

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0642**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 31, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective August 21, 2022 (decision # 84245). Claimant filed a timely request for hearing. On May 17, 2023, ALJ Lewis conducted a hearing, and on May 18, 2023 issued Order No. 23-UI-225402, reversing decision # 84245 by concluding that claimant was discharged, but not for misconduct or committing a disqualifying act, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On June 5, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) TTECH Healthcare Solutions Inc. employed claimant as a customer service representative from July 6, 2021 until August 30, 2022.

(2) The employer provided customer service for several other businesses. The employer's customer service representatives were each hired to service a specific business, and if that business discontinued their relationship with the employer, an affected employee would have to reapply for work with the employer to service a different business if they wished to remain employed.

(3) The employer had a written policy regarding drug use and testing. It was only available for employees to read on an internal website, and employees were instructed not to access that website except during work hours. Claimant was not given time to read this policy during work hours, and was unaware of its terms.

(4) The employer's written drug policy stated that, "Person[s] seeking employment with [the employer] may be required to undergo post-offer pre-employment drug testing, depending on client or client facing delivery role requirements. Applicants required to undergo this testing will be informed that they must pass a drug screen as a condition of employment. Disqualifying results may vary program to program. Applicants who test positive will be notified the day you have not met the standards for employment and

informed that they may have the confirmed position re-tested by a government certified lab of their choice." Transcript at 9. Claimant was not asked to undergo drug testing prior to beginning her work with employer.

(5) In August 2022, claimant used cannabis at night after her shifts. She did not possess or use it at work and did not appear for work under the influence of cannabis.

(6) In August 2022, the business that claimant was servicing for the employer was discontinuing their relationship with the employer, requiring claimant to apply for a position servicing a different business within the company.

(7) On August 9, 2022, claimant received an offer of continued employment servicing a different business for the employer. The offer was contingent on claimant passing a drug test per the requirements of the business that claimant would be servicing. However, the written offer did not state this contingency, and claimant was unaware of it. The employer emailed claimant shortly after she accepted the offer directing her to report for a drug test.

(8) On August 12, 2022, claimant reported to a medical facility selected by the employer and submitted to a drug test. The results were positive for cannabis. Claimant was not given the opportunity for a confirmatory laboratory test, nor a chance to explain or dispute the test results.

(9) On August 30, 2022, the employer discharged claimant due to the failed drug test.

**CONCLUSIONS AND REASONS:** Claimant was not discharged 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;

\* \* \*

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

\* \* \*

OAR 471-030-0125 (January 11, 2018) provides:

(2) Definitions. For the purpose of this rule:

\* \* \*

(e) 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:

(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.

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.

(g) For purposes of ORS 657.176(9) and 657.176(13), “unlawful drug” means a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law.

(h) “Connection with employment” as used in ORS 657.176(9) means where such positive test affects or has a reasonable likelihood of affecting the employee's work, the employer’s interest, or workplace.

\* \* \*

(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), (10), and (13), no employer policy is reasonable if the employer does not follow their own policy.

\* \* \*

(9) The employee is discharged or suspended for committing a disqualifying act if:

(a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace; unless in the case of drugs the employee can show that the violation did not result from unlawful drug use.

(b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.

(10) For the purposes of ORS 657.176(9) and (10):

(a) Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.

\* \* \*

(11) If the employer discharges or suspends an employee because of use, sale, or possession of drugs, cannabis, or alcohol in the workplace and the employer has no written policy regarding the use, sale, or possession of drugs, cannabis, or alcohol in the workplace, the provisions of OAR 471-030-0038 apply.

The employer has a written policy regarding the use of drugs, cannabis, or alcohol in the workplace, and claimant was discharged only because they believed claimant violated that policy. Under OAR 471-030-0125(11), the work separation is therefore analyzed to determine whether claimant committed a disqualifying act described in ORS 657.176(9) or (10), rather than under the misconduct analysis set forth in OAR 471-030-0038.

Claimant committed a disqualifying act if she was discharged for violating a reasonable written drug policy instituted by the employer. For the employer's written drug use policy to be considered "reasonable" as applied to an individual, the policy must be "published and communicated to the individual or provided to the individual in writing." OAR 471-030-0125(3)(c). The employer's witness testified that the text of the policy was only made available to employees on an intranet website to "review on their own." Transcript at 15-16. Claimant testified that she was not given time during her training or work hours to "look over" the policy. Transcript at 16-17, 19. Claimant further stated, "But when you're off the clock, you're not supposed to be on [the employer's] property. You're not supposed

to be on, you know, [the employer's] website." Transcript at 19. Claimant therefore did not review the policy and was unaware of its provisions. The employer did not refute this testimony. The publishing of an electronic copy of the policy without affording claimant sufficient time or access to read it did not constitute either publishing and communicating it to her, or providing her with a written copy of it. Accordingly, the employer has not shown that the policy was communicated to claimant or provided to her in writing, and has thus failed to establish that the policy was "reasonable."

Further, even if the policy had been communicated to claimant as required, the employer has not established that the testing was conducted in accordance with the policy. The policy itself is not in evidence, and the employer's witness read only a portion of it into the record. This portion provided that an employee failing a drug test would be provided with notice of their right to have the sample "re-tested by a government lab of their choice." Transcript at 9. The employer's witness testified that a second test was not performed. Transcript at 11. It is unclear whether an offer of re-testing was made to claimant, but even if it was, claimant testified she tried to contact both the employer and testing facility "several times" after receiving the results "but nobody would talk to [her.]" Transcript at 17. Because claimant did not have the opportunity to request a re-test as provided by the policy, the employer did not show that they followed their own policy, thus rendering it unreasonable under OAR 471-030-0125(6).

Additionally, the portion of the policy read into the record only provided for "post-offer pre-employment drug testing[.]" Transcript at 9. Claimant testified she had worked for the employer for more than a year without being required to submit to a drug test, despite changing positions within the company to service different businesses. Transcript at 13. The employer has not shown that a "pre-employment" drug testing policy was applicable to claimant by the terms of that policy, more than a year after beginning the employment, simply because she was required by the employer to internally transfer to the servicing of a different business. This is particularly true in light of the employer's ambiguous articulation of the policy's provisions regarding cannabis use, which were apparently variable depending on the business the employee was assigned to service. To the extent the policy prohibited cannabis use by certain employees while not at work, the prohibition was subject to exceptions such as having "a medical card, and the state [the employee lives] in has employment protection laws, or if the state does not allow testing." Transcript at 10. The employer's witness elaborated, "So we basically default to the state law if – if they test positive." Transcript at 10. This suggests that claimant may have been permitted under the policy to use cannabis recreationally in accordance with Oregon's laws because the businesses she serviced did not prohibit it, until her required transfer to servicing a new business was approved three days prior to being required to submit to the test. As detailed information about the test is not in evidence, it is possible that the test result was positive due to prior cannabis use, which had been permitted by the policy. Accordingly, the employer's policy was not reasonable as applied to claimant for these additional reasons.

Therefore, claimant was not discharged for committing a disqualifying act and is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 23-UI-225402 is affirmed.

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

**DATE of Service: July 13, 2023**

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