

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0300

Reversed & Remanded

PROCEDURAL HISTORY: On January 5, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 100705). The employer filed a timely request for hearing. On February 16, 2022, ALJ Janzen conducted a hearing, and on February 17, 2022 issued Order No. 22-UI-186678, reversing decision # 100705 by concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective October 24, 2021. On March 7, 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 him 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.

The parties may offer new information, such as the new information contained within claimant's written argument and attachments thereto, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) RLA Engineering LLC employed claimant as a mechanical tooling and processing engineer from November 20, 2020 until October 29, 2021.

(2) The employer assigned their engineers to work full time at their clients' sites. For the duration of his employment with the employer, claimant was assigned to work at Hewlett Packard (HP), which was the employer's largest client and accounted for approximately 70% of the employer's business.

(3) The employer's contract with HP required them to comply with and enforce HP's policies that were applicable to the employer's engineers. If the employer failed to do so, HP would have grounds for cancelling their contract with the employer, which would likely put the employer out of business.

(4) In September 2021, HP notified the employer that they would be requiring all of their contracted engineers who would be working onsite to be fully vaccinated against COVID-19 (or at least have received the first shot of a two-shot vaccination series) by November 1, 2021. The employer subsequently notified their employees of this requirement.

(5) After learning about HP's vaccination requirement, claimant sought an exception to the requirement on the basis of his religious beliefs, which forbade him from being vaccinated against COVID-19. The employer attempted to negotiate with HP to grant exceptions to claimant and some of the employer's other employees. However, HP refused to grant any exceptions to the vaccination requirement.

(6) On October 18, 2021, the employer notified claimant that HP would not grant any exceptions to their vaccination requirement. Claimant continued to refuse to become vaccinated against COVID-19.

(7) On October 29, 2021, the employer discharged claimant because he refused to become vaccinated against COVID-19.

CONCLUSIONS AND REASONS: Order No. 22-UI-186678 is set aside and this matter remanded for further development of the record.

If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(a) (September 22, 2020). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a). In the case of individuals working for temporary agencies, employee leasing companies, or governmental programs where a state agency serves as the employer of record for individuals performing home care services, the employment relationship "shall be deemed severed at the time that a work assignment ends." OAR 471-030-0038(1)(a).

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).

The employer discharged claimant due to claimant’s refusal to become vaccinated against COVID-19, which violated HP’s requirement applicable to claimant and the employer’s other employees. The order under review concluded that this constituted a willful violation of the employer’s expectations because claimant knew that the employer required him to become vaccinated against COVID-19, and that because the violation was not an isolated instance of poor judgment under OAR 471-030-0038(1)(d), it constituted misconduct. Order No. 22-UI-186678 at 4–5. However, the record as developed does not support the conclusion that claimant’s refusal to become vaccinated was misconduct.

Missing from the analysis in the order under review is the consideration of whether the employer’s expectation that claimant become vaccinated against COVID-19 was reasonable under the circumstances. Under OAR 471-030-0038(3)(a), misconduct is, in relevant part, a willful or wantonly negligent violation of the standards of behavior which an employer *has the right to expect of an employee*. If an employer imposes upon their employees a standard of behavior that they do not have the right to expect of an employee to comply with, then an employee’s violation of that standard of behavior is not misconduct.

Per the employer's contract with HP, their failure to comply with HP's COVID-19 vaccination policy could have resulted in cancellation of the contract, which likely would have put the employer out of business. The record also shows that the employer attempted to negotiate with HP in order to obtain exceptions from the vaccination requirement for some of their employees, but was unsuccessful in doing so, suggesting that the employer essentially had no choice but to end claimant's work at HP unless they wished to risk their entire business. However, the record contains inconsistencies that must be resolved in order to determine if the employer's requirement that claimant become vaccinated was reasonable under the circumstances, or if the employer might have had other options available besides discharging claimant.

At hearing, the owner of the business summarily testified that, during the relevant time period, the employer did not have any other work that claimant could have done for a different client who did not have the same vaccination requirements. Transcript at 9. However, the owner also testified that they had other clients besides HP, and that not all of their clients had the same vaccination policies for contracted engineers. Transcript at 45. It is not clear from the record as developed why the employer could not have reassigned claimant to work for another client who might have had less stringent vaccination requirements than HP. On remand, this line of inquiry should be further developed to show, in detail, whether the employer had other clients to whom the employer could have reassigned claimant.

If the record on remand shows that the employer *did* have other clients to whom they could have reassigned claimant, the ALJ should inquire as to whether doing so would have caused the employer to violate their contract with HP, such that they would have been at risk of incurring contractual damages. Further, it is not clear from the record whether the employer functioned as an employee leasing company or temporary agency, such that ending claimant's assignment with HP would have severed the employment relationship per OAR 471-030-0038(1)(a), even if the employer had assigned claimant to work for another client. In short, the ALJ should develop the record to determine whether the employer had any options available to them to continue to employ claimant without facing an undue burden to their business, or whether the employer could have reassigned claimant to another client who did not require vaccination, but did not do so for reasons of mere convenience.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 22-UI-186678 is reversed, and this matter is remanded.

DECISION: Order No. 22-UI-186678 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: May 13, 2022

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-186678 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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.

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