

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0802

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 1, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for a disqualifying act under the Department’s drug, cannabis, and alcohol adjudication policy, and that claimant was disqualified from receiving benefits effective June 23, 2024 (decision # L0005435211).¹ Claimant filed a timely request for hearing. On November 4, 2024, ALJ Scott conducted a hearing at which the employer failed to appear, and issued Order No. 24-UI-271951, reversing decision # L0005435211 by concluding that the employer discharged claimant, but not for a disqualifying act, and that claimant was not disqualified from receiving benefits based on the work separation. On November 14, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Groome Transportation employed claimant as a driver from 2019 until June 28, 2024.

(2) At some point during claimant’s employment, the employer provided him with a copy of their written drug, alcohol, and cannabis policy. The policy prohibited the use, sale, purchase, transfer, possession, or presence in one’s system of any controlled substance, except medically prescribed drugs.

(3) Claimant had numerous medical conditions and took prescribed medications to treat them. These medications interfered with claimant’s ability to sleep. Claimant and his physician considered prescribing other medications to counteract the insomnia but found that those medications would make him drowsy for prolonged periods and were unsafe to take since claimant was a driver.

¹ Decision # L0005435211 stated that claimant was denied benefits from July 7, 2024 to July 5, 2025. However, as decision # L0005435211 stated that the work separation occurred on June 28, 2024, the decision should have stated that claimant was disqualified from receiving benefits beginning Sunday, June 23, 2024 and until he earned four times his weekly benefit amount. *See* ORS 657.176.

(4) Claimant’s physician suggested that claimant use a cannabis product to relieve his insomnia. On the evening of June 19, 2024, claimant did so and experienced relief from his insomnia. The next day, June 20, 2024, was claimant’s day off.

(5) On June 21, 2024, claimant came to work following his day off and the employer told him he was required to submit to a drug test. Claimant did so and the results came back positive for cannabis.

(6) On June 28, 2024, the employer discharged claimant for testing positive for cannabis.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for a disqualifying act under the Department’s drug, cannabis, and alcohol adjudication policy.

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:

* * *

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

“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 . . . , 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) (January 11, 2018) (emphasis added). “‘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.” OAR 471-030-0125(2)(h).

OAR 471-030-0125(3) provides that for purposes of ORS 657.176(9), (10), and 657.176(13), 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.

* * *

No employer policy is reasonable if the employer does not follow their own policy. OAR 471-030-0125(6). 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 employer failed to show that claimant committed a disqualifying act under ORS 657.176(9)(a)(F).² For a positive test to be disqualifying under ORS 657.176(9)(a)(F), OAR 471-030-0125(2)(e) requires that the test be administered in accordance with the provisions of the employer’s reasonable written policy. OAR 471-030-0125(3) sets forth the elements of a reasonable written policy, and the record fails to show that the employer met their burden to meet some of these elements.

OAR 471-030-0125(3)(d) mandates that the policy require the employer have probable cause to require the individual to submit to the test or that the policy provides random, blanket or periodic testing. For his part, claimant testified that over his four years of employment, he had “innumerable tests,” and “way more than other people”, which he asserted meant that his selection for a test on June 21, 2024 “couldn’t be random.” Audio Record at 9:30. Assuming the employer’s policy provided for random testing, the employer failed to show that claimant’s test was random, or that the employer had probable cause to test claimant. The employer therefore failed to establish that its policy was reasonable.

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 sets forth certain minimum standards for substance abuse testing. At hearing, the ALJ asked whether the laboratory used to test the sample claimant submitted was federally certified, and claimant advised that he “believe[d] that it is.” Audio Record at 10:48. However, the testing standards imposed by ORS 438.435 are exacting, and claimant’s belief that the laboratory that tested his June 21, 2024, sample was federally certified is not sufficient to show that the requirements of OAR 471-030-0125(10)(a) were met.

For these reasons, the record fails to establish that claimant committed a disqualifying act under ORS 657.176(9) because it fails to show that his positive test result for cannabis was administered in accordance with a reasonable written policy or that the testing was conducted in accordance with ORS 438.435. Claimant therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-271951 is affirmed.

² The employer did not appear at the hearing in this matter, and although they offered documents intended to be admitted into the hearing record as exhibits, the ALJ excluded those documents because they were not served on claimant prior to the beginning of the hearing. See OAR 471-040-0023(4) (August 1, 2004) (“Prior to commencement of an evidentiary hearing that is held by telephone, each party and the Department shall provide to all other parties and to the Department copies of documentary evidence that it will seek to introduce into the record.”).

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

DATE of Service: December 19, 2024

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 stated above**. See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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>. If you are unable to complete the survey online and wish to have 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

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់យើងទេ បើសិនជាលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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 دستورالعمل 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
 Email: appealsboard@employ.oregon.gov
 Website: www.Oregon.gov/employ/pages/employment-appeals-board.aspx

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.