

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0060

Reversed
Disqualification

PROCEDURAL HISTORY: On November 17, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct, and was disqualified from receiving unemployment insurance benefits effective October 24, 2021 (decision # 93809). Claimant filed a timely request for hearing. On December 20, 2021, ALJ Wardlow conducted a hearing, and on December 21, 2021 issued Order No. 21-UI-182332, reversing decision # 93809 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 3, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rip City Management LLC employed claimant, most recently as their senior director of facility operations, from March 1995 until October 29, 2021.

(2) Around 2016, claimant had a severe allergic reaction to an over-the-counter pain medication, and thereafter carried an epinephrine pen with him in case of emergency. Claimant had not previously been allergic to the drug.

(3) On or around August 24, 2021, claimant received notice from the employer that all employees were required to either be vaccinated or in the process of becoming vaccinated against COVID-19, or else granted a medical or religious exemption from vaccination, by November 1, 2021. The employer required a physician's approval in order to grant a medical exemption from the vaccination requirement.

(4) Because of his previous allergic reaction to the pain medication, claimant was concerned that he may have a similar reaction to a COVID-19 vaccine, and therefore sought a medical exemption to the vaccination requirement. Claimant consulted with his physician about the matter. Claimant's physician told him that he did not have access to all of the ingredients in the vaccine, but that, of the ingredients that were disclosed, none of them should trigger claimant's allergy. As a result, claimant's physician did not sign off on claimant's request for a medical exemption.

(5) Because he did not obtain a physician's approval for a medical exemption, he was not granted the exemption. Claimant did not get vaccinated because he was concerned about suffering an adverse reaction to the vaccine.

(6) On October 29, 2021, because claimant was neither vaccinated against COVID-19 nor granted an exemption from vaccination, the employer discharged claimant.

CONCLUSIONS AND REASONS: Claimant was discharged 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience 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 having failed to either get vaccinated against COVID-19 or obtain a medical exemption from vaccination. The order under review concluded that claimant was not discharged for misconduct because “while claimant did not obtain the COVID-19 vaccine, the evidence establishes that, had he obtained a medical exemption he would not have been discharged”; that claimant’s failure to obtain a medical exemption was the final incident that led the employer to discharge him; and that, because claimant attempted to obtain a medical exemption but was unsuccessful in doing so, his failure to do so was not wantonly negligent. Order No. 21-UI-182332 at 3. The record does not support these conclusions.

As a preliminary matter, while it is true that the employer would not have discharged claimant if he had obtained a medical exemption, it is *also* true that the employer would not have discharged claimant if he had gotten vaccinated. Therefore, the final incident that caused the employer to discharge claimant was not merely his failure to obtain a medical exemption, but his failure to *either* get vaccinated *or* obtain a medical exemption. Even assuming that claimant’s failure to obtain a medical exemption was not the result of his willful or wantonly negligent disregard of the employer’s standards of behavior, the record nevertheless shows that claimant’s failure to get vaccinated was a willful violation of those standards.

The employer’s expectation that their employees get vaccinated against COVID-19 or obtain a religious or medical exemption was reasonable in order to help protect customers and other employees against risk of infection, particularly given the continuing threat to public health posed by COVID-19, the vaccine’s higher level of effectiveness against virus spread, and its higher level of protection against severe symptoms for those who become infected. Claimant sought a medical exemption, but was unable to obtain one because his physician did not believe that claimant was at risk of a serious adverse reaction to the vaccine. Claimant thereafter chose not to get vaccinated because of his fear that he might have an allergic reaction to the vaccine. Because claimant intentionally did not get vaccinated, in violation of the employer’s reasonable expectation that he do unless he received an exemption, claimant willfully violated the employer’s standards of behavior that they had a right to expect of their employees.

Further, claimant’s conduct cannot be excused as an isolated instance of poor judgment. Per OAR 471-030-0038(1)(d)(A), an isolated instance of poor judgment must be a “single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.” For at least two months prior to the date on which he was discharged, claimant knew that the employer expected him to either get vaccinated or obtain an exemption from vaccination. Throughout that period, claimant continuously failed to get vaccinated. While his decision not to get vaccinated might have been singular, in fact he refused to comply with the requirement on a daily basis until he was discharged, and presumably would have continued to do so indefinitely had the employer not discharged him. Therefore, the decision was a repeated act or pattern of behavior as it amounted to an on-going failure to comply with the employer’s reasonable expectation, and was not 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 24, 2021.

DECISION: Order No. 21-UI-182332 is set aside, as outlined above.

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

DATE of Service: February 10, 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 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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