

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-1092**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On November 4, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective October 17, 2021 (decision # 122222). Claimant filed a timely request for hearing. On December 15, 2021, ALJ Kaneshiro conducted a hearing, and on December 16, 2021 issued Order No. 21-UI-182085, affirming decision # 122222. On December 18, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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 when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, such as the new information contained in claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

**FINDINGS OF FACT:** (1) Douglas County School District No. 15 employed claimant as a charter school registry teacher from January 4, 2016 until October 18, 2021.

(2) In August 2021, the Oregon Health Authority (OHA) adopted an administrative rule<sup>1</sup> which required, in relevant part, that the employer obtain from each of their employees either proof that the employee was vaccinated against COVID-19; or else a signed form which excepted the employee from the

<sup>1</sup> OAR 333-019-1030 (August 25, 2021)

vaccination mandate. Exceptions could be requested and granted on either medical or religious grounds, and were required to be requested on a specific OHA form. If the employer continued to employ an employee after October 18, 2021 without either obtaining proof of vaccination or a signed exception form, the employer could be subject to a fine. The employer notified their employees, including claimant, of these requirements. The employer did not have a policy requiring employees to be vaccinated other than the policy to comply with OHA vaccination mandate.

(3) On September 11, 2021, claimant notified the employer that she declined to be vaccinated on the basis of her religious beliefs. Claimant also refused to sign the OHA religious exception form, as she believed that “. . . the OHA, on the bidding of demonic forces, aims to deceive us with its contracts.” Exhibit 2 at 4. Claimant instead submitted to the employer her own request for an exception to the vaccine requirement.

(4) On October 4, 2021, the employer again notified claimant that she was required to either submit proof of vaccination or a signed OHA exception form. Claimant did not comply.

(5) On October 18, 2021, claimant met with the employer’s human resources director, claimant’s direct supervisor, and a representative from the teacher’s union to discuss the matter. Claimant was again informed that she was required to either submit proof of vaccination or a signed exception form. Claimant told the employer that she would only sign the form if she could note on the form that it was under “duress,” which the employer “could not accept.” Transcript at 7. Because claimant submitted neither a proof of vaccination nor a signed OHA exception form, the employer discharged claimant that day.

(6) The employer wanted to keep claimant employed, and would have granted claimant’s request for a religious exception to the vaccine requirement if she had submitted a signed OHA exception form. Transcript 15.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-182085 is set aside and this matter remanded for further development of the record.

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).

The employer discharged claimant for failing to submit either proof of vaccination against COVID-19, or a signed OHA exception form, by October 18, 2021. The order under review concluded that this constituted misconduct because the employer “was subject to the Oregon government’s mandate” and

“faced significant fines” if claimant did not comply but continued working for the employer. The record as developed does not support this conclusion.

Despite claimant’s prior objections, the record nevertheless shows that claimant actually *was* willing to sign the OHA exception form—if she was also permitted to note on the form that she was doing so “under duress.” While the employer’s witness testified at hearing that they “could not accept” the form with such a notation, they did not offer an explanation as to why it was unacceptable. The most likely reason for the employer’s refusal to accept the form signed “under duress” was that they believed that the notation would invalidate claimant’s signature. This belief may have been derived from the common law concept that a contract signed under duress is voidable.<sup>2</sup> However, the record does not show that the OHA exception form, despite the fact that it required a signature, contained the elements necessary to constitute a contract. Unless the form *was* a contract, contracts-law doctrine would not apply to it.

Similarly, the administrative rule that required the employer to obtain claimant’s signed exception form (or proof of vaccination) required only, in relevant part, that:

(4) On or before October 18, 2021, teachers, school staff and volunteers must provide their school, employer or contractor with either:

(a) Proof of vaccination showing they are fully vaccinated; or

(b) Documentation of a medical or religious exception.

\* \* \*

(B) A religious exception must be corroborated by a document, on a form prescribed by the Oregon Health Authority, signed by the individual stating that the individual is requesting an exception from the COVID-19 vaccination requirement on the basis of a sincerely held religious belief and including a statement describing the way in which the vaccination requirement conflicts with the religious observance, practice, or belief of the individual.

OAR 333-019-1030. The rule contained no provision which stated or suggested that noting that the signature was obtained under duress would invalidate the form or otherwise fail to comply with the requirements of the rule, and the employer offered no other evidence to support their position. If the “under duress” notation would not have actually invalidated claimant’s signature, and therefore had no practical effect on the employer’s compliance with the rule, the employer’s expectation that claimant submit the signed form without the notation may not have been a standard of behavior that the employer had the right to expect of an employee. Likewise, under such circumstances, claimant’s submission of the form with the “under duress” notation may not have constituted a disregard for the employer’s interests. However, further inquiry is needed to determine the employer’s basis for believing that the form signed “under duress” would not comply with the requirements of the rule. On remand, the ALJ should ask the employer’s witness to explain the employer’s basis for this belief. Additionally, the record is unclear as to whether claimant actually signed the form with the “under duress” notation, or

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<sup>2</sup> See generally Restatement (Second) Of Contracts §175 (1981); 25 AM JUR2D Duress and Undue Influence §7 (1996).

merely offered to do so, as the employer both testified that claimant did sign the form and did not sign the form. Transcript at 6–7. On remand, the ALJ should direct inquiry in order to resolve this inconsistency.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. 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 for a determination of whether the employer discharged claimant for misconduct, Order No. 21-UI-182085 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-182085 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: January 27, 2022**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-182085 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return 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 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 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 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**  
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