

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0446

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 3, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective October 31, 2021 (decision # 131223). Claimant filed a timely request for hearing. On March 14, 2022, ALJ Micheletti conducted a hearing at which the employer failed to appear, and on March 22, 2022 issued Order No. 22-UI-189387, affirming decision # 131223. On April 6, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Oregon Department of Consumer and Business Services (DCBS) employed claimant, most recently as a safety compliance officer, until November 5, 2021.

(2) In March 2021 and April 2021, claimant received two doses of the COVID-19 vaccine. When claimant received the vaccinations, the vaccine provider gave claimant a vaccination card that included the lot numbers of the individual doses of vaccine that were administered to claimant. Claimant subsequently lost the vaccination card.

(3) On August 10, 2021, the Governor of Oregon issued Executive Order No. 21-29 (EO 21-29), which required executive branch employees to become fully vaccinated against COVID-19 and provide proof of vaccination to the State by October 18, 2021, unless the employee applied for and was granted a medical or religious exception from vaccination. The order also granted executive agencies the authority to implement requirements that exceeded the requirements in EO 21-29. EO 21-29 defined “proof of vaccination” as “documentation provided by a tribal, federal, state or local government, or a health care provider, that includes an individual’s name, date of birth, type of COVID-19 vaccination given, date or dates given, depending on whether it is a one-dose or two-dose vaccine, and the name/location of the health care provider or site where the vaccine was administered. Documentation may include but is not limited to a COVID-19 vaccination record card, a copy or digital picture of the vaccination record card, or a print-out from the Oregon Health Authority’s immunization registry.” See Exhibit A1–A2.

(4) On August 25, 2021, the Department of Administrative Services (DAS) Chief Human Resources Office (CHRO), which administers human resources policies for all executive state agencies in Oregon, issued State HR Policy 50.000.03. The policy, which implemented the requirements of EO 21-29, defined “proof of vaccination” as “documentation provided by a tribal, federal, state or local government or a health care provider that includes an individual’s name, date of birth, type of COVID-19 vaccination given, date or dates given, depending on whether it is a one-dose or two-dose vaccine and the name/location of the health care provider or site where the vaccine was administered.” *See Exhibit B1.*

(5) After the issuance of State HR Policy 50.000.03, DAS CHRO published a frequently-asked questions document (FAQ) regarding EO 21-29 and the State HR Policy. In relevant part, the FAQ stated that employees were required to submit vaccine lot numbers as part of their proof of vaccination.

(6) The employer subsequently notified their employees, including claimant, of the vaccination requirements. Thereafter, claimant gave the employer a printout from the pharmacy where she had been vaccinated. That printout showed her name, date of birth, the dates on which she received the vaccine, which vaccine was administered, and the name of the pharmacy where the vaccines were administered. The printout did not include the lot numbers of the vaccines that claimant received, and claimant did not otherwise have that information.

(7) On October 14, 2021, a human resources representative from the employer notified claimant that she was required to provide the vaccine lot numbers in order to comply with the state’s vaccination requirements. Claimant refused to do so, as she believed that this was an invasion of her privacy and an overreach of the employer’s authority under EO 21-29 and State HR Policy 50.003.03.

(8) On October 19, 2021, the employer placed claimant on paid administrative leave and scheduled an investigatory meeting for October 20, 2021. During the meeting on October 20, 2021, claimant reiterated that she would not provide the vaccine lot numbers. On October 25, 2021, claimant sent an email to the employer stating that providing the vaccine lot numbers would be a violation of her religious beliefs and requesting an exception to the requirement on that basis.

(9) On November 2, 2021, the employer held a pre-dismissal meeting at which claimant again refused to provide the vaccine lot numbers. On November 5, 2021, the employer discharged claimant for failing to provide documentation of her vaccination against COVID-19 because she did not provide the vaccine lot numbers to the employer.

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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

The employer discharged claimant because she refused to provide the employer with her COVID-19 vaccine lot numbers, thereby violating the employer’s policy requiring her to submit proof of vaccination by October 18, 2021. The order under review concluded that this constituted misconduct because the employer’s policy was “reasonable given the severity of the impact COVID-19 has had on the State of Oregon and the world,” claimant violated the policy willfully, and her refusal was not an isolated instance of poor judgment because it made a continuing employment relationship impossible. Order No. 22-UI-189387 at 4. The record does not support the conclusion that claimant’s refusal constituted misconduct.

The record is clear that claimant willfully violated the employer’s policy by refusing to provide the vaccine lot numbers. However, claimant’s refusal was not misconduct because the employer’s policy was not reasonable. As a preliminary matter, it *was* reasonable for the employer to require that their employees become vaccinated against COVID-19 and provide proof of the same (absent an approved exception) because, as the order under review reasoned, the COVID-19 pandemic has had a severe impact on the State of Oregon and the world, and requiring employees to become vaccinated would slow the spread of COVID-19 and preserve the employer’s ability to continue providing services to the public.

However, the employer did not appear at the hearing or otherwise offer evidence regarding this matter. As a result, there is little evidence in the record to explain or justify the employer’s policy requiring employees to furnish vaccine lot numbers. The only explanation in the record of the lot-number requirement, which was not contained in EO 21-29 or State HR Policy 50.003.03, was a brief statement made by the employer’s human resources analyst during the October 20, 2021 investigatory meeting. *See Exhibit G3*. In a transcript of that meeting, which claimant submitted into evidence, the human resources analyst stated that the lot numbers were “required to authenticate and verify your vaccination record.” *Exhibit G3*. However, claimant testified at hearing that the employer did not “check [employee vaccination status] against any sort of registry” and “don’t do anything with” the lot numbers. Transcript at 19. The employer did not provide evidence to contradict claimant’s testimony. Nor does the record show that the employer doubted, or had reason to doubt, the authenticity of claimant’s proof of vaccination. Because the employer was not required by EO 21-29 or other law to require the lot numbers, had no reason to doubt that claimant was vaccinated, and did not otherwise show a reason for requiring the lot numbers, the employer has not met their burden to show that the lot number requirement was reasonable.

On this record, the employer’s requirement that claimant provide the vaccine lot numbers was not reasonable. Under OAR 471-030-0038(1)(d)(C), a conscious decision not to comply with an unreasonable employer policy is not misconduct. Claimant was discharged due to her conscious decision

not to comply with an unreasonable employer policy. Therefore, under OAR 471-030-0038(1)(d)(C), claimant was not discharged for misconduct.

For the above reasons, 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-189387 is set aside, as outlined above.

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

DATE of Service: June 27, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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