EO: Intrastate
BYE: 11-Oct-2025

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

284
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0105

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0007487607). The employer filed a timely request for hearing. On February 3, 2025, ALJ Frank conducted a hearing, and on February 6, 2025, issued Order No. 25-UI-282184, affirming decision # L0007487607. On February 18, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's argument in reaching this decision. The employer argued that the proceedings were unfair because the ALJ failed to consider record documents as evidence. Employer's Argument at 2. These documents consisted of three written disciplinary actions dated July 20, 2023, July 25, 2024, and October 8, 2024, and three drug test result reports dated July 17, 2023, July 5, 2024, and September 25, 2024. Record Documents 11-16. These documents were part of the procedural record because they were included with the employer's request for hearing. The ALJ properly denied the employer's request to admit these documents as evidence because the employer failed to submit them as a proposed hearing exhibit in accordance with the instructions on the notice of hearing. Audio Record at 3:58. The ALJ advised the employer that they could nonetheless testify as to the contents of these documents during the hearing. Audio Record at 4:25.

Furthermore, the facts contained therein—that claimant submitted to these tests, that the results were positive for cannabis, and that each positive test resulted in discipline—are not in dispute. Therefore, the documents are of little additional probative value. As explained in greater detail below, the employer failed to meet their burden to show that claimant was discharged for a disqualifying act largely because they did not demonstrate that the tests were administered in accordance with a reasonable written testing policy. The documents in question, even if admitted as evidence, would not have established that such a policy existed or that the tests were conducted pursuant to a reasonable written testing policy.

EAB reviewed the entire hearing record, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4), and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Robbins Equipment – Christmas Valley, Inc. employed claimant in their parts facility from June 21, 2021, through October 8, 2024.

(2) The employer expected that their employees would not use "alcohol and illegal drugs," whether or not at work, such that they could not "perform their duties in a safe, effective, and efficient manner." Transcript at 7-8. The employer had a written policy stating this expectation, which claimant received at hire. The written policy did not provide for alcohol or drug testing of employees.

(3) In practice, the employer required random testing of employees to detect the use of intoxicants. The testing program was administered by a third party. Claimant was not asked to submit to drug or alcohol testing at hire or at any time prior to July 7, 2023.

(4) On July 7, 2023, claimant was randomly selected by the third-party administrator to submit to a drug test, and he complied. The laboratory that analyzed claimant's sample reported that it tested positive for cannabis. As a result of this report, the employer issued claimant a written warning.

(5) On June 28, 2024, claimant was again randomly selected by the third-party administrator to submit to a drug test, and he complied. The laboratory that analyzed claimant's sample reported that it tested positive for cannabis. As a result of this report, the employer issued claimant a written warning. Claimant advised the employer that he used cannabis for therapeutic purposes and offered to try alternate forms of treatment to comply with the employer's policy. The employer advised claimant to "let us know before you use marijuana and we will try to figure out something" if the alternate treatment was ineffective. Transcript at 11.

(6) On July 25, 2024, as part of the second warning, the employer and claimant agreed in writing that claimant would submit to another drug test within 30 days at the employer's request. During the following 30 days the employer did not request that claimant submit to a drug test.

(7) On September 17, 2024, the employer required that claimant submit to a drug test pursuant to the July 25, 2024, agreement. Claimant had not been randomly selected for testing on this occasion by the third-party administrator. The employer believed that they had probable cause to test claimant on this occasion based only on the positive result of the June 28, 2024, test and his admission to using cannabis prior to that test. The employer did not observe any aspect of claimant's appearance, performance, or behavior indicative of being under the influence of cannabis immediately prior to requiring the September 17, 2024, test. Claimant did not admit to the employer or any of their employees, after submitting the sample and prior to it being analyzed, that he had used cannabis more recently than July 25, 2024.

(8) On September 25, 2024, the employer received a report from the laboratory that analyzed claimant's September 17, 2024, sample, which indicated that it tested positive for cannabis.

(9) On October 8, 2024, the employer discharged claimant due to the positive result of the September 17, 2024, test. Claimant told the employer just prior to being discharged that he did not recall using cannabis since the July 25, 2024, test result and agreement.

CONCLUSIONS AND REASONS: Claimant was discharged, but not 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 provides that an individual is considered to have committed a disqualifying act when the individual:

> (9) (a)
>
> > (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[.]
> >
> > (G) Refuses to enter into or violates the terms of a last chance agreement with the employer.
>
> * * *
>
> (13) For purposes of this section:
>
> > * * *
> >
> > (d) "Last chance agreement" means a reasonable agreement:
> >
> > > (A) Between an employer and an employee who has violated the employer's reasonable written policy, has engaged in drug, cannabis or alcohol use connected with work or has admitted to alcohol abuse, cannabis abuse or unlawful drug use; and
> > >
> > > (B) That permits the employee to return to work under conditions that may require the employee to:

(i) Abstain from alcohol use, cannabis use and unlawful drug use; and

(ii) Attend and comply with the requirements of a rehabilitation or education program acceptable to the employer.

(e) "Under the influence of intoxicants" means the level of alcohol, cannabis or unlawful drugs present in an individual's body exceeds the amount prescribed in a collective bargaining agreement or the amount prescribed in the employer's reasonable written policy if there is no applicable collective bargaining agreement provision.

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.

* * *

(c) For purposes of ORS 657.176(9) and 657.176(13), 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.

(d) "Performing services for the employer" as used in ORS 657.176(9) and "during work" as used in ORS 657.176(9) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration.

(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) 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.

(4) Probable Cause for Testing. For purposes of ORS 657.176(9), an employer has probable cause to require an employee to submit to a test for drugs, cannabis, alcohol, or a combination thereof if:

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or

(b) The employer has received reliable information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace; or

(c) Such test is required by applicable state or federal law, or an applicable collective bargaining agreement that has not been declared invalid in final arbitration; or

(d) Such test is required or allowed pursuant to a reasonable agreement.

(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.

(b) A "periodic test for drugs, cannabis, or alcohol, or a combination thereof" means a drug, cannabis, or alcohol test or a combination thereof administered at prescribed intervals.

(c) 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.

(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.

(7) For purposes of ORS 657.176(13), a reasonable agreement is a document signed by the employee as a condition of continued employment and:

(a) The agreement may require the employee to submit to drug, cannabis, or alcohol testing;

(b) The agreement may not require the employee to pay for the test; and

(c) The agreement may not require them to attend a rehabilitation program that causes a hardship to the individual.

* * *

(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.[1]
>
> * * *

The employer discharged claimant because the report dated September 25, 2024, stated that the sample claimant provided on September 17, 2024, tested positive for cannabis. Though claimant had tested positive for cannabis on two other occasions since July 17, 2023, the initial focus of a discharge analysis is on the proximate cause of discharge, which in this case was the September 25, 2024, report. *See, e.g.*, *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

The employer expected that their employees would not use "alcohol and illegal drugs" to the extent that such use impaired their ability to "perform their duties in a safe, effective, and efficient manner." Transcript at 7-8. The expectation was contained in a written policy provided to claimant at hire. This policy did not contain provisions for random, periodic, blanket, or probable cause testing for alcohol or drug use. The employer's president was asked at hearing whether the employer believed their employees "should infer from the policy that they could be tested," to which he replied, "They all know that we do random drug tests and it doesn't state it." Transcript at 8. 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 employees to pay for any portion of a drug test, and was provided to claimant in writing, the policy was reasonable on its face.

Under ORS 657.176(9)(a)(A), a failure "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" is a disqualifying act. While the employer's written policy on the use of intoxicants did not provide for testing of any kind, claimant and the employer entered into an agreement on July 25, 2024, following claimant's admission to recent cannabis use. Under ORS 657.176(9)(a)(G) and (13)(d), this could be considered a "last chance agreement."

The agreement stated that the employer could require claimant to submit to a drug test within 30 days of July 25, 2024, without regard to further probable cause. The employer did not assert that they required claimant to submit to the September 17, 2024, test based on any observations of claimant's appearance, performance, or behavior that day, but maintained instead that it was required under the terms of the

[1] The record fails to show that the test for cannabis was conducted in accordance with ORS 438.435, but because this decision concludes that the testing was also not conducted in accordance with a reasonable written policy or agreement, it is unnecessary to analyze this requirement in detail.

July 25, 2024, agreement. Transcript at 20. OAR 471-030-0125(7)(a) allows for an employer to require testing as part of a reasonable agreement. However, the employer did not request that claimant submit to a test within the agreed upon period.

More than 30 days after the agreement was executed, on September 17, 2024, the employer required claimant to submit to the test that resulted in his discharge. Even if the July 25, 2024, agreement could be construed as reasonable under OAR 471-030-0125(7), requiring the September 17, 2024, test fell outside of the terms of that agreement. Therefore, whether construed as a written policy providing for drug testing or a last chance agreement, the testing in this instance was not "reasonable" pursuant to OAR 471-030-0125(6) because the employer did not follow the 30-day time limit that was part of that policy or agreement.

Moreover, the employer did not establish an admitted violation of the written policy under OAR 471-030-0125(9)(D). The employer testified that claimant told a co-worker, after giving the September 17, 2024, sample but before the sample was analyzed, that he had used cannabis "[t]he weekend prior to the test." Transcript at 13. Claimant denied making this statement. Transcript at 17. In weighing these conflicting accounts, claimant's first-hand testimony is entitled to greater weight than the employer's hearsay evidence, and the facts have been found accordingly. Additionally, claimant testified that he denied admitting to recent cannabis use preceding the September 17, 2024, test during the October 8, 2024, meeting at which he was discharged, and told the employer at that time, "I couldn't recall the last time I used[.]" Transcript at 18. Therefore, the employer has not shown by a preponderance of the evidence that claimant admitted to a violation of their written policy regarding the use of intoxicants after the July 25, 2024, warning.

Furthermore, the employer has not shown that claimant committed the disqualifying act of being "under the influence" of intoxicants, as provided by ORS 657.176(9)(a)(D), because such a showing requires "a test administered in accordance with the provisions of [the] employer's reasonable written policy," and the employer's written policy did not provide for any type of testing. As previously discussed, even if the July 25, 2024, testing agreement could also be construed as a written policy, testing pursuant to its terms was not reasonable under OAR 471-030-0125(6) because the employer did not abide by the 30-day time limit it contained. For the same reason, the employer has not shown that claimant "[tested] positive for alcohol, cannabis or an unlawful drug in connection with employment," which is a disqualifying act under ORS 657.176(9)(a)(F), because OAR 471-030-0125(2)(e) requires that the positive result be derived from a "test [that] is administered in accordance with the provisions of an employer's reasonable written policy[.]" Accordingly, the employer has not met their burden to show that claimant was discharged for a disqualifying act.

For these reasons, claimant was discharged, but not for a disqualifying act, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 25-UI-282184 is affirmed.

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

DATE of Service: <u>March 18, 2025</u>

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.

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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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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
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