

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0017**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 5, 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 # 90304). Claimant filed a timely request for hearing. On November 29, 2021, ALJ Hoppe conducted a hearing at which the employer failed to appear, and on December 6, 2021 issued Order No. 21-UI-181185, affirming decision # 90304. On December 23, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider claimant's December 23, 2021 written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

EAB considered claimant's January 21, 2022 written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Legacy Meridian Park Hospital employed claimant until October 19, 2021. Claimant was a cook who prepared food carts for patients.

(2) In August 2021, following the Oregon governor's announcement of a COVID-19 vaccination mandate for Oregon healthcare workers, the employer implemented a policy that required their employees to be vaccinated against COVID-19 by September 30, 2021, unless the employer granted them an exemption. Claimant was aware of and understood 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) On August 30, 2021, claimant submitted a request for religious exemption to the employer due to her opposition to receiving the COVID-19 vaccine for religious reasons. Claimant supported her exemption request with a letter from her faith community that confirmed claimant's membership in the community and expressed support for her exemption request. Exhibit 3. Claimant also supported her request with a personal letter, which explained how receiving the COVID-19 vaccine would conflict with her religious beliefs.

(5) The employer considered claimant's request for a religious exemption. On September 27, 2021, claimant received an email from the employer's "Vaccine Exception Workgroup" which 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. Exhibit 5.

(6) After her exemption request was denied, claimant declined to receive the COVID-19 vaccine and remained unvaccinated as of September 30, 2021. On October 19, 2021, the employer discharged claimant for violating their policy requiring her to be 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).

The employer discharged claimant for violating their policy, which required claimant to get vaccinated for COVID-19 prior to September 30, 2021. The record shows that the employer reasonably implemented the policy pursuant to the Governor's mandate requiring same, and based on their independent determination that the COVID-19 vaccine is "safe and effective" and presented "a proven strategy to reduce COVID-19 related illness for [the employer's] caregivers, patients, and community." Exhibit 4. The reasonableness of the employer's policy is further supported by the language of OAR 333-019-1010(1) (September 1, 2021 through January 31, 2022) which not only notes the "more transmissible" nature of COVID-19 and its variants, but also the reality that individuals in healthcare settings, such as a hospital, are more likely to have medical conditions that make them more susceptible to complications if infected by COVID-19. Consistent with the employer's policy, OAR 333-019-1010(3)(b) directs that after October 18, 2021, an employer of health care staff in the State of Oregon may not employ healthcare staff persons at a healthcare setting unless the healthcare staff workers are fully vaccinated against COVID-19 or have a documented medical or religious exception. Claimant understood the employer's policy that required her to be vaccinated by September 30, 2021, or have an approved exemption, and she willfully violated the policy by achieving neither prior to the deadline.

At hearing, claimant contended that the employer's vaccination policy was unreasonable pursuant to Title VII of the Civil Rights Act of 1964 because it discriminated against claimant based on her religious beliefs and, as a result, her exemption request should have been granted. Transcript at 19-20. However, the policy was not unreasonable on that basis. The record shows that the employer's policy provided a process for consideration of religious exemption requests and that the employer considered claimant's religious exemption request pursuant to that process. Furthermore, the record shows that after the employer evaluated claimant's request using the consistency and specificity criteria, the employer 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 an exemption 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. Claimant also argued that the employer's policy was unreasonable because the employer could have reasonably accommodated claimant by allowing her to continue the masking, hand-washing, and social distancing protocols that had preceded the employer's vaccine mandate. Transcript at 20. 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 allow these protocols, in lieu of vaccination, and without an approved exception (religious or medical) in place. Furthermore, even if the employer did have such an option, requiring vaccination was

not unreasonable as a healthcare provider and given the vaccine's higher level of effectiveness against virus spread and higher level of protection against severe symptoms for those who become infected.

In her January 21, 2022, written argument, claimant also asserts that the employer's policy was unreasonable because it would have been impossible for her to have become "fully vaccinated," as that term is defined in OAR 333-019-1010(2)(c)<sup>1</sup>, after the employer denied her request for religious exemption, and prior to the employer's September 30, 2021 deadline. January 21, 2022 written argument at 2-3. Claimant argued that because the FDA approved vaccine required a 21-day period between the receipt of the two necessary doses, and OAR 333-019-1010(2)(c) required an additional 14 days after the second dose, she could not have become "fully vaccinated" on or before her October 19, 2021 discharge date. January 21, 2022 written argument at 2-3. However, the express language of OAR 333-019-1010(2)(c) provides an option for a single-dose COVID-19 vaccine and therefore it is reasonable to conclude that claimant could have pursued this option and still met the timelines referenced by the rule. Furthermore, the record reflects that at the time they denied her exemption request, the employer advised claimant that she had the option to "[t]ake action to keep your job by getting vaccinated as soon as possible" and prior to September 30, 2021. Exhibit 5. Based on this language, it is reasonable to conclude that had claimant made an effort to receive the first of a two dose vaccine after her exemption request was denied, the employer would have, more likely than not, accommodated her situation to allow her to obtain the second dose as close to the necessary timeframes as possible.

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. 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 be vaccinated against COVID-19 prior to 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 be vaccinated prior to September 30, 2021 but declined to do so. 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 be vaccinated against COVID-19.

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<sup>1</sup> OAR 333-019-1010(2)(c) defines "fully vaccinated" as "having received both doses of a two-dose COVID-19 vaccine or one dose of a single-dose COVID-19 vaccine and at least 14 days have passed since the individual's final dose of COVID-19 vaccine."

For the above reasons, claimant was discharged for misconduct and is therefore disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 21-UI-181185 is affirmed.

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

**DATE of Service:** February 2, 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**

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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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