

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0277

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 10, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective December 12, 2021 (decision # 142101). Claimant filed a timely request for hearing. On February 9, 2022, ALJ Scott conducted a hearing and issued Order No. 22-UI-186014, affirming decision # 142101. On February 28, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider claimant's February 28, 2022 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).

Claimant's March 22, 2022 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.

FINDINGS OF FACT: (1) North Clackamas School Dist. #12 employed claimant as an interpreter and translator from December 1, 2014 until December 15, 2021.

(2) Pursuant to a state mandate, the employer required claimant to provide either proof of vaccination against COVID-19 or, documentation of a medical or religious exception from vaccination, by October 18, 2021.

(3) Claimant requested a religious exception from vaccination, which the employer granted on October 6, 2021. The accommodation the employer offered claimant in connection with the exception was to wear a KN95 mask at all times and to be tested for COVID-19 on a weekly basis.

(4) Between October 18, 2021 and November 3, 2021, after initially complying with the employer's accommodation, claimant determined that wearing a mask and performing COVID-19 testing on a weekly basis conflicted with her religious beliefs. As a result, claimant requested a religious exception from both the masking and testing requirements. The employer approved claimant's religious exception request and met with claimant several times to determine if other reasonable alternatives might be available.

(5) On November 3, 2021, November 15, 2021, and November 19, 2021, the employer and claimant met to discuss potential accommodations. During one or more of these meetings, claimant provided three accommodation proposals to the employer that she believed would be reasonable. These proposals included: 1) working from home, 2) working remotely in a workspace designated by the employer, and 3) being authorized to work without wearing a mask and while engaging in "verbal screening." Exhibit 1 at 2-3. The employer declined claimant's proposed accommodations because they viewed each as causing the employer undue hardship. The employer counter-proposed that claimant be placed on an unpaid leave of absence for the 2021-2022 school year. Claimant declined this accommodation proposal because she equated it to being "deprived of [her] livelihood[.]" Transcript at 12.

(6) On December 15, 2021, the employer terminated claimant's employment because claimant failed to agree to their offered accommodations that would allow her to work safely for the employer.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not 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 concluded that claimant was discharged for misconduct because she willfully refused to comply with the employer's offered reasonable accommodations of wearing a KN95 mask and submitting to weekly COVID-19 testing. Order No. 22-UI-186014 at 3. The record does not support that conclusion.

At hearing, the employer's witness testified that claimant was discharged for failing to comply with the employer's masking and testing requirements. Transcript at 4-5. However, claimant testified that she sought a religious exception to these requirements. Transcript at 11. Additionally, the employer introduced a December 15, 2021 termination letter confirming that claimant had made such a request, and that the employer did not contest that the masking and testing requirements conflicted with claimant's religious beliefs. Exhibit 1 at 2. It can be inferred from the employer's position in the

December 15, 2021 letter that the employer likely approved claimant's religious exception request because they concluded that the requirements conflicted with her religious beliefs.

Further, the record shows that, after claimant requested the religious exception, the employer and claimant met three times to try to determine if another reasonable accommodation might be available to claimant. It therefore stands to reason that had the employer not approved claimant's request for a religious exception from the masking and weekly testing, but instead remained firm that the masking and weekly testing requirements were reasonable accommodations for claimant, then they would not have engaged in these meetings to seek out additional potential accommodations.

Furthermore, the December 15 termination letter did not identify claimant's unwillingness to wear a KN95 mask or submit to weekly COVID-19 testing as the basis for discharge. Rather, the letter stated that claimant was being discharged "[b]ecause [she] had not agreed to a reasonable accommodation that would allow [her] to work safely in-person and [she had] declined unpaid leave." Exhibit 1 at 1. Thus, the preponderance of the evidence shows that the employer's reason for discharging claimant was not her refusal to wear a mask or submit to weekly testing. Instead, she was discharged because she and the employer could not agree on a reasonable accommodation that would allow claimant to continue working for the employer after the employer granted her a religious exception to the masking and weekly testing requirements.

To the extent the employer discharged claimant because the parties could not agree on a reasonable accommodation that would allow claimant to continue working for the employer, claimant was not discharged for misconduct. The record shows that the only accommodation offered by the employer was for claimant to take unpaid leave for the 2021-2022 school year. However, expecting claimant to take a significant period of unpaid leave under these circumstances was not reasonable. Therefore, claimant did not commit misconduct in failing to accept the employer's proposed unpaid leave accommodation because "[a] conscious decision not to comply with an unreasonable employer policy is not misconduct." OAR 471-030-0038(1)(d)(C).

For the forgoing reasons, claimant was discharged, but not for misconduct, and therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-186014 is set aside, as outlined above.

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

DATE of Service: April 29, 2022

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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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