

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0150

Modified
Disqualification

PROCEDURAL HISTORY: On December 1, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective November 7, 2021 (decision # 1551129). Claimant filed a timely request for hearing. On January 12, 2022, ALJ Lucas conducted a hearing, and on January 14, 2022 issued Order No. 22-UI-184085, modifying decision # 1551129 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving benefits effective October 17, 2021.¹ On January 14, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant and the employer each submitted written argument. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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 claimant's argument to the extent it was based on the record. EAB also considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) South Lane School District employed claimant as a speech language pathologist from August 30, 2005 until November 8, 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. As part of the mandate, the employer was required to take reasonable steps to ensure that unvaccinated staff who

¹ Order No. 22-UI-1854085 stated that it affirmed decision # 1551129. Order No. 22-UI-1854085 at 7. However, because the order changed the result of the administrative decision by changing the effective date of disqualification, Order No. 22-UI-1854085 modified decision # 1551129.

received an exception were protected from contracting and spreading COVID-19.² Failure of the employer to comply with the mandate could potentially expose them to daily fines.³

(3) Claimant was unvaccinated and had a religious objection to receiving the COVID-19 vaccine. In early September 2021, claimant requested a religious exception, which the employer granted. However, because claimant was unvaccinated, the employer expected claimant to agree to certain COVID-19 safety expectations, which the employer implemented to meet their requirement to take reasonable steps to ensure that unvaccinated staff were protected from contracting and spreading COVID-19.

(4) On September 24, 2021, claimant met with her superintendent regarding the COVID-19 safety expectations. The superintendent presented claimant with a form to sign that listed the safety expectations. One of the expectations called for claimant to enroll in a weekly COVID-19 testing program. The testing would occur via a mail-in test that would require claimant to visit a testing site and would not yield results until several days after the test was administered. Claimant suggested instead to agree to do weekly rapid results testing on site at the school. The superintendent responded that “that ma[de] sense” and told claimant to write the rapid results testing in the margin of the form. Transcript at 16. Claimant did so, and the superintendent initialed below claimant’s note in the margin. Claimant then signed the form and intended to submit it.

(5) On October 1, 2021, the superintendent sent an email to claimant advising that rapid results testing would only be available for symptomatic staff or students. The superintendent advised that claimant would instead have to choose one of two non-rapid testing options, each of which would require claimant to go to a testing site. The superintendent sent a new safety expectations form to claimant and instructed claimant to sign and submit it.

(6) On October 6, 2021, claimant responded that the superintendent “should not have made promises that [she] couldn’t keep[]” and that claimant could “not in good conscience sign the document as written.” Exhibit 5 at 2. The same day, the superintendent emailed claimant again, reiterated that on-site rapid testing was not an option, and again asked claimant to sign and submit the safety expectations form. Claimant declined to do so.

(7) On October 15, 2021, the employer held a pre-termination meeting with claimant. Claimant continued to decline to sign and submit the safety expectations form. On October 18, 2021, the employer placed claimant on administrative leave. On November 8, 2021, the employer discharged claimant for failing to agree to the COVID-19 safety expectations that were sent to her on October 1, 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

² See OAR 333-019-1030(5) (“Schools that grant an exception to the vaccination requirement under section (4) of this rule must take reasonable steps to ensure that unvaccinated teachers, school staff and volunteers are protected from contracting and spreading COVID-19.”) (August 25, 2021 through February 20, 2022).

³ See OAR 333-019-1030(9) (“Schools and school-based programs that violate any provision of this rule are subject to civil penalties of \$500 per day per violation.”) (August 25, 2021 through February 20, 2022).

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). Good faith errors and 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 because she violated the employer’s expectation that she agree to the COVID-19 safety expectations implemented after the employer granted claimant’s request for a vaccination exception. Claimant was aware of the employer’s expectation, but declined to agree to the safety expectations because one of them called for claimant to be tested for COVID-19 via mail-in testing that would require claimant to visit a testing site and would not yield results until several days after the test was administered. The employer’s expectation that she agree to the safety expectations was reasonable because they were being implemented to meet the employer’s requirement under the state mandate to take reasonable steps to ensure that unvaccinated staff who receive a vaccination exception were protected from contracting and spreading COVID-19. In particular, requiring mail-in testing, rather than rapid testing, as was claimant’s preference, was not unreasonable because the record shows that

rapid tests were to be limited to symptomatic staff or students. This supports the inference that the employer regarded rapid tests to be ineffective unless a person was symptomatic, meaning that non-rapid testing may have been a more effective option. In her written argument, claimant contended that the employer failed to offer her a reasonable accommodation to the vaccine requirement and appeared to argue that that rendered unreasonable the employer's expectation that she agree to the safety expectations for unvaccinated staff. Claimant's Written Argument 1-2. This argument is without merit because the record shows that the employer reasonably accommodated claimant's religious belief by exempting her from the requirement to get vaccinated. The fact that the employer conditioned claimant's continued employment as an unvaccinated person on safety expectations that included mail-in COVID-19 testing did not render unreasonable the accommodation the employer granted claimant.

Thus, claimant breached the employer's reasonable expectation that she agree to the COVID-19 safety expectations the employer implemented to meet their requirement under the state mandate to take reasonable steps to ensure that unvaccinated staff who receive a vaccination exception were protected from contracting and spreading COVID-19. This violation was willful because claimant knew and understood that she was required to agree to the safety expectations but intentionally declined to do so. Although the record shows the superintendent initially agreed to modify the safety expectations to include rapid testing as claimant preferred, the superintendent later informed claimant repeatedly that claimant was required to agree to non-rapid testing. Claimant intentionally refused to do so. Therefore, claimant willfully violated the standards of behavior the employer had a right to expect of her.

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 claimant's refusal to agree to the safety expectations amounted to an on-going failure to comply with the employer's expectation. Moreover, claimant's conduct exceeded mere poor judgment because it made a continued employment relationship impossible. Had the employer continued to employ claimant while she refused to comply with the safety expectations, the employer would have been out of compliance with the mandate for failing to take reasonable steps to ensure that unvaccinated staff were protected from contracting and spreading COVID-19. Such noncompliance would have exposed the employer to daily fines. The employer could not have continued to employ claimant if doing so meant that they would be violating the law and incurring daily fines. Therefore, because claimant's conduct made a continued employment relationship impossible, claimant's conduct was not an isolated instance of poor judgment.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective November 7, 2021. The order under review concluded that the employer discharged claimant on October 18, 2021 and the date of claimant's disqualification was therefore October 17, 2021. Order No. 22-UI-184085 at 2, 7. However, the record shows that claimant was discharged on November 8, 2021. Therefore, this decision is modifying to adjust the date of disqualification to November 7, 2021.

DECISION: Order No. 22-UI-184085 is modified, as outlined above.

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

DATE of Service: March 9, 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.surveymoz.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.