

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0402

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 150259). The employer filed a timely request for hearing. On March 3, 2022, ALJ Kaneshiro conducted a hearing, and on March 4, 2022 issued Order No. 22-UI-187916, reversing decision # 150259 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving benefits effective November 28, 2021. On March 23, 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) Oregon Health Sciences University employed claimant as a nurse in their pre-surgical unit from January 22, 2007 until December 2, 2021.

(2) In the fall of 2021, pursuant to a mandate announced by the governor, the Oregon Health Authority (OHA) issued an administrative rule requiring all healthcare workers to provide either proof of full vaccination against COVID-19 or documentation of a medical or religious exception by October 18, 2021. Thereafter, the employer announced a policy which required employees to get fully vaccinated

against COVID-19, unless they requested and were granted a medical or religious exception. Per the employer's policy, the employer would not grant a religious exception where an employee's objection to receiving the vaccine was based on "fetal cell concerns." Transcript at 10. In the event an employee remained unvaccinated or was not granted an exception as of October 18, 2021, they would be placed on a 45-day administrative leave and discharged at the end of that period unless they got fully vaccinated. Claimant was aware of and understood the employer's COVID-19 vaccine policy.

(3) Under the administrative rule implementing the vaccine mandate, if the employer granted an employee an exception, the employer was required to ensure that unvaccinated employees were protected from contracting and spreading COVID-19.¹ The employer was subject to fines of \$500 per day for violating the rule. The nature of claimant's work for the employer was such that it could not be performed remotely.

(4) On September 19 or 20, 2021, claimant submitted a request for a religious exception stating that she was a Christian and citing her belief that the COVID-19 vaccines were developed using cell lines from aborted fetuses, which claimant stated was against her religion because she opposed abortion. On October 7, 2021, the employer informed claimant they would not grant claimant an exception based on that request. On October 15, 2021, claimant made a second request for a religious exception, again citing her religious objection to receiving the vaccine based on her belief that the vaccines were developed using fetal cell lines.

(5) On October 18, 2021, the employer placed claimant on a 45-day administrative leave because she was unvaccinated and had not been granted an exception. On October 29, 2021, the employer informed claimant that they would not grant claimant an exception based on her second request.

(6) On December 2, 2021, claimant remained unvaccinated. On that date, the employer discharged claimant for non-compliance with their COVID-19 vaccine policy.

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 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

¹ See OAR 333-019-1010(5) (effective September 1, 2021 through January 31, 2022) ("Employers of healthcare providers or healthcare staff, contractors and responsible parties who grant an exception to the vaccination requirement under section (4) of this rule must take reasonable steps to ensure that unvaccinated healthcare providers and healthcare staff are protected from contracting and spreading COVID-19.").

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).

In her written argument, claimant argued that the employer’s conduct in declining to grant claimant a religious exception and then discharging her for being unvaccinated was unconstitutional and violated federal employment discrimination laws. Claimant’s written argument, based in part on information extraneous to the hearing record, is considered only to the extent it sheds light on the reasonableness of the employer’s expectation, that is, whether, under OAR 471-030-0038(3)(a), the employer’s expectation was a reasonable one they had a right to expect.

Claimant contended that the employer’s COVID-19 vaccine policy was unconstitutional because it interfered with her First Amendment right to free exercise of religion. Written Argument at 7-13. The Free Exercise Clause, like almost all constitutional provisions, only applies to governmental actors, not private entities. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (“[P]rivate action is immune from [constitutional] . . . restrictions[.]”). However, claimant’s argument does not fail for lack of state action because a line of United States Supreme Court cases, some of which claimant cited, premise state action on the state agency’s denial of unemployment benefits in situations in which the claimants refused or resigned from jobs that conflicted with their religious beliefs. *See Sherbert v. Verner*, 374 U.S. 398 (1963) (held Free Exercise Clause violation where claimant denied benefits for refusing job that would require work on claimant’s Sabbath day); *Thomas v. Review Board*, 450 U.S. 707 (1981) (held Free Exercise Clause violation where claimant denied benefits for quitting job that would require producing war materials in conflict with religious beliefs). The reach of these cases is narrow, however, because *Employment Division v. Smith*, 494 U.S. 872 (1990), which is the operative authority in this field, limited and distinguished *Sherbert* and *Thomas*.

In *Smith*, the Court held that the Free Exercise Clause did not bar the state of Oregon from prohibiting generally the possession of peyote and denying unemployment benefits to religiously-inspired peyote users who were discharged for violating an employer policy prohibiting peyote use. 494 U.S. at 874. The Court noted that “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Id.* at 878-79. The Court warned against establishing a rule favorable to the claimants in that case because doing so “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” including “compulsory vaccination laws.” *Id.* at 888-89. *Smith* stands for the proposition that a state may deny unemployment benefits where misconduct is based on the violation of a neutral state policy of general applicability even if doing so interferes with a person’s particular religious practices. Here, the state imposed a neutral policy of general applicability requiring all healthcare workers to provide proof of full vaccination against COVID-19 or documentation of a medical or religious exception; a policy it could impose validly. *See Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (an individual can be made to submit to vaccination against contagious diseases because of the societal interest in preventing the spread of disease). The Free Exercise Clause did not excuse claimant from compliance with this mandate, and the employer’s decision to discharge claimant for violation of an employer policy that implemented the mandate was not unconstitutional. Thus, the employer’s vaccination policy was not unconstitutional, and the argument that the employer’s policy was unreasonable because it was unconstitutional is without merit.

Claimant also argued that the employer violated Title VII of the federal Civil Rights Act of 1964. In her written argument, claimant lays out an elaborate two-part, multi-elemental framework for determining whether a plaintiff has *proven* a claim of employment discrimination under Title VII. Written Argument at 5-7. The framework involves requiring a plaintiff to prove a number of elements in order to “establish a prima facie case” whereupon the burden shifts to the employer to “establish that it initiated good-faith efforts to accommodate the employee’s religious practices.” Written Argument at 6. EAB is not a forum for litigating federal employment discrimination claims. Whether the employer is liable under Title VII would be a matter for a court of general jurisdiction to decide following a period of civil discovery and briefing from both parties, if not a jury trial.

To the extent a violation of Title VII is relevant to show whether the employer’s vaccination policy was reasonable, the record does not establish that the employer’s expectation violated Title VII. To make out a Title VII discrimination claim, the first element requires a plaintiff to have a bona fide religious belief. *See Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). Here, claimant stated in her exception requests that receiving the vaccine was against her religion because she opposed abortion. The record shows that the employer would not grant a religious exception where an employee’s objection to receiving the vaccine was based on “fetal cell concerns.” Transcript at 10. The employer’s position is consistent with announcements of numerous religious authorities urging adherents to vaccinate regardless of any association between the vaccines and fetal tissues.² Given the support from religious

² *See* U.S. Conference of Catholic Bishops, Vaccines for COVID-19, Nov. 20, 2020, *available at* <https://www.usccb.org/resources/memo-to-bishops-on-vaccines-for-covid-19.pdf>; Vatican News, Pope Francis Urges People to get Vaccinated against COVID-19, August 18, 2021, *available at* <https://www.vaticannews.va/en/pope/news/2021-08/pope-francis-appeal-covid-19-vaccines-act-of-love.html>; USA Today, COVID-19 Vaccine: Government, the Faith Community is Ready to Partner; Give us a Shot, Jan 15, 2021, *available at* <https://www.usatoday.com/story/opinion/2021/01/15/faith-community-can-host-covid-19-vaccine-sites-across-u-s/4167153001/>; Church of Jesus Christ of Latter-Day Saints, The First Presidency Urges Latter-day Saints to Wear Face

authorities for the vaccine, it is possible that a court would find that claimant's opposition to getting vaccinated was not a bona fide religious belief but rather a personal preference or a political view and that, as a result, claimant failed to prove a Title VII violation. Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII. *See Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 492 (3d Cir. 2017) (employee's objection to flu vaccine did not qualify as a religious belief protected by Title VII because his beliefs that "one should not harm their own body and . . . that the flu vaccine may do more harm than good" did not "address fundamental and ultimate questions having to do with deep and imponderable matters" and were not "comprehensive in nature"). *See also Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (unlike religious beliefs, philosophical and personal beliefs "do[] not rise to the demands of the Religion Clauses").

Moreover, even if claimant's belief qualified for protection under Title VII, an employer is not required to accommodate it under Title VII if the accommodation would constitute an undue burden on the employer. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). Here, it can be inferred from the record that accommodating claimant's request to remain unvaccinated in a healthcare setting would constitute an undue burden on the employer. This is because the employer was required, under pain of daily fines for non-compliance, to ensure that unvaccinated workers were protected from contracting and spreading COVID-19. Given that claimant's work was in a pre-surgical unit and could not be performed remotely, it is likely that the employer could not have protected claimant from contracting or spreading COVID-19 if it granted her an exception, which could result in the employer facing daily fines, and thereby constitute an undue burden. For these reasons, the record does not establish that the employer's policy violated Title VII. Accordingly, the argument that the employer's policy was unreasonable because it violated Title VII is without merit.

Having concluded that the employer's policy was not unreasonable, the analysis turns to whether claimant violated the employer's policy willfully or with wanton negligence under OAR 471-030-0038(3)(a). The record shows that claimant breached the employer's expectation that she get vaccinated against COVID-19 unless granted an exception. Claimant was aware that, absent obtaining an exception, she was required to get vaccinated. After failing to obtain an exception in connection with her first request, claimant willfully remained unvaccinated and was placed on a 45-day administrative leave beginning October 18, 2021. Thereafter, the employer informed claimant on October 29, 2021, that her second exception request was also denied. After her second request was denied, claimant willfully remained unvaccinated for the remainder of her administrative leave period. Accordingly, claimant willfully violated the employer's policy by not getting vaccinated against COVID-19 after her exception requests were denied.

Claimant's conduct is not excusable as an isolated instance of poor judgment. Claimant's conduct in declining to abide by the employer's vaccination requirement policy exceeded mere poor judgment

Masks When Needed and Get Vaccinated Against COVID-19, Aug. 12, 2021, *available at* <https://newsroom.churchofjesuschrist.org/article/first-presidency-message-covid-19-august-2021#:~:text=To%20provide%20personal%20protection%20from,medical%20experts%20and%20government%20leaders>; The Ethics & Religious Liberty Commission of the Southern Baptist Convention, *Explainer: COVID-19 Raises Concern about Abortive Fetal Cells in Medicine*, Dec. 15, 2020, ("Christians are not morally culpable if they use treatments and vaccines that were developed using such cells, even if the cells originated in aborted fetal tissue."), *available at* <https://erlc.com/resource-library/articles/explainer-covid-19-raises-concern-about-abortive-fetal-cells-in-medicine/>.

because claimant's opposition to the policy made a continued employment relationship impossible. The record shows that the employer was required by state mandate to impose the vaccination requirement, and had denied claimant's exception requests, but that claimant remained opposed to receiving the COVID-19 vaccine. Based on this evidence, along with the fact that claimant worked as a nurse in the employer's pre-surgical unit and, as an unvaccinated worker, posed a heightened risk of spreading COVID-19 to patients, the preponderance of evidence supports that claimant's conduct made a continued employment relationship impossible and therefore exceeded mere poor judgment.

Claimant's conduct also was not a good faith error. The record fails to show that claimant believed in good faith that her refusal to get vaccinated against COVID-19 did not violate the employer's expectations. The record instead shows claimant was aware that the employer had declined to grant her an exception, and that she would be discharged unless she became vaccinated by the end of her 45-day leave period. Claimant therefore was not operating under a mistake of fact as to what the employer expected of her. *See Hood v. Employment Dep't.*, 263 P.3d 1126, 1130 (2011) (the "error" in a good faith error analysis refers to a mistake of fact or action deriving from a mistake of fact, a good faith error is not an "exception for conscientious objectors to employer policies"). The record does not show that claimant believed in good faith that the employer approved of her failure to get vaccinated against COVID-19.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective November 28, 2021.

DECISION: Order No. 22-UI-187916 is affirmed.

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

DATE of Service: June 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 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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