

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0265

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 3, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was suspended for misconduct, and was disqualified from receiving unemployment insurance benefits effective December 12, 2021 (decision # 131424). Claimant filed a timely request for hearing. On February 7, 2022, ALJ Wardlow conducted a hearing, and on February 8, 2022 issued Order No. 22-UI-185881, affirming decision # 131424. On February 24, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Beginning on September 1, 2014, TDS Telecom Inc. employed claimant as a senior adviser of business billing and sales support until she was suspended on December 15, 2021.

(2) Prior to November 10, 2021, the employer decided to have all of their employees complete a "vaccination status form" (VSF). The VSF asked employees to indicate whether they were vaccinated against COVID-19 and, if so, the date of vaccination. Additionally, for those employees who were vaccinated, the VSF directed them to provide a copy of their vaccination card to the employer. The employer's intent in collecting this information was to have better visibility regarding which of their employees were vaccinated in the event of a COVID-19 contact, and so that they could be prepared to provide home-testing kits for those employees who were not vaccinated in the event of a nationwide vaccine mandate. The employer intended to have a single employee at their corporate office review the VSF information for accuracy, with no other employees having access to the information. The employer had no intention of taking disciplinary action against those employees who indicated they had not been vaccinated against COVID-19.

(3) On November 22, 2021, the employer sent an email to their employees directing them to complete the VSF no later than December 10, 2021. Claimant received the email and was aware of the employer's expectation with respect to completion of the VSF.

(4) On December 13, 2021, the employer sent a follow-up email to their employees informing them that the VSF needed to be completed by December 14, 2021 or they would be placed on unpaid suspension. Claimant received and understood this email.

(5) On December 15, 2021, the employer placed claimant on unpaid suspension because she refused to complete the VSF.

CONCLUSIONS AND REASONS: The employer suspended claimant for misconduct.

ORS 657.176(2)(a) and (2)(b) require disqualifications from unemployment insurance benefits if the employer discharged or suspended claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) and (b) . . . 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). The employer carries the burden to show 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 employer suspended claimant for refusing to complete the VSF by the December 14, 2021 deadline. The record shows that the employer's decision to require all of their employees to complete the VSF was reasonable in light of the continuing threat to public health posed by COVID-19 and because the information obtained from each VSF would allow the employer to better prepare for any COVID-19 contact among employees and any potential nationwide vaccine mandate. Claimant testified that her refusal to complete the VSF was based on her view that her vaccination status was "nobody's business but mine" and her concerns over being "persecuted for [her] medical choices." Transcript at 13, 14. However, the record shows that the employer's VSF was limited in the information it sought asking only whether the employee was vaccinated against COVID-19 and, if so, to provide their vaccination card. In addition, the record shows that the employer sought this information to be prepared for future COVID-related contingencies, which is a legitimate purpose, and that the employer planned no disciplinary action against employees who indicated they were not vaccinated. Under these circumstances, the employer's requirement that their employees complete the VSF was not unreasonable. Further, to the extent claimant feared persecution, the record shows that the employer limited access to the information provided in the VSF to a single individual in their corporate office and only for the purpose of verifying the information provided. As such, the record shows that claimant's refusal to complete the VSF was willful because she intentionally chose not to complete the document despite the employer's reasonable expectation that she do so.

Claimant's conduct in failing to complete the VSF cannot be excused as an isolated instance of poor judgment. Rather, the record shows that claimant's refusal to complete the VSF spanned several weeks, thereby constituting an ongoing refusal to comply with the employer's expectation that she do so. As such, claimant's conduct was not a single or infrequent occurrence and therefore cannot be excused as an isolated instance of poor judgment.

Claimant's conduct also was not a good faith error. The record shows claimant was aware that she was required to complete the VSF, but chose not to do so. Claimant was not operating under a mistake of fact as to what the employer expected of her. *See Hood v. Employment Dep't.*, 263 P.3d 1126, 1130 (2011) (the "error" in a good faith error analysis refers to a mistake of fact or action deriving from a mistake of fact, a good faith error is not an "exception for conscientious objectors to employer policies"). Nor does the record show that claimant believed in good faith that the employer approved of her failure to complete the VSF by the deadline.

For the above reasons, claimant was suspended for misconduct and is disqualified from receiving unemployment insurance benefits effective December 12, 2021.

DECISION: Order No. 22-UI-185881 is affirmed.

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

DATE of Service: April 28, 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 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 الإستئناف 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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