EO: Intrastate
BYE: 03-Apr-2027

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

344
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0882

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On June 4, 2026, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, and therefore was not disqualified from receiving unemployment insurance benefits based on the discharge (decision # L0017937812). The employer filed a timely request for hearing. On July 14, 2026, ALJ Murdock conducted a hearing at which claimant failed to appear, and on July 22, 2026 issued Order No. 26-UI-335622, reversing decision # L0017937812 by concluding that claimant was discharged for a disqualifying act and disqualified from receiving benefits effective April 5, 2026. On July 29, 2026, claimant filed a timely request to reopen the July 14, 2026 hearing. On September 4, 2026, ALJ Scott conducted a hearing, and on September 8, 2026 issued Order No. 26-UI-339359, allowing claimant's request to reopen and affirming decision # L0017937812 on the merits. On September 18, 2026, the employer filed an application for review of Order No. 26-UI-339359 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 their 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. EAB considered any parts of the employer's argument that were based on the hearing record.

PARTIAL ADOPTION: EAB considered the entire hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with the part of Order No. 26-UI-339359 allowing claimant's request to reopen the July 14, 2026 hearing. That part of Order No. 26-UI-339359 is **adopted.** *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Pacific Fibre Products, Inc. employed claimant as a millwright from September 25, 2024 through April 7, 2026.

(2) The employer had a written alcohol- and drug-free workplace policy that prohibited employees from "[r]eport[ing] for work with any measurable amount of controlled substance or intoxicant in [their] system," and provided for testing, at the employer's expense, of any employee "involved in an on the job accident, near-miss accident, or [who] engage[d] in an unsafe job-related activity that poses a danger to [themself] or others. . . regardless of whether a personal injury occurred," and, specifically, in the case of "an accident that resulted in. . . [p]roperty damage." Exhibit 1 at 4–5. Claimant acknowledged receipt of a copy of this policy at hire.

(3) On April 6, 2026, claimant was operating an employer-owned water truck. While focused on its water-spraying functions, claimant accidentally caused the truck to collide with an object, causing damage to the truck. Claimant promptly reported the incident to the employer. The employer did not observe any indications that claimant was under the influence of an intoxicant. The employer requested that claimant submit to on-site testing for alcohol and drug use under the terms of their written policy, and claimant consented.

(4) Shortly thereafter, a technician from an on-site screening facility arrived at the worksite. Claimant provided a urine specimen that was later analyzed for indications of drug use, but not of alcohol use. The urine specimen tested negative for indications of drug use. Claimant was also asked to submit to a breath test to screen for the presence of alcohol in his blood. At 2:53 p.m., claimant submitted to the breath test, which yielded a result of 0.105.[1] At some point after this test, it was discovered that claimant had chewing tobacco in his mouth when the breath specimen was provided, which did not comport with the screening facility's collection procedures. Claimant then removed the tobacco from his mouth, was observed to have an empty mouth for an additional fifteen-minute period, then submitted to a second breath test, which yielded a result of 0.101. Claimant was not asked to submit to further testing.

(5) On April 7, 2026, the laboratory provided a report to the employer stating the negative results of the urine drug screen, and with regard to breath testing, listed 0.105 and 0.101 as the results of a "[s]creening test" and "[c]onfirmation test," respectively. Exhibit 1 at 3. The report also stated, "This is a non-regulated drug or alcohol breath test and a verified positive result will have consequences as set forth by the company drug policy." Exhibit 1 at 2.

(6) On April 7, 2026, after receiving the report, the employer discharged claimant for having tested positive for alcohol while at work on April 6, 2026. Claimant told the employer that he had not consumed alcohol on April 6, 2026.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy.

A claimant is disqualified from receiving benefits if they have committed a disqualifying act as described in ORS 657.176(8) or (9). ORS 657.176(2)(h). Under ORS 657.176(8)(a), a claimant has committed a disqualifying act if claimant:

> (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

[1] Presumably, this and the subsequent result were measured in grams of alcohol per 210 liters of breath.

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 [or]

* * *

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

* * *

OAR 471-030-0125 (January 11, 2018)[2] states:

* * *

(2) Definitions. For the purposes 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:

[2] The citations in this rule to ORS 657.176(9), (10), and (13) have not yet been updated to account for recent legislative changes which renumbered certain paragraphs under ORS 657.176. Therefore, any reference under the rule to ORS 657.176(9), (10), or (13) should be read as ORS 657.176(8), (9), or (12), respectively.

(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.

* * *

(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):

* * *

(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.

* * *

(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.

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

* * *

ORS 438.435 states:

(1) The Oregon Health Authority by rule shall set standards for substances of abuse on-site screening facilities that engage only in the initial testing for substances of abuse in the body,

including application procedures and permit eligibility requirements for a facility to obtain a permit to conduct substances of abuse on-site screening tests.

(2) The operator of a substances of abuse on-site screening facility may use substances of abuse on-site screening tests if the test results are not for use in diagnosing or preventing disease and are not for use by physicians, dentists or other licensed health care professionals in treating humans. Any entity using the test shall pay a yearly filing fee established by rule by the authority, and file a permit application form as provided by rule of the authority that:

(a) States the current name and address of the entity, the telephone number of the entity, if any, and the name of a contact individual at each on-site facility operated by the entity; and

(b) Certifies that:

(A) The tests are being administered according to the federal Food and Drug Administration package insert that accompanies the test;

(B) The tests are being administered according to the instructions of the manufacturer;

(C) Custody chain procedures are being followed;

(D) Operators of the substances of abuse on-site screening facility are trained in the use of the substances of abuse on-site screening tests by the manufacturer; and

(E) If the substances of abuse on-site screening facility obtains a positive test result on a specimen and the entity indicates that the test result is to be used to deny or deprive any person of employment or any benefit, or may otherwise result in adverse employment action, the same specimen shall be submitted to a clinical laboratory certified under ORS 438.040 or an equivalent out-of-state facility and the presence of a substance of abuse confirmed prior to release of the on-site test result.

(3) The authority by rule shall set reasonable standards for substances of abuse on-site screening by correctional agencies of adults in custody within state and local correctional facilities and offenders on parole, probation or post-prison supervision for substances of abuse. The standards shall include, but not be limited to, the establishment of written procedures and protocols, the qualifications and training of individuals who perform screening tests, the approval of specific technologies and the minimum requirements for record keeping, quality control and confirmation of positive screening results.

(4) If an initial test by a substances of abuse on-site screening facility shows a result indicating the presence of a substance of abuse in the body, a confirmatory test shall be conducted in a clinical laboratory certified under ORS 438.040 if the results are to be used to deprive or deny any person of any employment or benefit. If a screening test of an adult in custody in a state or

> local correctional facility is positive for a substance of abuse, the adult in custody may be held in a secure facility pending the outcome of the confirmatory test. If the confirmatory test is positive, the adult in custody may be held in a secure facility pending the outcome of any hearing to determine what action will be taken.
>
> (5) If any test for substances of abuse is performed outside this state the results of which are to be used to deprive or deny any person any employment or any benefit, the person desiring to use the test shall have the burden to show that the testing procedure used meets or exceeds the testing standards of this state.
>
> (6) Notwithstanding the provisions of this section, a clinical laboratory certified under ORS 438.040 may perform substances of abuse on-site screening testing.

ORS 438.100 states:

As used in ORS 438.010 to 438.450, unless the context requires otherwise:

> * * *
>
> (3) "Clinical laboratory" or "laboratory" means a facility where the microbiological, serological, chemical, hematological, immunohematological, immunological, toxicological, cytogenetical, exfoliative cytological, histological, pathological or other examinations are performed on materials derived from the human body, for the purpose of diagnosis, prevention of disease or treatment of patients by physicians, dentists and other persons who are authorized by license to diagnose or treat humans.
>
> * * *
>
> (9) "Specimen" means materials derived from a human being or body.
>
> (10) "Substances of abuse" means ethanol, cannabis and controlled substances.
>
> (11) "Substances of abuse on-site screening facility" or "on-site facility" means a location where on-site tests are performed on specimens for the purpose of screening for the detection of substances of abuse.
>
> (12) "Substances of abuse on-site screening test" or "on-site test" means a substances of abuse test that is easily portable and can meet the requirements of the federal Food and Drug Administration for commercial distribution or an alcohol screening test that meets the requirements of the United States Department of Transportation National Highway Traffic Safety Administration for conforming products.

The employer discharged claimant due to an alleged violation of their alcohol use policy. The employer had a written policy, a copy of which had been provided to claimant, that prohibited employees from working with any measurable amount of alcohol in their system. The policy provided for blanket testing for indications of drug or alcohol use, at the employer's expense, of all employees involved in

workplace accidents resulting in property damage. On April 6, 2026, claimant was involved in such an accident and consented to provide specimens to test for indications of drug or alcohol use. The employer's policy met the criteria to be deemed "reasonable" under OAR 471-030-0125(3), and the record shows that the employer followed their own policy in requiring claimant to submit to testing.

Under OAR 471-030-0125(10)(a), testing for alcohol must be conducted in accordance with ORS 438.435. ORS 438.453 governs "substances of abuse on-site screening" facilities, with ORS 438.100 defining, for purposes of that statute, "substances of abuse" as including ethanol (alcohol), and defining "specimen" as "materials derived from a human being or body," which would include a test subject's breath. The initial on-site breath screening conducted at the worksite on April 6, 2026 showed a result indicating the presence of alcohol in claimant's body. ORS 435.453(4) requires, "If an initial test by a substances of abuse on-site screening facility shows a result indicating the presence of a substance of abuse in the body, a confirmatory test shall be conducted *in a clinical laboratory certified under ORS 438.040* if the results are to be used to deprive or deny any person of any employment or benefit." (emphasis added).

The record shows that claimant provided the on-site screening facility with at least two breath specimens, at 2:53 p.m. and 4:13 p.m., that were analyzed by the same machine and found to be positive for the presence of alcohol. The latter test result was considered confirmation of the former by the on-site screening facility. However, ORS 435.453(4) requires the confirmatory test to "be conducted in a clinical laboratory certified under ORS 438.040," rather than the on-site testing facility. Claimant's urine specimen was not analyzed by the laboratory for the presence of alcohol, and no other specimen capable of being sent to and analyzed in an off-site laboratory, such as blood, was requested from claimant. As such, the record fails to show that the alcohol testing was conducted in accordance with ORS 438.435, which is necessary to a determination that claimant tested positive for alcohol use under OAR 471-030-0125(2)(e) and thereby violated the employer's written policy.

Furthermore, under OAR 471-030-0125(9)(b), in the absence of the required confirmatory alcohol testing, the record fails to show "clear observable evidence" that claimant was under the influence of alcohol in the workplace. Claimant's supervisor testified that he was present with claimant following the collision and throughout the testing process, and when asked at hearing if he had observed any signs that claimant had used or was under the influence of alcohol, he replied that he had not. Transcript at 28, 39-40. The employer did not present any other evidence of observed impairment. Therefore, the employer has not met their burden to show that claimant was discharged for committing a disqualifying act under OAR 471-030-0125(9).

For these reasons, claimant was discharged, but not for committing a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, and therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 26-UI-339359 is affirmed.

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

DATE of Service: <u>November 4, 2026</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
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*

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