

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0891

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective May 29, 2022 (decision # 122645). Claimant filed a timely request for hearing. On August 9, 2022, ALJ Blam-Linville conducted a hearing, at which the employer failed to appear, and on August 10, 2022 issued Order No. 22-UI-200204, affirming decision # 122645 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective May 29, 2022. On August 12, 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) T-Mobile USA Inc. employed claimant as a facilities manager from April 29, 2015 to June 3, 2022.

(2) In mid-March 2020, after the beginning of the COVID-19 pandemic, the employer asked claimant to do most of her work from home at her option. Thereafter, claimant did some of her work from home and some of her work at the employer's call center.

(3) Following the development of the COVID-19 vaccines, claimant became opposed to receiving any of the vaccines. One of the reasons claimant opposed receiving any of the COVID-19 vaccines was that she was a Christian and, although she had taken the flu vaccine as an adult in the past, believed that her body was "a temple" and that taking a vaccine would "defile" the temple. Audio Record at 20:23. The other reason claimant opposed receiving any of the COVID-19 vaccines was that she opposed abortion

and thought that the COVID-19 vaccines contained fetal cells and that receiving products that contain fetal cells was not acceptable to her.

(4) In September 2021, the employer required all the unvaccinated employees at the call center to work from home. Because claimant was unvaccinated, the employer required claimant to work from home during call center operating hours. However, the employer permitted claimant to work on site between 10:00 p.m. and 6:00 a.m. if she wished. Thereafter, claimant worked on site between 10:00 p.m. and 6:00 a.m. at least once a week and occasionally more often.

(5) On January 28, 2022, the employer announced that beginning April 2, 2022, unvaccinated workers must return to work and were required upon their return to on-site work to be either vaccinated against COVID-19 or to be granted a religious accommodation from the employer.

(6) On February 20, 2022, claimant submitted to the employer a request for a religious accommodation by filling out and turning in an electronic form provided by the employer. In the request, claimant mentioned that she was willing to continue to work from home or work on-site with masking, social distancing, and COVID-19 testing in place, so long as she was not required to get vaccinated. Shortly after she submitted the request, claimant received an automated message that the employer had received the accommodation request.

(7) On March 17, 2022, the employer sent claimant an email stating that her religious accommodation request was denied because remote work would no longer be permitted for her position. Claimant replied to the email asking whether the employer had considered her idea that she remain unvaccinated but mask, social distance, and test. The employer did not respond to claimant's email. Claimant also emailed inquiring about an appeal process but received no response. In late March 2022, claimant took a leave of absence.

(8) On May 31, 2022, claimant's leave of absence ended. That day, claimant had a teleconference with her director, confirmed that she was still unvaccinated, and expressed that she did not intend to receive the COVID-19 vaccine. The director stated that he would need more time to determine the employer's next step. On June 2, 2022, claimant and the director had a telephone meeting and claimant again advised that she would not receive the COVID-19 vaccine.

(9) On June 3, 2022, the employer discharged claimant for remaining unvaccinated against COVID-19.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

The order under review concluded that claimant's failure to receive the COVID-19 vaccine was misconduct because it violated the employer's expectation with at least wanton negligence and the violation was not an isolated instance of poor judgment. Order No. 22-UI-200204 at 4. On this record, the employer did not establish that claimant's failure to get vaccinated was misconduct.

Given that the COVID-19 pandemic is a global public health emergency, it is reasonable for an employer to implement a policy requiring employees to become vaccinated against the virus. Here, the employer expected claimant to become vaccinated against COVID-19 unless they granted claimant an accommodation. However, the employer did not meet their burden to show that the aspect of their expectation related to denying claimant's religious accommodation was reasonable.

The employer failed to appear at hearing, and the record therefore fails to show precisely what information the employer requested to consider claimant's accommodation request and the factors they weighed in considering the request. When the employer denied the request, they informed claimant that their reason for doing so was that remote work would no longer be permitted for claimant's position. However, the employer had allowed claimant to work remotely at her option beginning in mid-March 2020 and then required claimant to work from home starting in September 2021, with latitude to work on-site between 10:00 p.m. and 6:00 a.m. On this record, lacking in any evidence from the employer, it is not evident why the employer could not grant claimant an accommodation by simply allowing claimant's work from home arrangement to continue. Additionally, claimant offered to work on-site while unvaccinated with masking, social distancing, and testing in place. Although it is possible to imagine why the employer might reject this approach, perhaps because it would be too costly or pose an unacceptable risk of COVID-19 spread to other workers, with no evidentiary input from the employer, the record does not show why the employer could not adopt this approach and grant claimant's accommodation. Thus, the employer failed to meet their burden to show that denying claimant's accommodation request was reasonable, which meant that claimant's subsequent failure to receive the COVID-19 vaccine was not misconduct. *See* OAR 471-030-0038(1)(d)(C) ("A conscious decision not to comply with an unreasonable employer policy is not misconduct.").

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-200204 is set aside, as outlined above.

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

DATE of Service: November 18, 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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