

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0198

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective October 24, 2021 (decision # 91436). Claimant filed a timely request for hearing. On January 5, 2022, ALJ Lucas conducted a hearing, and on January 12, 2022 issued Order No. 22-UI-183877, affirming decision # 91436. On January 31, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Rheumatology Clinic Joint Venture employed claimant as an infusion nurse from January 18, 2021 until October 25, 2021. Claimant's work necessarily brought her into contact with patients who were immunocompromised, and who were therefore at a higher risk of complications or death if they were to contract COVID-19.

(2) In September 2021, the employer informed their employees that in order for the employer to protect patients and to comply with an executive order passed by the governor and rules¹ issued by the Oregon Health Authority, 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. The employer also notified employees of a policy that, in order to comply with the law and to protect the health of their patients and staff, unvaccinated employees would be required to submit to weekly testing for COVID-19. As a result of discussions with employees and in order to accommodate their concerns,

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

the employer amended their COVID-19 testing policy several times between September and October 2021, each time providing a copy of the policy, as amended, to employees.

(3) Claimant applied for and was granted a medical exception from vaccination, and did not become vaccinated. Claimant was concerned about the employer's policy requiring weekly testing. Claimant raised a number of concerns about employer's requirement for unvaccinated employees to receive weekly COVID testing such as whether she would be paid for her time, whether the employer would sufficiently maintain the confidentiality of her vaccination status and testing results, whether claimant could test herself at home, and whether claimant could be adequately reimbursed if she chose to pursue off-site testing. The employer discussed these concerns with claimant and, to the extent that they were able to do so, modified the testing policy to accommodate for claimant's concerns.

(4) Claimant also raised a concern about deep nasal swab COVID testing because claimant had experienced nosebleeds following a surgery she underwent in 2020. Claimant raised this concern with one of the clinic's doctors ("Dr. D"), who assured claimant that he would conduct the COVID testing himself in a manner to prevent nosebleeds or injury to claimant.

(5) The employer's testing policy indicated that an "employee" would perform the weekly testing of unvaccinated employees. Transcript at 49. The employer notified claimant verbally that she could choose who would perform the testing on her, including Dr. D. Nevertheless, claimant understood the language of the policy to mean that a lab technician, rather than Dr. D, would perform the testing, and claimant believed this would result in her experiencing injury or nosebleeds. As such, claimant refused to consent to weekly testing and did not seek further clarification or changes to the policy.

(6) Claimant last worked for the employer on October 12, 2021. The employer discharged claimant on October 25, 2021 because she "repeatedly" refused to submit to weekly testing for COVID-19. Tr. 7-8.

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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience 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 claimant refused to comply with the employer's policy that, as an unvaccinated employee, she submit to weekly testing for COVID-19. OAR 333-019-1010 governed the duties of healthcare employers with regard to COVID-19 vaccination requirements. In pertinent part, the rule required that employers of healthcare providers who granted an exception to the vaccination requirement must take reasonable steps to ensure that unvaccinated healthcare providers and healthcare staff are protected from contracting and spreading COVID-19. OAR 333-019-1010(5). The rule also imposed upon such employers a potential fine of \$500 per day per violation of any provision of the rule. OAR 333-019-1010(9). Because the employer was required to take steps to mitigate the risk posed by unvaccinated employees, and because the employer also faced fines if they failed to do so, and the employer had an interest in ensuring the safety of its patients, the employer's policy to require weekly COVID testing of unvaccinated employees was reasonable. The record also shows that the employer would have permitted claimant to submit to weekly testing in a manner that did not cause or exacerbate injury to claimant's sinuses and, as such, the policy was reasonable as applied to claimant.

Claimant was aware of the employer's policy and consciously refused to comply with it, which was an intentional violation of the standards of behavior that the employer had the right to expect of their employees. However, this refusal was not an isolated instance of poor judgment. First, claimant's refusal to submit to weekly testing was not isolated, 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 unless they took reasonable steps to ensure that unvaccinated employees were protected from contracting and spreading COVID-19—here, by requiring that unvaccinated employees submit to weekly testing—they could not have continued to employ individuals such as claimant without

potentially incurring a daily fine. As such, claimant's refusal made a continuing employment relationship impossible.

Claimant's refusal to submit to weekly testing cannot be excused as a good faith error. A "good faith error" logically involves some sort of mistake made with the honest belief that one is acting rightly. *See Webster's Third New Int'l Dictionary 978 (unabridged ed 2002) (defining "good faith" as "a state of mind indicating honesty and lawfulness of purpose : belief in one's legal title or right : belief that one's conduct is not unconscionable or that known circumstances do not require further investigation : absence of fraud, deceit, collusion, or gross negligence")*. If claimant sincerely, even if mistakenly, believed that the employer would excuse or condone a violation of their policy, and had at least some factual basis for believing so, claimant would likely be deemed to have acted in good faith and eligible to receive benefits. *See Goin v. Employment Dept.*, 203 Or App 758, P3d (January 18, 2006) (Claimant's incorrect assumption caused her to violate the employer's policy, but she acted in good faith). In order to support the conclusion that an individual was discharged for a good faith error, the individual must have made a "serious attempt" to determine whether the belief that led them to act as they did was true. *Hood v. Employment Dep't*, 245 Or.App. 606, 612–614, 263 P.3d 1126 (Or. App. 2011).

Claimant argued at hearing she believed that the employer's policy would not permit her to choose Dr. D to perform the required weekly testing, despite her testimony that the doctor had verbally confirmed he would perform the testing. The employer also addressed other concerns raised by the claimant and made efforts to modify the policy to address those concerns. While claimant might have made an error in believing that the policy required her to submit to testing that could potentially injure her, the record does not show that claimant made a serious attempt to verify her belief that the policy, as written, meant that Dr. D would not perform the testing for her, nor did claimant have a good faith belief that the employer would allow her to remain employed and not submit to weekly COVID testing while remaining unvaccinated. Therefore, claimant's refusal to comply with the testing requirement was not the result of a good faith error.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective October 24, 2021.

DECISION: Order No. 22-UI-183877 is affirmed.

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

DATE of Service: April 1, 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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