

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0369

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 23, 2021, 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 October 31, 2021 (decision # 142951). Claimant filed a timely request for hearing. On February 25, 2022, ALJ Ramey conducted a hearing, and on March 4, 2022 issued Order No. 22-UI-187870, affirming decision # 142951. On March 14, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Psychological Services of Pendleton employed claimant as an administrative assistant from January 2020 to November 5, 2021.

(2) On August 27, 2021, the owner of the clinic informed claimant that she would be required to either become vaccinated against COVID-19, or else submit a request for a medical or religious exception from vaccination, on or prior to the state-mandated deadline of October 18, 2021.¹ Religious exception requests were required to be submitted on forms provided by the Oregon Health Authority (OHA), and required individuals seeking exceptions to “describe [their] religious belief and how it affects [their] ability to receive a COVID-19 vaccination.” Exhibit 1 at 1.

(3) Claimant objected to vaccination on religious grounds. On October 6, 2021, claimant submitted an OHA religious exception form to the owner. Under the section that required an explanation of her religious beliefs, claimant wrote, “My religious beliefs are with God.” Exhibit 1 at 1. The owner felt that claimant’s explanation as to why claimant could not get vaccinated was insufficient as stated, denied claimant’s exception request, and directed claimant to fill out the explanation section completely. Claimant refused to do so, as she felt uncomfortable discussing her religious beliefs at work, and

¹ 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.

continued to refuse to become vaccinated. Had claimant filled out the explanation section completely, the owner would have granted claimant's request.

(4) On October 13, 2021, claimant met with the owner to discuss the vaccine mandate. Claimant again refused to either become vaccinated or provide more information regarding her religious beliefs. Later that day, the owner decided to discharge claimant, and offered claimant's position to another person. That evening, claimant, recognizing that continuing to refuse to comply would lead to the loss of her job, weighed her options and ultimately decided to provide the owner with more information about her religious beliefs. At that time, claimant believed that she had until October 18, 2021 to comply with the mandate.

(5) On October 14, 2021, claimant notified the owner that she would provide more information regarding her religious beliefs. However, because the owner had already hired a replacement for claimant's position, the owner notified claimant that she would be discharged. The owner permitted claimant to continue working remotely, unvaccinated, until November 5, 2021. Claimant worked until November 5, 2021, and aided with training her replacement.

(6) Prior to being discharged, claimant had never violated any of the employer's policies other than the policy relating to the vaccine mandate.

CONCLUSIONS AND REASONS: Claimant was discharged, 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). 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 because she did not comply with the employer's requirement to either become vaccinated against COVID-19, or obtain a religious or medical exception, prior to the state-imposed deadline of October 18, 2021. In particular, claimant failed to comply with the requirement to submit a completed OHA exception form that included a full explanation of how her religious beliefs prevented her from becoming vaccinated. The order under review concluded that this constituted misconduct because claimant willfully refused to provide the full explanation on the form, was not an isolated instance of poor judgment because claimant's conduct exceeded mere poor judgment and was tantamount to unlawful conduct, and therefore made a continued employment relationship impossible. Order No. 22-UI-187870 at 4. While the record shows that claimant did willfully refuse to comply with the employer's policy, the record also shows that claimant's refusal was an isolated instance of poor judgment.

In order for conduct to be considered an isolated instance of poor judgment, the conduct must first be a single or infrequent occurrence. The record supports the conclusion that claimant's refusal to provide further information was a single occurrence. Even though claimant maintained the refusal over a period of time, it was nevertheless a refusal to comply with the employer's policy at a future date. Had claimant continued to refuse to comply with the policy on or after the date on which it took effect—October 18, 2021—or had she failed to rescind her refusal prior to that date, claimant's daily refusal to comply could rightly be viewed as a series of actions. However, claimant agreed to comply by rescinding her refusal and agreeing to provide the requested information prior to both the owner's notification of her intent to discharge claimant *and* the mandate deadline. Therefore, claimant's ongoing refusal through October 13, 2021 was essentially one act. As the record does not show that claimant had ever engaged in any other willful or wantonly negligent violations of the employer's standards of behavior, claimant's temporary refusal to provide information regarding her religious beliefs was isolated.

Additionally, the record does not show that claimant's conduct made a continued employment relationship impossible. OAR 333-019-1010 governed the duties of healthcare employers in regards to COVID-19 vaccination requirements. In pertinent part, 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). Had claimant continued to work for the employer without becoming vaccinated or obtaining an exception from vaccination after October 18, 2021, claimant's conduct might have been tantamount to unlawful conduct. However, the owner decided to discharge claimant on October 13, 2021, before the mandate's

requirements took effect. Thus, the conduct that led the owner to discharge claimant was not, at the time it occurred, tantamount to unlawful conduct. Further, because claimant ultimately was willing to provide the requested information—albeit after the owner had already taken steps to discharge claimant and replace her with another person—claimant’s earlier refusal did not make a continued employment relationship impossible. The record supports a conclusion that, more likely than not, had the owner not offered claimant’s position to another person after the meeting with claimant on October 13, 2021, claimant would have complied with the employer’s policy, and the employer would have allowed claimant to continue working.

Finally, claimant testified at hearing that the owner never gave claimant a specific date by which claimant was required to either become vaccinated or submit the completed exception request, and that claimant therefore believed that she had until October 18, 2021 to do so. Transcript at 14. While claimant’s refusal on October 13, 2021 was poor judgment, the fact that she ultimately rescinded her refusal prior to what she reasonably believed to be the deadline for doing so shows that her conduct did not exceed mere poor judgment. Claimant’s refusal through October 13, 2021 to provide additional information regarding her religious reason for objecting to vaccination therefore was an isolated instance of poor judgment. As such, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-187870 is set aside, as outlined above.

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

DATE of Service: May 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. 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.

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.

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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
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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.