

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0106

Reversed
Disqualification

PROCEDURAL HISTORY: On November 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant was not denied unemployment insurance benefits based on the work separation (decision # 70851). The employer filed a timely request for hearing. On January 10, 2022, ALJ Roberts conducted a hearing and issued Order No. 22-UI-183692, affirming decision # 70851. On January 12, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant, most recently as a nurse case manager, from December 17, 2012 until October 15, 2021.

(2) Claimant was raised as a Catholic, and continued to identify with the Catholic faith as an adult.

(3) On September 1, 2021, the employer informed their employees that in order for the employer to comply with an executive order passed by the governor and rules issued by the Oregon Health Authority (OHA),¹ employees would be required to either be fully vaccinated against COVID-19 by October 18, 2021 or obtain an exception from vaccination based on medical or religious grounds.

(4) On September 14, 2021, claimant submitted a religious exception request to the employer, claiming that her belief was that she was “always able to make [her] own choices based on” her Catholic upbringing about whether to get vaccinated. Audio Record at 14:11. The employer subsequently denied claimant’s exception request, reasoning that claimant’s refusal to be vaccinated was the result of a “strongly held personal conviction” rather than a “sincerely held religious belief.” Audio Record at 13:25.

¹ See OAR 333-019-1010 (effective September 1, 2021 through January 31, 2022).

(5) After the employer denied claimant's exception request, claimant remained unvaccinated. On October 15, 2021, the employer discharged claimant because she failed to either become vaccinated against COVID-19 or obtain an exception from vaccination.

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 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 become fully vaccinated against COVID-19 or obtain a religious or medical exception from vaccination. The order under review concluded that this did not constitute misconduct because claimant "tried to comply with the employer's policy" by

submitting a religious exception, which the employer denied; and that claimant neither willfully failed to comply with the policy nor acted with indifference to the consequences of her actions. Order No. 22-UI-183692 at 3. The record does not support these conclusions.

OAR 333-019-1010² governed the duties of healthcare employers in regards to COVID-19 vaccination requirements. In pertinent part, the rule forbade healthcare providers or staff from working in healthcare settings unless they were fully vaccinated or had provided documentation of a medical or religious exception by October 18, 2021; and imposed upon “employers of healthcare providers or healthcare staff” a fine of \$500 per day for violation of the rule. OAR 333-019-1010(3)(a), (9).

Compliance with the employer’s policy, in line with the requirements of OAR 333-019-1010, could be met either by being fully vaccinated against COVID-19 *or* having obtained a religious or medical exception from vaccination. While claimant may have made an attempt to comply with the policy by pursuing an exception, when the employer refused the exception claimant was left with the option of becoming vaccinated. The record contains no indication that claimant made an attempt to become vaccinated. Further, claimant’s explanation does not suggest that she was unable to become vaccinated for any reason. At hearing, claimant explained that her choice to remain unvaccinated was based on the belief that she had the “right to make [her] own choice” and the “ability to do [her] own research” and her “conclusion [was] that this vaccine is not right for [her].” Audio Record at 16:35; 17:26.

The record shows that the employer’s vaccination policy was reasonable, given the continuing threat to public health posed by COVID-19, and the fact that the employer was required to implement the mandates in OAR 333-019-1010 or else face daily fines for noncompliance. Additionally, the policy was reasonable because it allowed employees to seek exceptions from vaccination for either medical or religious reasons. Nor does the record show that the employer’s denial of claimant’s religious exception request was unreasonable. Because claimant had the option of complying with the employer’s policy by becoming vaccinated, but chose of her own accord not to do so, claimant’s refusal constituted a willful violation of the standards of behavior that the employer had the right to expect of their employees.

Claimant’s refusal to become vaccinated cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d). First, claimant’s refusal to become vaccinated was not an isolated instance of poor judgment because it was an ongoing refusal to comply with the employer’s policy. Additionally, the employer was required by law to comply with OAR 333-019-1010, meaning that they could not continue to employ claimant without her having provided proof of vaccination or obtained an exception by the October 18, 2021 deadline without incurring fines of \$500 per day. Claimant’s refusal to become vaccinated therefore made a continued employment relationship impossible, and exceeded mere poor judgment.

For the above reasons, the employer discharged claimant for misconduct, and claimant therefore is disqualified from receiving unemployment insurance benefits effective October 10, 2021.

DECISION: Order No. 22-UI-183692 is set aside, as outlined above.

² This administrative rule, first temporarily adopted on August 5, 2021, was amended several times after its initial adoption. For purposes of this decision, all citations to the rule refer to the version of the rule which was adopted on September 1, 2021 and effective through January 31, 2022.

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

DATE of Service: February 24, 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 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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