

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0111**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective October 10, 2021 (decision # 94231). Claimant filed a timely request for hearing. On January 6, 2022, ALJ Lucas conducted a hearing, and on January 12, 2022 issued Order No. 22-UI-183831, reversing decision # 94231 by concluding that claimant was discharged but not for misconduct and was not disqualified from receiving unemployment insurance benefits based on the work separation. On January 14, 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 as a centralized scheduler from November 14, 2016 until October 15, 2021.

(2) Pursuant to a state mandate, the employer expected claimant to provide either proof of vaccination against COVID-19 or documentation of a medical or religious exception by October 18, 2021. The employer's policy excluded employees who were fully remote workers, resided outside of the Oregon counties of Deschutes, Jefferson and Crook, and did not provide direct or indirect patient care or have the potential for direct or indirect exposure to patients. Claimant was aware of and understood the employer's expectation. Failure of the employer to comply with the mandate could potentially expose them to daily fines.<sup>1</sup>

(3) Claimant lived in Crook County, Oregon, and was therefore subject to the employer's policy. Claimant was not vaccinated against COVID-19 because she had a religious objection to receiving it. Claimant did not have a medical condition that would interfere with receiving the vaccine.

<sup>1</sup> See OAR 333-019-1010(9) ("Employers of healthcare providers or healthcare staff, contractors and responsible parties who violate any provision of this rule are subject to civil penalties of \$500 per day per violation.") (September 1, 2021 through January 31, 2022).

(4) On a number of occasions in August, September, and October 2021, claimant asked her supervisor what would happen if she received a religious exception. The supervisor informed claimant that if she requested and received an exception, the employer would do their best to find a remote position for her outside of Deschutes, Crook, or Jefferson County and transfer her into it prior to October 18, 2021. If the employer did not find such a position by October 18, 2021, they would place claimant on unpaid leave for up to 42 days while they continued to try to identify and transfer claimant into a remote position outside of Deschutes, Crook, or Jefferson Counties. If, after 42 days of leave, claimant remained unvaccinated and had not been transferred into a remote position outside of Deschutes, Crook, or Jefferson County, the employer would terminate her employment.

(5) During the same timeframe, claimant spoke to the employer's president for legal compliance about what would happen if she sought and received an exception. That individual told claimant that if she requested an exception and the employer granted it, claimant would not be able to keep her current position or work in the employer's hospital campuses in Deschutes, Crook, or Jefferson Counties. However, the president for legal compliance did not say that there would be no remote positions outside of those counties for claimant to transfer into if she received an exception.

(6) Following this conversation, claimant looked on the employer's website and saw no remote jobs listed and assumed none would be available if she sought and received an exception. Claimant decided that requesting a religious exception "wouldn't have saved [her] job" and concluded she would not request one. Transcript at 11.

(7) In September or early October 2021, claimant informed her supervisor that she would not be submitting proof of receiving the vaccine or documentation of an exception by October 18, 2021. The supervisor advised claimant that October 15, 2021 would be her last day of work because the following two days were weekend days claimant had off, and she could not work Monday October 18, 2021 because allowing her do so would place the employer in noncompliance with the state mandate.

(8) On October 15, 2021, claimant remained unvaccinated and had not submitted proof of receiving the COVID-19 vaccine or documentation of an exception. On that date, at the conclusion of claimant's shift, the employer discharged claimant for violating their COVID-19 vaccination policy.

**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 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 Order under review concluded that claimant violated the employer’s policy but that claimant’s conduct was not misconduct because the employer’s policy was unreasonable. Order No. 22-UI-183831 at 5-6. The order’s conclusion was based on the premise that “if claimant had received a religious exception she would have been placed on a 42-day unpaid administrative leave and then discharged[.]” Order No. 22-UI-183831 at 5. The order reasoned that this meant “claimant’s only options were to either undergo a medical procedure that would have violated her religious beliefs, or be in violation of the employer’s policy.” Order No. 22-UI-183831 at 5-6. The record does not support these conclusions.

At hearing, claimant testified that her supervisor informed her that if she received a religious exception, the employer “would do their best to find [claimant] a remote position, outside of Deschutes, Crook or Jefferson County. If they did not find [claimant] a position by [October] 18th, [she would] be placed on an unpaid leave, for up to 42 days, or if they found [her] a position sooner than that, then that would end [the leave].” Transcript at 8. Claimant further testified that the employer’s president for legal compliance did not tell her that there would be no remote positions outside of Deschutes, Crook, or Jefferson Counties available for claimant if she received an exception. Transcript at 13. Claimant’s belief that there would be no remote positions available to her if she received an exception was speculative, and based merely upon her review of the employer’s website after speaking with the president for legal compliance. Transcript at 13.

Therefore, the record shows that in lieu of receiving the vaccine, claimant had the option of requesting a religious exception. Had she done so, and if her exception request was granted, the employer would have accommodated her by placing her on a 42-day unpaid leave beginning October 18, 2021. Further,

the employer would have made efforts from the point the exception was granted and during the 42-day leave period to transfer claimant into a remote position outside of Deschutes, Crook, or Jefferson Counties. While claimant would have faced discharge after 42 days of leave if she had not been transferred into a remote position, this possibility is insufficient to conclude that such a remote position would not have been available based merely upon claimant's review of the employer's website after her conversation with the president for legal compliance. Indeed, as claimant worked as a scheduler, it stands to reason that claimant's job could be performed without patient contact, which presumably improved the chances that claimant could have been transferred into a remote position if she had requested and received an exception. Accordingly, the record does not show that the employer's COVID-19 vaccination policy was unreasonable.

Having concluded that the employer's policy was not unreasonable, 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 either proof of vaccination against COVID-19 or documentation of a medical or religious exception by October 18, 2021. Claimant was aware of the employer's expectation and knew that failure to provide proof of vaccination or exception documentation prior to the October 18, 2021 deadline would violate this expectation. Claimant was not vaccinated against COVID-19 because she had a religious objection to receiving it. The employer advised claimant that a religious exception could be requested, and if granted, the employer would make efforts to transfer claimant into a remote position outside of Deschutes, Crook, or Jefferson Counties. However, claimant opted not to pursue a religious exception because she saw no remote jobs listed on the employer's website and decided that requesting a religious exception "wouldn't have saved [her] job." Transcript at 11. Thus, the record shows that claimant willfully remained unvaccinated and willfully failed to request an exception by October 18, 2021. As such, claimant willfully violated the employer's policy by failing to either provide proof of vaccination against COVID-19 or documentation of a medical or religious exception by the required date.

Claimant's conduct is not excusable as an isolated instance of poor judgment because it exceeded mere poor judgment. Claimant's conduct exceeded mere poor judgment because claimant's opposition to receiving the COVID-19 vaccine and unwillingness to request an exception made a continued employment relationship impossible. The record shows that the employer—a healthcare provider—reasonably imposed their expectation in compliance with the state mandate, but claimant opposed receiving the COVID-19 vaccine for religious reasons and failed to provide either proof of vaccination or medical or religious exception documentation. Continuing to employ claimant absent proof of vaccination or exception documentation was impossible because doing so would have placed the employer in noncompliance with the mandate and potentially exposed them to daily fines. As such, the preponderance of evidence supports the conclusion that claimant's conduct made a continued employment relationship impossible and therefore exceeded mere poor judgment. For that reason claimant's conduct cannot be excused as 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 10, 2021.

**DECISION:** Order No. 22-UI-183831 is set aside, as outlined above.

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

**DATE of Service: February 25, 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](https://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 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  
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