

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0816**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 23, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for a disqualifying act and was disqualified from receiving benefits effective May 21, 2023 (decision # 114536). Claimant filed a timely request for hearing. On July 20, 2023, ALJ Kaneshiro conducted a hearing, and on July 21, 2023 issued Order No. 23-UI-231118, reversing decision # 114536 by concluding that claimant was discharged, but not for a disqualifying act, and was not disqualified from receiving benefits based on the work separation. On July 25, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Empire Airlines, Inc. employed claimant as an airframe and power plant (A&P) mechanic from February 14, 2016 until May 24, 2023.

(2) The employer maintained a written policy governing the use of, and testing for, drugs and alcohol which applied to all of their employees deemed to perform "safety-sensitive functions." Exhibit 1 at 3. The policy, which was issued in accordance with Federal Aviation Administration (FAA) requirements, covered claimant, as he performed safety-sensitive functions. In relevant part, the policy prohibited employees from "report[ing] for duty or remain[ing] on duty in a position requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater." Exhibit 1 at 11. The policy also provided for randomized drug or alcohol testing, whereby the employer's third-party vendor would randomly select employees to be tested from a list provided by the employer. The employer provided claimant with a copy of this policy upon hire. Claimant was aware of and understood the policy.

(3) On May 23, 2023, claimant started his shift at 1:00 p.m. At about 1:30 p.m., the employer notified claimant that he had been randomly selected for an alcohol test, and that he was required to report to an off-site testing facility for the test. After claimant arrived at the testing facility, he was administered an initial (screening) alcohol breath test at 3:22 p.m. That test showed that claimant had a blood alcohol content (BAC) of 0.043. Because claimant's BAC on the screening test was higher than 0.02, a confirmation test was, under the employer's policy and federal regulations, required to be performed. At 3:40 p.m., a confirmation alcohol breath test was administered to claimant. The confirmation test resulted in a BAC reading of 0.032.

(4) Claimant was not required to pay for the costs of the testing.

(5) On May 24, 2023, the employer discharged claimant because he had tested positive for alcohol above 0.04 BAC.

**CONCLUSIONS AND REASONS:** Claimant was discharged for 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; [or]

\* \* \*

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

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

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

(a) For purposes of ORS 657.176(9), "workplace" means the employer's premises or any place at or in which an individual performs services for the employer or otherwise acts within the course and scope of employment.

\* \* \*

(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.

\* \* \*

(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.

(i) For purposes of ORS 657.176(9):

(A) "Recognized drug, cannabis, or alcohol rehabilitation program" means a program authorized and licensed by the State of Oregon, or another state.

(B) "Documentation of participation in the program" means a signed statement by an authorized representative of the recognized program that the individual is or was participating in a treatment program.

(C) "Participation" means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program.

\* \* \*

(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.

\* \* \*

\* \* \*

(5) Random, blanket and periodic testing. For purposes of ORS 657.176(9) and (10):

(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.

\* \* \*

(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.

\* \* \*

(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.

(b) Breathalyzer tests for alcohol must be conducted in accordance with ORS 659A.300 and ORS 659.840.

\* \* \*

The employer discharged claimant due to a violation of their drug and alcohol policy, as he had tested positive for alcohol above the 0.04 BAC limit outlined in the policy. The order under review concluded that this did not constitute a disqualifying act because claimant "did not willfully, or with wanton negligence, violate employer's drug and alcohol policy," pointing to claimant's last having consumed alcohol more than 12 hours prior to the test and suggesting that claimant's denture cleaner might have inadvertently caused the positive result. Order No. Order No. 23-UI-231118 at 3-4. In so concluding, the order under review misconstrues the law and rule applicable to claimant's circumstances.

In most cases involving a discharge from employment, the standard as to whether an individual is disqualified from benefits is whether, under ORS 657.176(2)(a), they were discharged for "misconduct" connected with work. "Misconduct" is defined under OAR 471-030-0038(3)(a) (September 22, 2020) as "a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee" or "[a]n act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest." Thus, in cases

where ORS 657.176(2)(a) and OAR 471-030-0038(3)(a) determine whether an individual was discharged for a reason that would disqualify them from benefits, a finding must be made that the individual committed the act(s) that led to their discharge either willfully or without regard to the consequences of their actions. However, ORS 657.176(2)(a) and OAR 471-030-0038(3)(a) do not apply to claimant's circumstances.

ORS 657.176(2)(h) requires a disqualification from benefits when an individual has committed a disqualifying act as described in ORS 657.176(9) or (10). In claimant's case, ORS 657.176(9) (and, by extension, OAR 471-030-0125) apply because claimant was discharged for failing a drug, cannabis, or alcohol test as required by the employer's reasonable written policy (as discussed below). Unlike disqualifications under ORS 657.176(2)(a), the individual's mindset when committing the act that led to their discharge is not relevant. Thus, when an individual is discharged for failing a drug, cannabis, or alcohol test, whether or not they intended to commit the act that led them to fail the test (or, for that matter, whether they committed the act negligently when they had reason to know that doing so would likely cause them to fail the test), is immaterial. Instead, whether the individual is disqualified from benefits turns on whether their circumstances satisfy the applicable elements of ORS 657.176(9) and OAR 471-030-0125. The record shows that, in testing positive for alcohol above a BAC of 0.04, claimant's circumstances satisfied those elements.

As a preliminary matter, the record shows that the employer's policy prohibited claimant from reporting for duty with a BAC of 0.04 or higher. Claimant's screening test resulted in a BAC above this limit, while his confirming test resulted in a BAC below this limit. The employer's policy does not appear to account for discrepancies such as this, whereby one test result shows a violation of their policy and another test shows otherwise. *See* Exhibit 1 at 9–23. In the absence of such a showing, it is reasonable to conclude that a result above the permitted BAC limit on *either* test is considered to be a violation of the employer's policy. Therefore, because claimant's first test resulted in a BAC above the limit permitted by the employer's policy, claimant "failed" the alcohol test under OAR 471-030-0125(2)(f) because, under OAR 471-030-0125(2)(e), claimant "test[ed] positive for alcohol" by having an amount of alcohol in his system that equaled or exceeded the amount prescribed by the employer's policy.

The record also shows that the employer's policy was reasonable under OAR 471-030-0125(3) because the policy prohibited the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace, did not require claimant to pay for any portion of the test, was published and communicated in writing to claimant, and provided for random testing. The record does not show that the employer failed to follow their own policy, or suggest that the tests were conducted without regard to the requirements of ORS 438.435, ORS 659A.300, or ORS 659.840.<sup>1</sup> Therefore, claimant's having tested above the employer's permitted BAC level constituted a violation of their reasonable written policy. As a result, claimant was discharged for a disqualifying act, and is disqualified from receiving unemployment insurance benefits effective May 21, 2023.

---

<sup>1</sup> ORS 659A.300 and ORS 659.840, in relevant part, require the consent of the employee before an alcohol breath test is administered; the record does not indicate that claimant withheld consent for the tests performed on May 23, 2023. ORS 438.435 outlines certain procedures required by clinical laboratories when testing for substance abuse. The documentary record of claimant's test results indicate that these requirements were satisfied. *See* Exhibit 1 at 53.

**DECISION:** Order No. 23-UI-231118 is set aside, as outlined above.

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

**DATE of Service: September 1, 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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

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.