not show that the written policy specified a cut off level, any detectable level of drugs, cannabis, or alcohol in claimant's system was sufficient to count as a positive test result for purposes of ORS 657.176(9)(a)(F). Here, however, because claimant's test yielded a result of "diluted," there was no detectable level of drugs, cannabis, or alcohols present in her system. Accordingly, claimant did not test positive for alcohol, cannabis or an unlawful drug in connection with employment, and therefore did not commit a disqualifying act under ORS 657.176(9)(a)(F).

For the above reasons, 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. 22-UI-189992 is affirmed.

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

**DATE of Service:** June 28, 2022

**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.

**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.



# 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 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.