

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0134

Reversed
Disqualification

PROCEDURAL HISTORY: On December 13, 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 September 26, 2021 (decision # 82845). Claimant filed a timely request for hearing. On January 11, 2022, ALJ Wardlow conducted a hearing, and on January 13, 2022 issued Order No. 22-UI-184056 reversing decision # 82845 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 21, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Allcare Management Services, LLC employed claimant as a member services manager from August 1, 2017 to September 30, 2021.

(2) The employer's organization was comprised of "a mixture of direct care and non-direct care" workers. Transcript at 12. As a member services manager, claimant was "a public-facing healthcare worker" whose job normally placed him "in [the] front lines . . . working directly with patients." Transcript at 17. However, since the onset of the COVID-19 pandemic, claimant had been working almost exclusively from home. Despite his pandemic-related shift to remote work, the employer did not reclassify claimant's status to "a completely work-from-home" employee and expected that, at some point, claimant would return to his normal role of having contact with the public and would have to attend future in-person meetings. Transcript at 18.

(3) In or around August 2021, the employer informed their employees that in order for the employer to comply with a state mandate, employees would be required, by September 30, 2021, to either be fully vaccinated against COVID-19, “in the process of being vaccinated” against COVID-19, or to have obtained a medical or religious exemption from vaccination. Transcript at 12. The employer deemed employees not in compliance with this policy after September 30, 2021 to be a “voluntary resignation” and the employer intended to terminate the employment of these employees as of that date. Transcript at 17. Despite the employer’s goal to have full vaccination among their workforce, they did make “a little bit” of an exception regarding compliance with their vaccine policy for some remote workers. Transcript at 19. However, the employer expected all employees anticipated to “possibly have any contact with the public” to be fully vaccinated. Transcript at 19-20.

(4) Claimant considered getting vaccinated, but chose not to because he believed the vaccine might negatively affect his ability to start a family. Transcript at 5. Claimant did not raise this specific concern with the employer and he did not pursue a medical exemption because of his overall good health. Claimant did not pursue a religious exemption because he felt uncomfortable using a religious exemption “as an excuse” for not obtaining the vaccine. Transcript at 8. Claimant did not become vaccinated against COVID-19.

(5) On September 13, 2021, claimant provided the employer notice of his intent to quit effective September 30, 2021. Claimant decided to give notice of his intent to quit due to a separate company policy that prohibited the employer from making payment to a terminated employee for any unused paid time off (PTO) if the employee either was terminated for a violation of the employer’s rules, or had failed to provide proper notice before resigning. But for the employer’s PTO forfeiture policy, claimant would not have provided notice, and but for the employer’s vaccine mandate, claimant was willing to continue working for the employer beyond September 30, 2021.

(6) On September 30, 2021, claimant completed his last day of work for the employer.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

Nature of the Work Separation. The first issue in this case is whether claimant quit or was discharged. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The record shows that but for the employer’s policy that required employees to be vaccinated, or in the process of being vaccinated, by September 30, 2021, claimant was willing to continue working for the employer beyond this date. Further, the record shows that the employer was not willing to allow claimant to continue working beyond the September 30, 2021 date unless he was in compliance with their vaccine policy. While the record also shows that claimant provided notice on September 13, 2021 of his intent to quit effective September 30, 2021, claimant *only* provided this notice because he had already determined he would not comply with the employer’s September 30, 2021 vaccine mandate deadline, and because not providing notice would have caused him to forfeit reimbursement of his PTO due to the employer’s separate PTO policy. Under these circumstances, claimant’s work separation was therefore a discharge because claimant would not have given his September 13 notice but for the

employer's vaccine mandate, and claimant was willing to continue working for the employer after the September 30, 2021 vaccine mandate deadline, but the employer would not allow him to do so.

Discharge. 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).

The order under review concluded that the employer discharged claimant, not for misconduct, because although claimant willfully violated the employer's vaccine policy, the employer had failed to show that they had a right to expect claimant to comply with the policy given the particular circumstances of claimant's employment with the employer. Order No. 22-UI-184056 at 3-4. In reaching this conclusion, the order under review reasoned that because claimant had worked remotely for the previous two years, he worked during this time "in his private home" and not in a "healthcare setting" as the latter term is

defined in OAR 333-019-1010(2)(e) (September 1, 2021 through January 31, 2022). Order No. 22-UI-184056 at 3-4. Thus, because the statewide prohibition against employing healthcare staff who remained unvaccinated for COVID-19 after October 18, 2021 only applied to those working in a healthcare setting, the order reasoned that the employer did not have the right to mandate that claimant – a remote worker - get vaccinated for COVID-19 prior to September 30, 2021. Order No. 22-UI-184056 at 3-4. The order under review also reasoned that the employer did not have a right to mandate that claimant become vaccinated by September 30, 2021 in light of evidence showing that the employer allowed some, but not all, of their remote workers to bypass the vaccination requirement. Order No. 22-UI-184056 at 4. Finally, the order under review reasoned that although the employer testified that claimant would have to attend future in-person meetings, this did not establish the employer’s right to mandate that claimant be vaccinated against COVID-19, because “two years had already passed with claimant performing the duties of his job without in person meetings, and because the duration requirement was unknown.” Order No. 22-UI-184056 at 4. The record does not support the order under review’s conclusions.

As an initial matter, although claimant had worked remotely for a lengthy period of time that began with the onset of the COVID-19 pandemic, the record shows that claimant’s remote work status remained temporary in nature as reflected by the fact that the employer never permanently reclassified claimant as a “completely work-from-home” employee during this period. Likewise, the employer’s witness testified that although it was unclear “how long this is gonna go on . . . [claimant] would eventually have to likely have contact with the public again [and] public partners” and attend future in-person meetings as part of any continued employment. Transcript at 18. Thus, contrary to the order under review’s conclusion, the preponderance of the evidence shows that the employer did not consider claimant to be a remote worker operating out of his private home, but instead expected claimant to resume his work in their healthcare setting, including direct patient and public contact and attendance at in-person meetings.

For these same reasons, the record also does not support the order under review’s conclusion that the employer did not have a right to expect claimant to get vaccinated for COVID-19 when it did not impose the same mandate on some of their other remote workers. Here, the record shows that the employer’s organization employed direct-care and non-direct care employees and that claimant’s job classification normally placed him “in [the] front lines . . . working directly with patients.” The employer’s witness testified that although the employer’s goal was to have all of their employees fully vaccinated against COVID-19, they had made “a little bit” of a distinction for some of their “people working at home.” Transcript at 19. However, the employer’s witness also testified that notwithstanding this distinction, the employer’s vaccine policy required that “anybody who would possibly have any contact with the public had to be fully vaccinated.” Transcript at 19. As has been noted, despite claimant’s recent remote work status, the employer never reclassified claimant to a “completely work-from-home” employee and they expected that, at some point, he would return to direct contact with the public and future in-person meetings. Thus, the preponderance of the evidence shows that claimant was not a long-term remote worker and was never classified by the employer as such, thereby making irrelevant any comparison of the employer’s approach to applying the vaccine policy to traditional remote workers and other non-direct care employees.¹

¹ The record does not make clear why the employer allowed certain remote workers to avoid the requirement that they obtain the COVID-19 vaccine. This suggests the possibility that these workers may have been approved for a religious or medical exemption pursuant to the employer’s vaccine policy; an option claimant elected not to pursue.

The employer discharged claimant for violating their vaccine policy, which required claimant to either be fully vaccinated against COVID-19, “in the process of being vaccinated” against COVID-19, or to have obtained a religious or medical exemption to vaccination prior to September 30, 2021. Claimant understood the employer’s policy that required him to have begun the process of being vaccinated by September 30, 2021, or have an approved exemption, and he willfully violated the policy by achieving neither prior to the deadline.

Claimant’s conduct is not excusable as an isolated instance of poor judgment. Rather, claimant’s conduct exceeded mere poor judgment because claimant’s failure to obtain the COVID-19 vaccine prior to the September 30, 2021 deadline made a continued employment relationship impossible. The record shows that the employer reasonably imposed the vaccination requirement in compliance with the state mandate and claimant’s refusal to obtain the vaccination, despite working in a healthcare context, potentially jeopardized the health of patients and coworkers. 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 and for that reason cannot be excused as an isolated instance of poor judgment.

Claimant’s conduct also was not a good faith error. The record fails to show that claimant believed in good faith that he did not violate the employer’s policy by not getting vaccinated for COVID-19, or obtaining an approved exemption prior to September 30, 2021. Likewise, the record fails to show that claimant sincerely believed that the employer would excuse his conduct in failing to get vaccinated, or obtain an exemption prior to the deadline. Instead, the record shows that claimant was aware of the employer’s vaccine policy, “under[stood] their point in . . . putting the mandate forward,” and willfully violated it. Transcript at 11. Claimant therefore was not operating under any mistake of fact as to the employer’s expectations. As such, claimant’s conduct did not constitute a good faith error and claimant was therefore discharged for misconduct and disqualified from receiving benefits effective September 26, 2021.

DECISION: Order No. 22-UI-184056 is set aside, as outlined above.

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

DATE of Service: March 4, 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.



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.

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.