

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0098

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 19, 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 31, 2021 (decision # 141244). Claimant filed a timely request for hearing. On January 3, 2022, ALJ Wardlow conducted a hearing, and on January 5, 2022 issued Order No. 22-UI-183333, affirming decision # 141244. On January 11, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Oregon Department of Consumer & Business Services employed claimant as a self-insurance auditor from March 3, 2016 until November 3, 2021.

(2) Pursuant to an executive order, the employer expected all their employees to either submit proof of being fully vaccinated against COVID-19 or submit a request for a medical or religious exception by October 18, 2021. Claimant was aware of these expectations.

(3) Beginning on August 23, 2021, and on several occasions thereafter, the employer informed their employees of the requirement to provide proof of vaccination against COVID-19 or an exception request by October 18, 2021. In late September 2021, claimant submitted to the employer a request for a religious exception.

(4) Thereafter, claimant conducted “research[]” on one of the available vaccines, Comirnaty, which is made by Pfizer, and developed the belief that Comirnaty was “still in the experimental phases” and that the U.S. Food and Drug Administration (FDA) had not fully approved it. Transcript at 13, 15. Claimant believed that she had “the right to say no” to a “product that is not fully approved” and that it was “unreasonable to force somebody to use religion . . . to say no to the vaccine that is not fully approved.” Transcript at 16, 20. After arriving at these views, prior to October 18, 2021, claimant withdrew her religious exception request.

(5) On October 18, 2021, claimant remained unvaccinated and her religious exception request remained withdrawn. As a result, the employer placed claimant on administrative leave on that date. On November 3, 2021, the employer discharged claimant for violating their expectation that she provide proof of vaccination against COVID-19, or submit a request for 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).

As an initial matter, claimant asserted that the employer's expectation was unreasonable based on a number of theories, none of which are meritorious. First, at hearing, claimant testified that she believed that she had a right to refuse to get vaccinated and not be required to request an exception because her "research[]" indicated that the Pfizer vaccine, Comirnaty, had not been fully approved by the FDA. Transcript at 13, 15, 16, 20. Claimant was incorrect about the FDA approval status of Comirnaty, and did not show that the employer's expectation was unreasonable based on that status. On August 23, 2021, many weeks before the deadline for claimant to either provide proof of vaccination or submit an exception request, the FDA fully approved Comirnaty, upgrading it from its previous emergency use authorization status.¹ Thus, claimant's assertions that Comirnaty was not fully approved are incorrect, and she did not establish that the employer's expectation was unreasonable because of the FDA approval status of that vaccine.

Similarly, in documentary submissions admitted as Exhibit 1, claimant argued that the employer's expectation was unreasonable because the executive order on which it was based was unconstitutional. Exhibit 1 at 3-5. Claimant did not establish that the employer's expectation was unreasonable based on the constitutionality of the executive order because claimant did not show that the executive order was unconstitutional. It is settled constitutional law that a state may require an individual to submit to vaccination against contagious diseases based on the societal interest in preventing the spread of disease. *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). Claimant also asserted, without explanation, that being required to provide proof of vaccination or submit and maintain an exception request violated the Nuremberg Code. Exhibit 1 at 5. Claimant did not establish that the employer's expectation was unreasonable because of a conflict with the Nuremberg Code, which is not a body of law but a set of ethical guidelines relating to experimentation on human subjects. See United States Holocaust Memorial Museum, "Nuremberg Code," available at <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/doctors-trial/nuremberg-code>. The employer's expectation and the mandate on which it was based were public health interventions, not an effort to experiment on human subjects.

Having concluded that the employer's expectation was reasonable, the analysis turns to whether claimant violated the employer's policy willfully or with wanton negligence under OAR 471-030-0038(3)(a). The record shows that claimant breached the employer's expectation that she provide proof of vaccination against COVID-19 or submit a request for a medical or religious exception by October 18, 2021. Claimant was aware that she was required to provide proof of vaccination or submit an exception request by October 18, 2021 but failed to do either. Claimant initially submitted a religious exception request in late September 2021 but then withdrew it. Because claimant withdrew her request, the withdrawn request was not sufficient to meet the employer's expectation to submit an exception request by the deadline. After withdrawing her religious exception request, claimant decided to remain unvaccinated against COVID-19 and willfully did not provide proof of vaccination by October 18, 2021.

¹ See FDA News Release, FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), available at <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> ("Today, the U.S. Food and Drug Administration approved the first COVID-19 vaccine. The vaccine has been known as the Pfizer-BioNTech COVID-19 Vaccine, and will now be marketed as Comirnaty . . . for the prevention of COVID-19 disease in individuals 16 years of age and older. . . . Since Dec. 11, 2020, the Pfizer-BioNTech COVID-19 Vaccine has been available under [emergency use authorization] in individuals 16 years of age and older[.]"). EAB has taken notice of these facts, which are generally cognizable facts. OAR 471-041-0090(1) (May 13, 2019). A copy of the information is available at the URL hyperlink listed above. 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.

Accordingly, claimant willfully violated the employer's policy by not submitting proof of vaccination against COVID-19 or submitting an exception request by the October 18, 2021 deadline.

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 either receiving the COVID-19 vaccine or maintaining an exception request made a continued employment relationship impossible. The record shows that the employer reasonably imposed the vaccination requirement in compliance with an executive order and offered a process by which a medical or religious exception could be requested. Claimant initially made a religious exception request, but then withdrew it and remained opposed to receiving the COVID-19 vaccine. By the terms of the executive order, the employer was not allowed to permit any employee to work after October 18, 2021 if the employee had not been fully vaccinated against COVID-19 and provided proof thereof.² Based on the foregoing, the preponderance of evidence supports that claimant's conduct made a continued employment relationship impossible and therefore exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct also was not a good faith error. The record shows claimant was aware that she was required to either provide proof of vaccination or submit an exception request by October 18, 2021 but chose not to do either. Claimant 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 provide proof of vaccination against COVID-19 or submit an exception request by the deadline.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective October 31, 2021.

DECISION: Order No. 22-UI-183333 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.

² *See* Executive Order No. 21-29(2)(b) (August 13, 2021), *available* at https://www.oregon.gov/gov/Documents/executive_orders/eo_21-29.pdf ("This order prohibits the following: . . .The Executive Branch from permitting any Employee . . . to engage in work for the Executive Branch after October 18, 2021 . . . if the Employee . . . has not been fully vaccinated against COVID-19 and provided proof or documentation thereof[.]").

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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