

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0086

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 23, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was therefore not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 92230). The employer filed a timely request for hearing. On January 5, 2022, ALJ Kaneshiro conducted a hearing, and on January 6, 2022 issued Order No. 22-UI-183401, affirming decision # 92230. On January 10, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rip City Management, LLC employed claimant as one of their guest experience staff from August 23, 2021 to November 3, 2021.

(2) On August 25, 2021, the employer implemented a COVID-19 vaccination policy for their employees to comply with National Basketball Association (NBA) requirements. The employer's policy required their employees to have received their first COVID-19 vaccination prior to October 22, 2021 in order to continue employment. The employer's COVID-19 vaccination policy provided employees a process for requesting a religious or medical exemption from the vaccination requirement. The employer emailed this policy to their employees and claimant was aware of the policy.

(3) On September 7, 2021, claimant submitted a request to the employer for a religious exemption from the policy, along with supporting paperwork that articulated the basis for his religious beliefs.

(4) On October 5, 2021, claimant received an email from the employer that denied his request for a religious exemption. In denying claimant's request, the employer explained that to allow his request would require the employer to track "who is and isn't vaccinated," and who does and does not need masks, and therefore would be "inconvenient and costly." Transcript at 17-18. The employer also explained that granting claimant's exemption would be risky for other employees and the employer's guests, and that the employer would therefore not "make any kind of exceptions for anyone that's not

vaccinated.” Transcript at 18. The employer told claimant he would be terminated on November 2, 2021 if he did not receive the COVID-19 vaccine by November 2, 2021.

(5) On October 21, 2021, the employer emailed claimant reconfirming that his religious exemption request had been denied, and that he would be discharged if he did not receive the COVID-19 vaccine by November 2, 2021.

(6) On November 3, 2021, the employer discharged claimant for failing to obtain the COVID-19 vaccine or a religious or medical exemption from the vaccination requirement by November 2, 2021.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not 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).

The employer discharged claimant for knowingly violating their mandatory COVID-19 vaccination policy by failing to obtain the COVID-19 vaccine, or a religious or medical exemption on or before November 2, 2021. As an initial matter, the record shows that the employer’s COVID-19 vaccine policy was reasonable *on its face*. Specifically, the employer’s policy was mandated by their higher organization, the NBA, and it can be inferred from the record that in implementing the policy the employer was otherwise motivated by workplace safety concerns due to the highly transmissible nature of the COVID-19 virus not only for their employees, but also for their guests. Furthermore, in the context of this case, the record shows that the employer’s COVID-19 policy was *facially reasonable* because it incorporated a process to allow their employees to seek a religious exemption from the vaccine requirement based on a sincerely held religious belief.

However, even though the employer’s *policy* was reasonable on its face, the record shows that the employer’s actual *expectations* with respect to their policy were objectively unreasonable. Specifically, the preponderance of the evidence shows that the employer did not treat each religious exemption request they received from an employee on the request’s individual merits, but rather denied all such requests because they were “inconvenient and costly.” Thus, instead of considering the sincerity of the employee’s religious belief and whether the employee’s beliefs (if sincerely held) might be subject to reasonable accommodation (or whether any potential accommodation might create an undue hardship for the employer), the preponderance of the evidence shows that the employer instead expected *all* of their employees to become vaccinated for COVID-19 regardless of the potential validity of any religious exemption request. Thus, as applied, the employer appears to have implemented a blanket denial approach to all religious exemption requests, thereby refusing “any kind of exceptions for anyone.”

Transcript at 18. Under these circumstances, the record fails to show that the actual expectations that the employer applied with respect to their COVID-19 vaccine policy were objectively reasonable.

The record shows that claimant was aware of the COVID-19 vaccination policy, and submitted a timely request for a religious exemption from the vaccine requirement per the terms of the policy.¹ Furthermore, the record shows that claimant's religious exemption request articulated the basis for his sincerely held religious belief and was supported by additional documentation. However, despite claimant making this initial showing in his religious exemption request, the preponderance of the evidence shows that the employer never actually considered claimant's request or the individual circumstances supporting his request. Instead, the preponderance of the evidence shows that the employer utilized their blanket denial approach with respect to claimant's exemption request due to the cost and inconvenience the request entailed, and based on their actual expectation that claimant would be vaccinated against COVID-19, regardless of the potential merits of any sincerely held religious belief. Under these circumstances, where the employer failed to consider the specific details behind claimant's religious exemption request, but instead applied their blanket expectation that all employees would be vaccinated against COVID-19 regardless of any exemption request, the employer's actual expectations with respect to their COVID-19 policy as applied to claimant were unreasonable. Because the employer's actual expectations were unreasonable, any violation of these expectations by claimant was not misconduct, and claimant is not disqualified from receiving benefits based upon the work separation.

DECISION: Order No. 22-UI-183401 is affirmed.

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

DATE of Service: February 23, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.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.

¹ The employer's witness testified that she was unaware whether claimant had sought a religious exemption to the employer's COVID-19 vaccination policy, but that she had only started her position with the employer after the date claimant indicated that he had made his exemption request. Transcript at 9, 23. Thus, according to the employer's witness, it was possible that claimant's religious exemption request was handled by her supervisor and she "was not a part of that." Transcript at 23. Under these circumstances, and in light of claimant's first-hand testimony that he had made a timely religious exemption request, the record supports the conclusion that claimant made a timely religious exemption request. Transcript at 16.



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 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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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.