

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0292

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 12, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 73023). The employer filed a timely request for hearing. On February 18, 2022, ALJ Demarest conducted a hearing, and on February 22, 2022 issued Order No. 22-UI-186883, reversing decision # 73023, by concluding that the employer discharged claimant for misconduct and claimant was therefore disqualified from receiving benefits effective October 10, 2021. On March 4, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's 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) St. Charles Health System, Inc. employed claimant as a nurse from October 13, 2008 until October 16, 2021.

(2) Prior to September 10, 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,¹ 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.

¹ See OAR 333-019-1010. 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.

(3) On September 10, 2021, claimant submitted a religious exception request to the employer. At the time of her religious exception request, claimant did not respond to a prompt on the religious exception request form asking her to “describe [her] religious belief and how it affects [her] ability to receive a COVID-19 vaccination.” Exhibit 1 at 1. On September 17, 2021, the employer emailed claimant and acknowledged receipt of her religious exception request, but informed her that the request was incomplete due to claimant’s failure to respond to the prompt. Claimant replied to the employer’s email by stating, in pertinent part, “[The COVID-19 vaccine] is in violation of my constitutionally secured and protected rights and my God-given right to bodily sovereignty.” Exhibit 1 at 3.

(4) On September 22, 2021, the employer emailed claimant that they had denied her religious exception request, reasoning that her refusal to be vaccinated “appears to be [based] on a strongly held personal conviction, or a medical belief or concern . . . not a sincerely held religious belief.” Exhibit 1 at 4. Despite the denial of her religious exception request, the employer invited claimant to forward any other information that she would like to have the employer consider with respect to her religious exception request.

(5) On or about October 6, 2021, claimant confirmed for the employer that she would not be vaccinated against COVID-19 prior to the October 18, 2021 deadline. The employer informed claimant that her last scheduled shift would be October 15, 2021.

(6) On October 16, 2021, the employer discharged claimant because she failed to become vaccinated against COVID-19 and had not obtained an exception from vaccination.

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).

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).

OAR 333-019-1010 governs the duties of healthcare employers in regards to COVID-19 vaccination requirements. In pertinent part, the rule forbids healthcare providers or staff from working in healthcare settings unless they are fully vaccinated or provide documentation of a medical or religious exception by October 18, 2021; and subject "[e]mployers of healthcare providers or healthcare staff" to a potential fine of \$500 per day per violation of the rule. OAR 333-019-1010(3)(a), (9).

Compliance with the employer's policy, in line with the requirements of OAR 333-019-1010, could be met either by being fully vaccinated against COVID-19 or having obtained a religious or medical exception from vaccination. Claimant attempted to comply with the policy by submitting a religious exception request. However, claimant's religious basis for objecting to the COVID-19 vaccine—because it was a purported "violation of [her] constitutionally secured and protected rights and [her] God-given right to bodily sovereignty"—was determined by the employer to be more reflective of a strongly held personal conviction or medical belief and not a sincerely held religious belief. When the employer denied claimant's religious exception request, claimant was left with the option of becoming vaccinated. Claimant chose not to become vaccinated against COVID-19 and the record does not otherwise show that she was unable to become vaccinated for any reason.

The record shows that the employer's vaccination policy was reasonable, given the continuing threat to public health posed by COVID-19, and the fact that the employer was required to implement the mandates in OAR 333-019-1010 or else face the potential of daily fines for noncompliance. Additionally, the policy was reasonable because it allowed employees to seek exceptions from vaccination for either medical or religious reasons. Because claimant had the option of complying with the employer's policy by becoming vaccinated, but chose of her own accord not to do so, claimant's refusal constituted a willful violation of the standards of behavior that the employer had the right to expect of their employees.

Claimant's refusal to become vaccinated cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d). First, claimant's refusal to become vaccinated was not an isolated instance of poor judgment 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 they

could not continue to employ claimant without her having provided proof of vaccination or obtained an exception by the October 18, 2021 deadline without potentially incurring fines of \$500 per day. Claimant's refusal to become vaccinated therefore made a continued employment relationship impossible, and as such it exceeded mere poor judgment.

For the above reasons, the employer discharged claimant for misconduct, and claimant is therefore disqualified from receiving unemployment insurance benefits effective October 10, 2021.

DECISION: Order No. 22-UI-186883 is affirmed.

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

DATE of Service: May 9, 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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