

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0505

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 17, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was suspended, not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the suspension (decision # 114445). The employer filed a timely request for hearing. On April 14, 2022, ALJ Mott conducted a hearing, and on April 15, 2022 issued Order No. 22-UI-191386, reversing decision # 114445 by concluding that claimant was suspended for misconduct and was disqualified from receiving benefits effective October 17, 2021. On April 25, 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 has employed claimant as a resource nurse since May 9, 2011. Claimant normally works with immunocompromised patients in the employer's outpatient pediatric oncology clinic.

(2) Beginning in August 2021, the employer informed their employees that in order for the employer to comply with 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. Claimant was aware of and understood the employer's COVID-19 vaccine policy.

¹ See OAR 333-019-1010 (effective September 1, 2021 through January 31, 2022).

(3) In early October 2021, claimant submitted a request for religious exception to the employer that the employer denied. The employer provided claimant an additional period of time to submit additional information in support of her religious exception request.

(4) Claimant amended her religious exception request by providing additional information. The employer did not act on claimant's amended religious exception request by the October 18, 2021 deadline. Claimant was placed on administrative leave pending the employer's determination.

(5) On October 29, 2021, the employer notified claimant that they had approved her religious exception request as amended. The notification further advised claimant that a human resources department representative would contact claimant to assess whether a reasonable accommodation that would allow claimant to perform her role with the employer could be achieved. Claimant remained on administrative leave.

(6) Since the employer's religious exception approval, claimant has remained on an "open-ended" administrative leave with the employer, while working with the human resources department in an effort to find a reasonable accommodation that will allow her to perform her role with the employer. Transcript at 9.

CONCLUSIONS AND REASONS: The employer suspended claimant, but not for misconduct.

ORS 657.176(2)(a) and (2)(b) require disqualifications from unemployment insurance benefits if the employer discharged or suspended claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) and (b) . . . 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). The employer carries the burden to show misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The order under review concluded that the employer suspended claimant for willfully violating their COVID-19 vaccination policy by not becoming vaccinated against COVID-19 prior to October 18, 2021. Order No. 22-UI-191386 at 3-4. The order reasoned that although the employer approved claimant for a religious exception that allowed her to remain employer-attached, the employer was still required to ensure that their unvaccinated employees like claimant were protected from contracting and spreading COVID-19 to coworkers and patients. Order No. 22-UI-191386 at 4. The order concluded that because the employer was unwilling to allow claimant to work with immunocompromised patients while unvaccinated, and because claimant was unwilling to vaccinate, claimant willfully violated the employer's reasonable expectation that she become vaccinated pursuant to the employer's COVID-19 policy. Order No. 22-UI-191386 at 4-5. The record does not support these conclusions.

Contrary to the order under review's conclusion that claimant violated the employer's COVID-19 policy, the record shows that claimant complied with the policy by seeking approval for, and being granted, a religious exception to the policy. Although claimant did not meet the October 18, 2021 deadline for obtaining an approved religious exception, the record shows that the employer elected to place her on administrative leave while considering her amended religious exception request, before subsequently approving that request on October 29, 2021. From that point forward, the employer maintained claimant on an "open-ended" administrative leave while working with her to find a reasonable accommodation that will allow her to continue performing work for the employer. Accordingly, because the employer approved claimant's religious exception request and then placed her on open-ended administrative leave, claimant committed no misconduct and was not suspended for misconduct.

For the above reasons, claimant was not suspended for misconduct and is not disqualified from receiving unemployment insurance benefits based on the suspension.

DECISION: Order No. 22-UI-191386 is set aside, as outlined above.

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

DATE of Service: July 14, 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 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 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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