

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0270**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 28, 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 1, 2021 (decision # 124319). Claimant filed a timely request for hearing. On January 26, 2022, ALJ Amesbury conducted a hearing, and on February 1, 2022 issued Order No. 22-UI-185337, reversing decision # 124319 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On February 18, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Both claimant's and the employer's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the respective parties' 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 parties' respective arguments to the extent they were based on the record.

**FINDINGS OF FACT:** (1) Northwest Rheumatology Associates, PC employed claimant as a medical assistant from November 24, 2003 until October 7, 2021.

(2) At their clinic, the employer administered infusions to patients who were immunocompromised due to autoimmune diseases. Claimant's patient-care duties put her in close contact with patients during their infusion sessions—treatments that also had the potential to compromise the patients' immune systems.

(3) In or around September 2021, the employer informed their employees that in order for the employer to comply with an executive order passed by the governor and rules issued by the Oregon Health Authority,<sup>1</sup> 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. Claimant applied for an exception based on religious grounds, which the employer granted.

(4) The employer notified claimant that in order for her to continue working in their clinic while unvaccinated, she would be required to abide by several additional safety measures. These measures included limiting time spent in close proximity to patients, wearing an N-95 mask at all times, and submitting to weekly molecular polymerase-chain reaction (PCR) testing for COVID-19. Claimant agreed to abide by all of the safety measures except the weekly testing, as the employer proposed that the testing be performed using a nasal swab—the standard type of PCR test used by hospitals to detect COVID-19 in asymptomatic persons. Claimant refused to agree to the use of the nasal-swab tests on religious grounds, as she believed that the swabs were “unclean” because ethylene oxide was used to sterilize them during the manufacturing process. Transcript at 51. Instead, claimant suggested that her weekly testing be conducted using a PCR test that only required collection of a saliva sample.

(5) The employer told claimant that they would investigate the feasibility of using PCR saliva tests. After investigating, the employer was not able to determine the costs of using the saliva tests, and determined that the saliva tests were not as readily available as the standard nasal swab tests. The lack of readily available PCR saliva tests concerned the employer because it meant that there might be weeks where they could not test claimant, making her unavailable to work in the clinic until more PCR saliva tests were obtained. The employer determined that the potential for this outcome created an undue burden on their operations, as it could lead to the need to reschedule patients or other employees if claimant was not available to work.

(6) On October 7, 2021, the employer held a meeting with claimant. At the meeting, the employer notified claimant that they would not accommodate her request to use saliva tests, and that she would be required to submit to the nasal swab tests. Claimant again refused to agree to submit to nasal swab testing. The employer then informed claimant that if she did not agree to become vaccinated by October 18, 2021, she would be discharged immediately. Claimant did not agree to become vaccinated, and as a result the employer discharged her on October 7, 2021. Had claimant agreed to submit to nasal swab testing, the employer would not have discharged her.

**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

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<sup>1</sup> 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.

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 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 did not discharge claimant for misconduct because the employer did not show that it had “a right to expect claimant to violate her sincerely held religious beliefs by receiving the COVID 19 vaccine.” Order No. 22-UI-185337 at 6. The record does not support this conclusion.

As a preliminary matter, the employer discharged claimant because she refused to comply with the employer’s expectations that she either become vaccinated against COVID-19 by October 18, 2021 or, in the alternative, remain unvaccinated but agree to the employer’s safety requirements. In particular, claimant refused to agree to submit to weekly COVID-19 testing using a nasal swab PCR test. As the employer had already granted claimant an exception from vaccination on religious grounds, and as they would not have discharged claimant if she had agreed to the nasal swab tests, claimant’s refusal to submit to nasal swab testing was the proximate cause of the discharge.

OAR 333-019-1010 governed the duties of healthcare employers with regard to COVID-19 vaccination requirements. The rule forbade healthcare providers or staff from working in healthcare settings unless they were fully vaccinated or had provided documentation of a medical or religious exception by

October 18, 2021. OAR 333-019-1010(3)(a). Notably, the rule further required that employers of healthcare providers or healthcare staff who grant 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).

As the employer had granted claimant’s request for a religious exception to vaccination, the employer was required by law—and their duty to protect the safety of vulnerable patients in their care—to take reasonable steps to ensure that claimant did not spread COVID-19. The employer did so by requiring unvaccinated employees to agree to several safety measures, including, in particular, the weekly testing requirement. Further, the employer concluded that claimant’s suggested alternative to the nasal swab tests would create an undue burden on the employer because the saliva tests were not readily available, and relying on their availability could therefore create a situation in which the employer could not test claimant for COVID-19 and she would be unavailable for work, leading to potential impairment of workplace safety, diminished clinical efficiency, and the need for patients to be rescheduled or other employees to carry an additional workload. As such, the employer’s requirement that claimant submit to weekly COVID-19 testing in lieu of vaccination using standard nasal swab tests, despite claimant’s request to be accommodated with saliva tests, was reasonable. The employer therefore had the right to expect that claimant comply with this expectation.

Because the employer had the right to expect that claimant submit to weekly nasal swab testing, claimant’s refusal to do so constituted a willful violation of the standards of behavior that the employer had the right to expect of her. Further, claimant’s violation cannot be considered an isolated instance of poor judgment. As claimant’s refusal was ongoing, and would have therefore presumably continued indefinitely had the employer not discharged her, the violation was not isolated. Additionally, claimant’s refusal to submit to testing that was readily and reliably available to the employer made a continuing employment relationship impossible, as it would both jeopardize the safety of the employer’s patients and potentially cause the employer to violate the law. Therefore, the employer discharged claimant for misconduct.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective October 3, 2021.

**DECISION:** Order No. 22-UI-185337 is set aside, as outlined above.

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

**DATE of Service:** April 25, 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](https://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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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