

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0152

Reversed
Disqualification

PROCEDURAL HISTORY: On November 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct, and claimant was therefore not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 91727). The employer filed a timely request for hearing. On January 14, 2022, ALJ Scott conducted a hearing, and on January 21, 2022 issued Order No. 22-UI-184519, affirming decision # 91727. On January 24, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lebanon Community School District employed claimant as a secretary from August 26, 2013 to October 18, 2021.

(2) Claimant suffered from Celiac Disease. Claimant experienced negative side effects and would “get sick every time” in the instances where she previously received a flu shot. Transcript at 12.

(3) On August 27, 2021, the employer notified their employees by letter that in order for the employer to comply with a state mandate, employees would be required, by October 15, 2021, either to be fully vaccinated against COVID-19, or to have obtained a medical or religious exception from vaccination. For those employees who were not vaccinated against COVID-19 by October 15, 2021, or who had not received a medical or religious exception by October 15, 2021, the employer planned to terminate their employment effective that day, but continue to pay them through October 18, 2021. Claimant received the August 27, 2021 notification letter and understood the employer’s expectations.

(4) Claimant was not opposed to receiving the COVID-19 vaccine but in light of her Celiac Disease and her prior flu vaccine experiences she preferred to wait on any vaccination decision until she had the opportunity to seek advice from her doctor as to whether the COVID-19 vaccine was right for her.

(5) On September 10, 2021, the employer conducted a survey of their employees to explore “their thinking” in terms of whether they planned to get vaccinated against COVID-19, or seek an exception.

Transcript at 6. For those employees who indicated they were not inclined to obtain the vaccine or seek an exception, the employer arranged a pre-termination meeting for September 22, 2021. At some point after September 10, 2021, claimant indicated to the employer she was not inclined to obtain the vaccine or seek an exception.

(6) The employer received 120 requests for an exception from their respective employees, including some requests for a medical exception. The employer granted some of the requests for medical exception. For those exception requests that were granted, the employer offered employees continued work if the employee conducted daily temperature testing, weekly COVID-19 testing, and wore a mask.

(7) On September 22, 2021, claimant attended the employer's pre-termination meeting. During the meeting, the employer discussed the provisions of the COVID-19 mandate as well as relevant timelines for action.

(8) On October 1, 2021, the employer sent a letter to claimant, via certified mail, which informed claimant that her last day of work would be October 15, 2021 and that the employer would pay her through October 18, 2021. Claimant received the employer's letter.

(9) On October 15, 2021, claimant worked her last day for the employer, but received pay through October 18, 2021. Claimant never attempted to make an appointment with her doctor to address her COVID-19 vaccine concerns, nor submitted a request for a medical or religious exception to the employer.

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).

The order under review determined that claimant was discharged, not for misconduct, because despite the fact that she may have had a valid medical basis for pursuing a medical exception from the COVID-19 vaccine requirement, the employer had "led [her] to believe that only religious-based exceptions" could be pursued and therefore she "was not aware that applying for [a medical] exception was an option." Order No. 22-UI-184519 at 3. Based on this lack of knowledge, and in light of evidence that suggested claimant was not indifferent to the consequences of her actions, the order under review concluded that the employer had failed to show that claimant was discharged for misconduct. Order No. 22-UI-184519 at 3. The record does not support these conclusions.

The employer discharged claimant for violating their vaccine policy, which required claimant either to be fully vaccinated against COVID-19, or to have obtained a religious or medical exception to vaccination prior to October 15, 2021. As the order under review found, the record shows that claimant suffered from health-related circumstances – Celiac Disease and prior adverse reactions to flu vaccines – that may have provided her with a valid basis for seeking a medical exception. The record shows that claimant never attempted to discuss her health concerns with a healthcare provider, nor sought a medical exception from the employer, and claimant testified that she was unaware that requesting a medical exception was an option that was available to her. Transcript at 13, 18. However, in light of the employer’s credible testimony that “every single . . . e-mail, every document that was put on our website, [and every] communication that went out [informed their employees]” about the availability of medical exceptions, and the record evidence showing that the employer communicated with their employees about their COVID-19 vaccine policy through various mediums on multiple occasions, the preponderance of the evidence supports the conclusion that claimant was aware prior to her discharge about the possibility of seeking a medical exception. Transcript at 20. Further supporting this conclusion is the record evidence showing that during this time some of claimant’s coworkers sought, and received, medical exceptions from the employer, making it all-the-more unlikely that claimant would not have been aware of this option, particularly given her medical history. As such, the record shows that claimant understood the employer’s policy that required her to have obtained the COVID-19 vaccine by October 15, 2021, or have an approved exception, and she willfully violated the policy by achieving neither prior to the 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 failure to obtain the COVID-19 vaccine prior to the October 15, 2021 deadline made a continued employment relationship impossible. Specifically, the employer was required by law to comply with OAR 333-019-1030 (August 25, 2021 through February 20, 2020), meaning that they could not continue to employ claimant without her having provided proof of vaccination or documentation of a medical or religious exception October 18, 2021 without the potential of incurring fines of \$500 per day.¹ 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.

For the above reasons, the employer discharged claimant for misconduct, and claimant therefore is disqualified from receiving unemployment insurance benefits effective October 17, 2021.

DECISION: Order No. 22-UI-184519 is set aside, as outlined above.

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

¹ OAR 333-019-1030 governed the duties of schools and school-based programs with regard to COVID-19 vaccination requirements. In pertinent part, the rule forbade teachers, school staff, and volunteers from working in a school or a school-based program unless they were fully vaccinated or had provided documentation of a medical or religious exception by October 18, 2021; and threatened schools and school-based programs with a fine of \$500 per day for violation of the rule. OAR 333-019-1030(3)(a), (7)(a), (15).

DATE of Service: March 10, 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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