

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

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0400

Reversed & Remanded

PROCEDURAL HISTORY: On March 31, 2025, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for a disqualifying act and was therefore disqualified from receiving unemployment insurance benefits effective February 16, 2025 (decision # L0010000311). Claimant filed a timely request for hearing. On June 16, 2025, ALJ S. Lee conducted a hearing, and on June 26, 2025, issued Order No. 25-UI-296050, affirming decision # L0010000311. On July 3, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McLane Foodservice, Inc. employed claimant as a warehouse specialist from October 3, 2017 through February 20, 2025.

(2) The employer had a written policy concerning the possession and use of drugs and alcohol which claimant acknowledged receiving at hire. In relevant part, the policy prohibited “the use. . . of illegal drugs or other unlawful intoxicants at any time, and in any amount or any manner, regardless of occasion. ‘Illegal drugs’ means all drugs the use or possession of which is regulated or prohibited by federal, state, or local law, and includes prescription medication which is used in a manner inconsistent with the prescription for which the individual does not have a valid prescription.” Exhibit 1 at 8. The policy also provided, in relevant part, for “Reasonable Suspicion” testing at the employer’s expense “based upon reasonably contemporaneous observations of the individual’s behavior or performance, or other indication that this policy may have been violated.” Exhibit 1 at 8. It further provided, “[A] person’s refusal to submit to a proper test will be viewed as insubordination and will subject the person to separation.” Exhibit 1 at 9.

(3) On February 20, 2025, the employer discharged claimant because they believed he violated their drug and alcohol policy on February 10, 2025 by refusing to submit to a test that was required based on reasonable suspicion. The employer believed that on February 10, 2025, claimant was observed by several employees operating a forklift in an unsafe manner, was unable to communicate coherently, and was otherwise acting erratically, which prompted the employer to request that claimant submit to a

saliva test for the presence of drugs or alcohol. The employer further believed that claimant destroyed the test kit when attempting to open it with scissors, and when another employee went to obtain a replacement test kit, claimant said, “[J]ust fire me,” and walked out of the office without submitting to the test, whereupon he was suspended until his discharge ten days later. Transcript at 15.

CONCLUSIONS AND REASONS: Order No. 25-UI-296050 is set aside and the matter remanded for further proceedings.

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;

(B) Fails or refuses to take a drug, cannabis or alcohol test as required by the employer’s reasonable written policy;

(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,

* * *

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

* * *

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

* * *

(b) For purposes of ORS 657.176(9), an individual “fails or refuses to take” a drug, cannabis, or alcohol test when the individual does not take the test as directed by the employer in accordance with the provisions of an employer’s reasonable written policy or collective bargaining agreement.

* * *

(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.

* * *

(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.

* * *

(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.

* * *

OAR 471-040-0025(2) (August 1, 2004) provides, in relevant part, “All testimony at any hearing before an administrative law judge shall be under oath or affirmation.”

The employer discharged claimant because they believed that on February 10, 2025, he violated their drug and alcohol use policy by refusing to submit to a test that was required based on reasonable suspicion. The employer had a written policy prohibiting the use of illegal drugs at any time, and providing for testing based on probable cause at the employer’s sole expense if observable, objective evidence existed that an employee might be impaired by drugs in the workplace. Claimant acknowledged receipt of this policy in writing when he was hired. Therefore, the employer’s written policy, if followed, met the rule’s requirements for reasonableness under OAR 471-030-0125(3).

The order under review concluded that the employer required claimant to submit to probable cause testing under their reasonable written drug and alcohol use policy, and that claimant was discharged for a disqualifying act by having refused to submit to the test. Order No. 25-UI-296050 at 8. However, because the testimony of the employer’s human resources manager was not given under oath, as required by OAR 471-040-0025(2), further development of the record is required to ensure proper weighing of the evidence.

The parties gave sharply contrasting accounts of the events leading to claimant’s discharge. The employer’s distribution manager testified that on February 10, 2025, it was brought to his attention that claimant was exhibiting “odd behavior” such as difficulty communicating and unusual physical movements when operating a forklift. Transcript at 12-13. The witness watched either live or recorded surveillance video with the human resources manager, and they both suspected, based on their observations, that claimant might be under the influence of illegal drugs. The witness summoned claimant to his office, where claimant denied being under the influence of drugs. The witness and the human resources manager directed claimant to submit to a saliva test to detect drug or alcohol use, and claimant initially agreed. Claimant was handed a test kit and, while opening the packaging with scissors, he cut into the test’s safety seal and chemical components, rendering it useless. Claimant was told that another test kit would be brought to him, at which point he said, “[J]ust fire me,” and walked out of the office without submitting to the test. Transcript at 15. Claimant was advised that failing to submit a sample could result in his discharge, but he still refused. Claimant attempted to gather his things to leave work but could not locate his locker or open the combination lock, and it had to be opened for him. Claimant was then suspended from work pending investigation, and remained suspended until being notified of his discharge on February 20, 2025.

The employer’s regional manager for asset protection viewed recorded surveillance footage of the incident during the ensuing investigation. In a written statement, the regional manager asserted that the

video depicted claimant operating a forklift while “nodding off, bumping into pallets, rubbing his eyes and face as if trying to wake himself up,” and other “obviously dangerous” behaviors that led him to believe that claimant was “impaired.” Exhibit 1 at 14. The regional manager did not testify at hearing.

The human resources manager appeared at hearing but was not placed under oath. Transcript at 35. The human resources manager corroborated the distribution manager’s account of claimant being given the first test kit, destroying it, then refusing to submit to the test when a second test kit was requested. Transcript at 37-38. She also corroborated that claimant was suspended from work following the incident and remained suspended through his discharge on February 20, 2025. Transcript at 39.

In rebuttal, claimant denied working under the influence of drugs, exhibiting unusual or unsafe behavior at work, being asked to submit to a drug test, or refusing to provide a sample for a drug test. Transcript at 22, 26, 30-31. Claimant denied being suspended from work on February 10, 2025, and asserted that he continued to work his normal schedule without incident until “either the 20th or 23rd of February,” when he was discharged without being given a reason. Transcript at 27-29.

The employer’s account could support the conclusion that claimant was discharged for a disqualifying act under OAR 471-030-0125(9). Per the employer’s account, they acted in accordance with their reasonable written policy because they had probable cause, based on their observations of claimant’s unsafe and unusual behavior, to believe that he might be under the influence of illegal drugs. The employer asserted that they then provided a saliva test kit to claimant at the employer’s sole expense and directed him to provide a sample, which claimant failed to provide after destroying the first test kit and leaving the office when a replacement kit was requested. However, claimant denied that any of this occurred and suggested that nothing out of the ordinary happened from February 10, 2025 through February 20, 2025, when he was inexplicably discharged. Further development of the record is needed to properly weigh the parties’ conflicting accounts because the human resources manager’s account was not given under oath.

On remand, the human resources manager should be asked, under oath, if her statements at the June 16, 2025 hearing were accurate. Furthermore, because the distribution manager testified that the human resources manager observed claimant’s actions prior to claimant being summoned to the office, the human resources manager should also be asked what specifically she observed, in-person or through video, that led her to suspect that claimant was under the influence of illegal drugs. Any other testimony or evidence relevant to resolving the conflicting accounts of the parties should also be explored. If the human resources manager does not affirm, under oath, the accuracy of her statements made during the June 16, 2025 hearing, those statements should not be considered in weighing the evidence.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary to consider all the issues before the ALJ. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary to decide whether claimant was discharged for a disqualifying act, Order No. 25-UI-296050 is reversed and this matter remanded to the Office of Administrative Hearings for another hearing and order.

DECISION: Order No. 25-UI-296050 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 8, 2025

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 25-UI-296050 or return this matter to EAB. Only a timely application for review of the order mailed to the parties after the remand hearing will return this matter to EAB.

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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

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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.

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