

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-1066**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 27, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective October 17, 2021 (decision # 121953). Claimant filed a timely request for hearing. On December 6, 2021, ALJ Logan conducted a hearing at which the employer failed to appear, and on December 7, 2021 issued Order No. 21-UI-181261, affirming decision # 121953. On December 14, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At hearing, the ALJ admitted Exhibit 1 into evidence, but failed to mark it. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it, and marked it as Exhibit 1. Audio Record at 7:56.

**FINDINGS OF FACT:** (1) Legacy Good Samaritan Hospital employed claimant from August 2011 until October 19, 2021. Claimant was a respiratory therapist who treated patients with breathing issues and managed the care of patients on ventilators.

(2) In August 2021, the governor of Oregon announced a mandate requiring all Oregon healthcare workers to get vaccinated against COVID-19 and employers in the healthcare field to implement the mandate. In compliance with the mandate, the employer implemented a policy that required their employees to get vaccinated against COVID-19 by September 30, 2021, unless the employer granted them an exemption. Claimant was aware of the employer's policy.

(3) The employer provided a procedure through which employees could obtain an exemption from the vaccination requirement if they qualified for a medical exemption or a religious exemption. To determine whether to grant a religious exemption, the employer assessed the employee's consistency, such as whether they received other vaccines. The employer also assessed specificity, such as whether the employee's religious belief was clearly stated and whether the religious belief was specifically against receiving the COVID-19 vaccine.

(4) Claimant was opposed to receiving the COVID-19 vaccine for religious and personal reasons. She had declined to receive flu vaccines in previous years. The employer's exemption form requested that applicants who had a religious authority submit a signed letter from such an authority explaining how receiving the COVID-19 vaccine would conflict with the applicant's religious beliefs. Claimant sought a letter from her church for this purpose, but her religious leader declined to provide her a letter because the church's conference had advised not to provide any information.

(5) On August 30, 2021 claimant submitted a request for a religious exemption, to which she attached her own letter explaining her position. In the letter, claimant stated "I believe my body is a temple of the Holy Spirit and it is a personal responsibility for me to protect my body's physical integrity against unethical and harmful ingredients and injections." Exhibit 1 at 3. Claimant also stated "I personally do not believe in abortion. Stem cells from aborted fetuses are used in testing of the vaccines or are in the vaccines themselves. I cannot in good conscience take these vaccines knowing that the creation or contents of the vaccines go against my personal and religious beliefs." Exhibit 1 at 3.

(6) The employer considered claimant's request for an exemption. On September 27, 2021, the employer informed claimant that they had denied her exemption request because they determined that the information claimant provided did not meet one or both of the consistency and specificity criteria.

(7) After her exemption request was denied, claimant declined to receive the COVID-19 vaccine. On September 30, 2021, claimant remained unvaccinated. On October 1, 2021, the employer placed claimant on administrative leave. On October 19, 2021, the employer discharged claimant for violating their policy requiring her to get vaccinated against COVID-19 by September 30, 2021, absent an exemption.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

- (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

At hearing, claimant argued that her conduct did not constitute misconduct because the employer's vaccination policy imposed a standard of behavior the employer did not have the right to expect because the policy was unconstitutional. Audio Record at 24:23. More specifically, claimant contended the employer's policy was unconstitutional because it interfered with her First Amendment right to free exercise of religion. The Free Exercise of Religion Clause, like almost all constitutional provisions, only applies to governmental actors, not private entities, and there is no indication the employer is a governmental entity or so significantly involved with the state that it should be treated as such. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (“[P]rivate action is immune from [constitutional] . . . restrictions[.]”). However, claimant's argument does not fail for lack of state action because a line of United States Supreme Court cases, which claimant cited, premise state action on the state agency's denial of unemployment benefits in situations in which the claimants refused or resigned from jobs that conflicted with their religious beliefs. *See Sherbert v. Verner*, 374 U.S. 398 (1963) (held Free Exercise Clause violation where claimant denied benefits for refusing job that would require work on claimant's Sabbath day); *Thomas v. Review Board*, 450 U.S. 707 (1981) (held Free Exercise Clause violation where claimant denied benefits for quitting job that would require producing war materials in conflict with religious beliefs). The reach of these cases is narrow, however, because *Employment Division v. Smith*, 494 U.S. 872 (1990), which is the operative authority in this field, limited and distinguished *Sherbert* and *Thomas*.

In *Smith*, the Court held that the Free Exercise Clause did not bar the state of Oregon from prohibiting generally the possession of peyote and denying unemployment benefits to religiously inspired peyote users who were discharged for violating an employer policy prohibiting peyote use. 494 U.S. at 874. The Court noted that “[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Id.* at 878-79. The Court warned against establishing a rule favorable to the claimants in that case because doing so “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” including “compulsory vaccination laws.” *Id.* at 888-89. *Smith* stands

for the proposition that a state may deny unemployment benefits where misconduct is based on violation of a neutral state policy of general applicability even if doing so interferes with a person's particular religious practices. Here, the state imposed a neutral policy of general applicability requiring all healthcare workers to get vaccinated against COVID-19, a policy it could impose validly. *See Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (an individual can be made to submit to vaccination against contagious diseases because of the societal interest in preventing the spread of disease). The Free Exercise Clause did not excuse claimant from compliance with this mandate, and the employer's decision to discharge claimant for violation of an employer policy that implemented the mandate was not unconstitutional. Thus, the employer's vaccination policy was not unconstitutional, and claimant's argument that the employer's policy was unreasonable, or not one the employer had a right to expect because it was unconstitutional, is therefore without merit.

Claimant also argued that the employer's vaccination policy was unreasonable because the employer did not grant claimant's request for a religious exemption and "Title VII of the Civil Rights Act of 1964 requires employers to provide exemptions and accommodations for employees who raise objections to receiving employer-mandated vaccines based on their religious beliefs." Audio Record at 22:33. However, the policy was not unreasonable on that basis. The record shows that the employer considered claimant's religious exemption request, and, after evaluating it using the consistency and specificity criteria, declined to grant an exemption. Given that the employer had a procedure for granting religious exemptions, and that the employer evaluated claimant's request for one using objective criteria, claimant did not show that the employer's vaccination requirement policy was unreasonable merely because the employer declined to grant an exemption. Similarly, claimant argued that the employer's policy was unreasonable because the employer did not provide daily COVID-19 testing of employees as an alternative to getting vaccinated against COVID-19. Audio Record at 18:13. However, the policy was not unreasonable on that basis either. The record supports an inference that the employer did not have the latitude under the state mandate to test employees instead of requiring they be vaccinated. And even if the employer did have such an option, requiring vaccination was not unreasonable given its higher level of effectiveness against virus spread and higher level of protection against severe symptoms for those who become infected.

Having concluded that the employer's policy was not unreasonable, the analysis turns to whether claimant violated the employer's policy willfully or with wanton negligence under OAR 471-030-0038(3)(a). The record shows that claimant breached the employer's expectation that she get vaccinated against COVID-19 by September 30, 2021. Claimant was aware that, absent obtaining an exemption, she was required to get vaccinated by that date. After failing to obtain an exemption, claimant willfully decided to not get vaccinated by September 30, 2021 for religious and personal reasons. Accordingly, claimant willfully violated the employer's policy by not getting vaccinated against COVID-19 the September 30, 2021 deadline.

Claimant's conduct is not excusable as an isolated instance of poor judgment. Claimant's conduct in declining to abide by the employer's vaccination requirement policy exceeded mere poor judgment because claimant's opposition to the policy made a continued employment relationship impossible. The record shows that the employer was required by state mandate to impose the vaccination requirement, and had deemed claimant ineligible for an exemption, but that claimant remained opposed to receiving the COVID-19 vaccine for religious and personal reasons. Based on this evidence, along with the fact that claimant treated patients with breathing issues and, as an unvaccinated worker, posed a heightened

risk of spreading COVID-19 to a group of particularly vulnerable patients, the preponderance of evidence supports that claimant's conduct made a continued employment relationship impossible and therefore exceeded mere poor judgment.

Claimant's conduct also was not a good faith error. The record fails to show that claimant believed in good faith that her refusal to get vaccinated against COVID-19 by September 30, 2021 did not violate the employer's expectations. The record instead shows claimant was aware that the employer had declined to grant her an exemption, and that she was required to get vaccinated by September 30, 2021 but declined to do so because of her religious opposition. Claimant therefore was not operating under a mistake of fact as to what the employer expected of her. *See Hood v. Employment Dep't.*, 263 P.3d 1126, 1130 (2011) (the "error" in a good faith error analysis refers to a mistake of fact or action deriving from a mistake of fact, a good faith error is not an "exception for conscientious objectors to employer policies"). The record does not show that claimant believed in good faith that the employer approved of her failure to get vaccinated against COVID-19 by September 30, 2021.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective October 17, 2021.

**DECISION:** Order No. 21-UI-181261 is affirmed.

S. Alba, D. Hettle and A. Steger-Bentz.

**DATE of Service:** January 25, 2022

**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](http://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.

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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 desisyong ito.

## 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 فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف 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  
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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.