

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0067**

*Late Application for Review Allowed*  
*Order No. 21-UI-180191 Affirmed ~ Disqualification*

**PROCEDURAL HISTORY:** On October 15, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer suspended claimant for misconduct on October 1, 2021, disqualifying claimant from receiving unemployment insurance benefits effective September 26, 2021 (decision # 91556). Claimant filed a timely request for hearing. On November 16, 2021, ALJ Toth conducted a hearing at which the employer failed to appear, and on November 19, 2021 issued Order No. 21-UI-180191, concluding that the employer discharged claimant for misconduct on October 19, 2021, disqualifying claimant from receiving unemployment insurance benefits effective September 26, 2021. On December 9, 2021, Order No. 21-UI-180191 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On December 23, 2021, the Department served notice of an administrative decision concluding that the employer discharged claimant for misconduct on October 19, 2021 disqualifying claimant from receiving unemployment insurance benefits effective October 17, 2021 (decision # 110016). EAB Exhibit 1 at 5. On January 5, 2022, claimant filed a timely request for hearing on decision # 110016, which was scheduled to be held on February 15, 2022.<sup>1</sup> Also on January 5, 2022, claimant filed a late application for review of Order No. 21-UI-180191 with EAB.

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the statement and documents claimant submitted with her January 5, 2022 late application for review, which have been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

---

<sup>1</sup> EAB has taken notice of this fact, which is contained in Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

**FINDINGS OF FACT:** (1) Legacy Medical Group St. Helens employed claimant as a customer service specialist. The employer suspended claimant and placed her on unpaid administrative leave from October 1, 2021 through October 18, 2021.

(2) In August 2021, following the Oregon governor's announcement of a COVID-19 vaccination mandate for Oregon healthcare workers in order to protect the public, the employer implemented a policy that required their employees to be vaccinated against COVID-19 by September 30, 2021. Unless the employer granted an employee a medical or religious exception to the vaccination requirement, an employee who was not vaccinated by September 30, 2021 would be placed on unpaid administrative leave on October 1, 2021. Thereafter, if the employee did not receive or start a COVID-19 vaccine series by October 18, 2021, the employer would terminate their employment. Claimant understood the employer's COVID-19 vaccine policy.

(3) Claimant was not vaccinated against COVID-19. Claimant did not believe in the safety of vaccines in general and had a history of opting not to receive them. She also had a medical condition that made her wary of receiving vaccines. Claimant asked her medical provider to support a medical exception, but her provider declined to support her request for a medical exception because the provider did not believe her condition qualified her for one.

(4) On August 30, 2021, claimant submitted a request for a religious exception to the vaccine requirement to the employer.

(5) On September 27, 2021, the employer sent claimant a written denial of her religious exception request, stating that her request was denied because the information she provided did not meet one or more of the criteria necessary for a religious exception. The denial also stated that claimant's choices were to get vaccinated as soon as possible to keep her job, "take no action and be placed on administrative leave on October 1st with termination following as soon as October 19th," or resign. Transcript at 20.

(6) Claimant decided to take no action and remained unvaccinated against COVID-19. She continued to work until September 30, 2021. At the end of that day, the employer's manager took away claimant's employment badge and notified her that she would be placed on unpaid administrative leave.

(7) On October 1, 2021, the employer placed claimant on unpaid administrative leave for failing to comply with the employer's COVID-19 vaccine policy by obtaining a medical or religious exception to the vaccination requirement or receiving, or starting a COVID-19 vaccine series by September 30, 2021. Thereafter, she remained unvaccinated through the end of her leave period on October 18, 2021.

(8) On October 19, 2021, the employer discharged claimant for failing to comply with the employer's COVID-19 vaccine policy by receiving or starting a COVID-19 vaccine series by October 18, 2021.

(9) On November 19, 2021, the Office of Administrative Hearings (OAH) mailed copies of Order No. 21-UI-180191 to the parties, but claimant did not receive her copy in the mail. EAB Exhibit 1 at 1. Order No. 21-UI-180191 stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed." Order No. 21-UI-180191 at 5. Order No. 21-UI-180191 also stated on its Certificate of Mailing, "Any

party may appeal this Order by filing a Request for Review with the Employment Appeals Board no later than December 9, 2021.”

(10) On January 4, 2022, having failed to receive a copy of Order No. 21-UI-180191 in the mail, claimant contacted the Department and inquired about the result of the November 16, 2021 hearing. EAB Exhibit 1 at 1. On that day, a Department representative told claimant that the order from the hearing had denied her benefits and advised her of the steps to take to file an appeal of the order. EAB Exhibit 1 at 1.

(11) On January 5, 2022, claimant filed a late application for review of Order No. 21-UI-180191 with EAB.

**CONCLUSIONS AND REASONS:** Claimant’s late application for review of Order No. 21-UI-180191 is allowed. The employer suspended claimant for misconduct.

**Late Application for Review.** An application for review is timely if it is filed within 20 days of the date that OAH mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

An application for review of Order No. 21-UI-180191 was due on December 9, 2021. Because claimant filed her application for review on January 5, 2022, the application for review was late. In her application for review, claimant included a written statement describing the circumstances that prevented a timely filing. The application for review stated that claimant “never received documentation from [OAH] regarding my denial.” EAB Exhibit 1 at 1. She also stated that she “did not get the actual denial/facts or steps on what to do and where to go next until 1/4/22.” EAB Exhibit 1 at 1. Claimant’s apparent failure to receive Order No. 21-UI-180191 in the regular course of the mail constituted a circumstance beyond claimant’s reasonable control that prevented a timely filing. Because claimant filed her late application for review one day after learning about Order No. 21-UI-180191 and how to file an appeal of that order, ending the circumstance that caused the late filing, claimant filed her application for review within a reasonable time under OAR 471-041-0070(2)(b). For these reasons, claimant’s late application for review is allowed.

**Suspension.** As a preliminary matter, this decision only addresses whether the employer suspended claimant for misconduct on or about October 1, 2021, and not whether the employer discharged claimant for misconduct on or about October 19, 2021, as Order No. 21-UI-180191 concluded. The administrative decision at issue, # 91556, concluded that the employer suspended claimant for misconduct on October 1, 2021, disqualifying claimant from receiving unemployment insurance benefits effective September 26, 2021. Order No. 21-UI-180191 at 2-5. On December 23, 2021, the Department issued a separate administrative decision, # 110016, concluding that the employer discharged claimant for misconduct on October 19, 2021. On January 5, 2022, claimant filed a timely request for hearing on that decision, which was scheduled to be held on February 15, 2022. For that reason, this decision only

addresses whether the employer suspended claimant for misconduct on or about October 1, 2021, and not whether the employer discharged claimant for misconduct on or about October 19, 2021. See ORS 657.275(2).

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended claimant from work 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a suspension from work 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 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).

To avoid being placed on unpaid administrative leave on October 1, 2021, the employer expected claimant to be vaccinated against COVID-19 or obtain a medical or religious exception by September 30, 2021. The employer’s expectation was reasonable given the governor’s mandate and the continuing threat to public health posed by COVID-19. Claimant violated this expectation because she did not

obtain a medical or religious exception to the vaccination requirement or get vaccinated by September 30, 2021. The preponderance of the evidence shows that once claimant's efforts to obtain a medical or religious exception failed, she made a conscious decision to remain unvaccinated, which she knew would result in a violation of the employer's expectations. Thus, claimant violated the employer's expectation with at least wanton negligence when she failed to get vaccinated against COVID-19 by September 30, 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 1, 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 a medical or religious exception 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, remained unvaccinated, and then failed to provide proof of vaccination or receive a medical or religious exception to the vaccination requirement by the deadline. Continuing to employ claimant absent proof of vaccination or an exception was impossible because doing so would have placed the employer in noncompliance with the mandate issued to protect the public. 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 is not excusable as an isolated instance of poor judgment.

Claimant's conduct is not excusable as the result of a good faith error. The record shows that claimant was aware that the employer had declined to grant her an exemption, and that she was required to get vaccinated prior to September 30, 2021 to avoid violating the employer's policy and being placed on administrative leave. 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"). Accordingly, the record fails to show that claimant believed in good faith that the employer approved of her failure to get vaccinated against COVID-19.

For the above reasons, the employer suspended claimant from October 1, 2021 through October 18, 2021 for misconduct, and claimant is disqualified from receiving unemployment insurance benefits effective September 26, 2021 and until she requalifies for benefits under ORS 657.176(2).

**DECISION:** Order No. 21-UI-180191 is affirmed.

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

**DATE of Service:** February 17, 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](http://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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymoz.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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 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)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.