

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-1082**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 10, 2021, 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 # 80113). The employer filed a timely request for hearing. On December 13, 2021, ALJ Mott conducted a hearing, and on December 14, 2021 issued Order No. 21-UI-181802, affirming decision # 80113. On December 17, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Physical Therapy & Hand Clinic of Hillsboro LLP employed claimant from January 2015 until October 18, 2021. The employer was an outpatient physical therapy clinic with seven employees. Claimant was a physical therapist who worked in close proximity with patients.

(2) In August 2021, the governor of Oregon announced a mandate requiring all Oregon healthcare workers to get vaccinated against COVID-19. Claimant was unvaccinated. The employer's owner had tried to convince claimant to receive the vaccine since February 2021, when all of the employer's other employees had been vaccinated against COVID-19. Claimant understood the state mandate required her to either get vaccinated by October 18, 2021 or submit a medical or religious exemption request to her employer that, if approved, meant she could continue working.

(3) Claimant decided to submit a religious exemption request to the employer. On August 27, 2021, claimant obtained a letter from her pastor, filled out an Oregon Health Authority religious exemption form, and submitted both to the employer's owner.

(4) On August 31, 2021, claimant and the owner discussed claimant's exemption request. The owner expressed skepticism about the accuracy of a particular representation about the vaccine made in the pastor's letter. The owner also stated that granting an exemption would impose a hardship on the employer because patients expected the employer's therapists to be vaccinated and if claimant contracted COVID-19, other employees would not be capable of covering claimant's patients, patient appointments would have to be canceled, and the employer would be harmed financially. On September

1, 2021, claimant asked for permission to provide more information to supplement her exemption request. The owner agreed, and on September 8, 2021, claimant emailed the owner a letter explaining how receiving the vaccine conflicted with her religious beliefs.

(5) On September 21, 2021, claimant and the owner again discussed claimant's exemption request. The owner doubted that she could grant claimant an exemption, again stating that doing so would create a hardship because patients expected therapists to be vaccinated and if claimant remained unvaccinated and contracted COVID-19, the employer may have to cancel patient appointments.

(6) On September 30, 2021, claimant and the owner again discussed claimant's exemption request and vaccination status. The owner told claimant that she had to get vaccinated against COVID-19 unless the vaccine mandate was lifted. The owner stated she could not grant claimant an exemption because of patient expectations and the possibility of canceling patient appointments if claimant contracted COVID-19. The owner noted that if claimant remained unvaccinated she would be subject to longer quarantine periods if she was exposed to COVID-19 than vaccinated employees causing additional risk of financial harm to the employer as patient appointments would have to be canceled. The owner also stated that she believed having an unvaccinated employee would subject the employer to fines. The owner stated further that she thought claimant did not concretely show how receiving the vaccine conflicted with her religious beliefs. The owner advised that claimant receiving the vaccine was necessary to protect claimant's patients and coworkers and that it was not possible to accommodate claimant by assigning her to different tasks because the nature of her job was to work in close proximity with patients.

(7) On October 7, 2021, the owner provided claimant a letter stating "I have decided not to accept your request for a religious exemption regarding your obtaining a Covid-19 vaccine in order to continue to work here." Exhibit 1 at 13. The owner's letter also stated "[t]his letter serves as your notice of employment lay off . . . effective Oct. 18, 2021 (unless you provide proof of vaccination prior to that date)." Exhibit 1 at 13. Claimant received and understood the owner's letter.

(8) Claimant declined to get vaccinated against COVID-19 and, on October 18, 2021, the employer discharged claimant for that reason.

**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).

The order under review concluded that the employer’s expectation was for claimant to comply with the “State’s expectations concerning the vaccination of healthcare workers” located at OAR 333-019-1010 and that claimant was discharged, but not for misconduct, because the employer did not show that claimant violated the requirements of that administrative rule. Order No. 21-UI-181802 at 2, 4. The record does not support the conclusion of the order under review.

While OAR 333-019-1010 imposed duties and restrictions on both claimant and the employer,<sup>1</sup> the employer’s expectation was independent of the administrative rule. The record shows that after the mandate was announced, claimant understood she had to either get vaccinated by October 18, 2021 or submit a medical or religious exemption request to her employer that, if approved, meant she could continue working while remaining unvaccinated. At hearing, claimant testified that she did not understand the above to be required by a written employer policy. Transcript at 22-23. Regardless, given the multiple submissions claimant made to the employer to obtain an exemption and the many discussions she had with the owner about the same, claimant knew her obligation to obtain an exemption or get vaccinated was an expectation held by the employer. Moreover, the record shows that claimant knew by October 7, 2021 that the employer had rejected her exemption request and imposed a standard

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<sup>1</sup> For example, as to claimant, OAR 333-019-1010(3)(a) states that after October 18, 2021, a “healthcare staff person may not work . . . in a healthcare setting unless they are fully vaccinated or have provided documentation of a medical or religious exception.” As to the employer, OAR 333-019-1010(3)(b) states that after October 18, 2021, an “employer of . . . healthcare staff . . . may not employ . . . healthcare staff persons who are working . . . at a healthcare setting unless the . . . healthcare staff persons are fully vaccinated against COVID-19 or have a documented medical or religious exception.”

of behavior, conveyed in writing, that claimant be vaccinated before October 18, 2021 or have her employment terminated on that date. This is because on October 7, 2021 the owner conveyed a letter to claimant informing her “I have decided not to accept your request for a religious exemption regarding your obtaining a Covid-19 vaccine” and “[t]his letter serves as your notice of employment lay off . . . effective Oct. 18, 2021 (unless you provide proof of vaccination prior to that date).” Exhibit 1 at 13. Claimant received and understood the owner’s letter. For these reasons, the preponderance of evidence shows the employer expected claimant to get vaccinated against COVID-19 prior to October 18, 2021 and claimant knew and understood this expectation.

The record shows that claimant breached the employer’s expectation that she get vaccinated against COVID-19 prior to October 18, 2021. Claimant was aware that the employer had declined to grant her an exemption, and, after failing to obtain an exemption, claimant willfully decided to not get vaccinated against COVID-19. The employer’s expectation was reasonable because the employer was not required to grant claimant’s request for a religious exemption to obtaining a COVID-19 vaccine and requiring claimant to receive the vaccine protected claimant’s patients and coworkers, was consistent with patient demand for vaccinated therapists, and enabled the employer to comply with the state mandate. The employer’s decision to decline to grant claimant an exemption was not unreasonable given the evidence that exempting claimant would impose an undue hardship on the employer because claimant worked closely with patients, patients expected the employer’s therapists to be vaccinated, and claimant could not perform her job duties in isolation from others. Moreover, if claimant remained unvaccinated she was subject to longer quarantine periods if she was exposed to COVID-19 than vaccinated employees causing additional risk of financial harm to the employer since patient appointments would have to be canceled. Accordingly, the record shows that the employer’s expectation was reasonable and that claimant willfully violated it when, after her exemption request was denied, she failed to get vaccinated against COVID-19 prior to October 18, 2021.

Claimant’s conduct is not excusable as an isolated instance of poor judgment. Claimant’s conduct in violating the employer’s expectation was not isolated because it was an on-going refusal to comply with the employer’s expectation. Moreover, claimant’s conduct exceeded mere poor judgment because claimant’s opposition to receiving the COVID-19 vaccine made a continued employment relationship impossible. The record shows that the employer reasonably imposed the vaccination requirement in compliance with the state mandate, the employer was not required to accommodate claimant’s request for a religious exemption, and the employer had deemed claimant ineligible for an exemption, but claimant remained opposed to receiving the COVID-19 vaccine for religious reasons. Based on this evidence, the preponderance of evidence supports that claimant’s conduct made a continued employment relationship impossible and therefore exceeded mere poor judgment and for that reason cannot be excused as an isolated instance of 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 prior to October 18, 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 prior to October 18, 2021 but declined to do so for religious reasons. 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.

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-181802 is set aside, as outlined above.

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

**DATE of Service: January 26, 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](https://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 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**

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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.

**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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