

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0020

Reversed
Disqualification

PROCEDURAL HISTORY: On November 9, 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 # 110144). Claimant filed a timely request for hearing. On December 15, 2021, ALJ Roberts conducted a hearing, and on December 20, 2021 issued Order No. 21-UI-182254, reversing decision # 110144 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On December 23, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ashland Public School District No. 5 employed claimant as an educational assistant from March 18, 2019 until October 18, 2021.

(2) In August 2021, the governor of Oregon announced a mandate requiring Oregon school district workers to provide proof of vaccination against COVID-19, unless they provide documentation of a medical or religious exception. Pursuant to the mandate, which school district employers were required to implement, the employer expected claimant to provide either proof of vaccination or documentation of a medical or religious exception by October 18, 2021. Claimant was aware of and understood this expectation. If the employer continued to employ unvaccinated or un-expected employees after October 18, 2021, the employer could lose funding or be required to switch to teaching students remotely.

(3) Claimant was opposed to receiving the vaccine because she believed it was “experimental” and that its long-term effects were unknown. Transcript at 34. On August 27, 2021, the employer sent a survey to each of their employees inquiring whether the employees intended to provide proof of having received the vaccine or intended to provide documentation of an exception. Claimant responded to the survey advising that she did not intend to get vaccinated against COVID-19 or to pursue an exception.

(4) After filling out the survey, claimant decided she would try to get medical exception documentation. On August 31, 2021, claimant saw a doctor and requested documentation to support a medical exception. The doctor declined to provide such documentation to claimant based on her medical status.

(5) On October 14, 2021, claimant saw a different doctor in an effort to obtain documentation to support a medical exception. This doctor also declined to provide any medical exception documentation to claimant based on her medical status.

(6) On October 18, 2021, claimant remained unvaccinated and had not submitted proof of receiving the COVID-19 vaccine or documentation of a medical or religious exception. On that date, the employer discharged claimant for violating their expectation to provide either proof of vaccination or documentation of a medical or religious exception by October 18, 2021.

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 record shows that the employer expected claimant to provide either proof of vaccination against COVID-19 or documentation of a medical or religious exception by October 18, 2021. The employer's expectation was reasonable given the continuing threat to public health posed by COVID-19, and the fact that the employer was required to implement the mandate or face loss of funding if they did not. Claimant violated this expectation because on October 18, 2021, due to her opposition to receiving the vaccine and failure to obtain documentation of an exception, she remained unvaccinated and did not provide the employer with the required proof of vaccination status or documentation of a medical or religious exception. The record shows that claimant initially informed the employer that she would not pursue a medical exception, but later sought exception documentation from two doctors neither of whom would agree to provide such documentation based on claimant's medical status. The preponderance of the evidence supports that once claimant's efforts to obtain medical exception documentation failed, she consciously remained unvaccinated, which she knew would result in a violation of the employer's expectation. Claimant was aware of the employer's expectation and knew or should have known that failure to provide proof of vaccination or exception documentation by October 18, 2021 would violate the employer's standard of behavior. Thus, claimant violated the employer's expectation with at least wanton negligence when she failed to provide either proof of vaccination against COVID-19 or documentation of a medical or religious exception by 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 beginning October 18, 2021, it amounted to an on-going failure 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 and inability to obtain medical exception documentation made a continued employment relationship impossible. The record shows that the employer reasonably imposed their expectation in compliance with the state mandate, but claimant opposed receiving the COVID-19 vaccine, was rejected by two doctors who would not support her request for a medical exception, remained unvaccinated, and then failed to provide either proof of vaccination or medical or religious exception documentation by the deadline. Continuing to employ claimant absent proof of vaccination or exception documentation was impossible because doing so would have placed the employer in noncompliance with the mandate and potentially exposed them to repercussions such as loss of funding. 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.

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-182254 is set aside, as outlined above.

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

DATE of Service: February 1, 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. 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 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.

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