EO: 200
BYE: 202248

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

789
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1179

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective December 5, 2021 (decision # 115044). Claimant filed a timely request for hearing. On October 27, 2022, ALJ Nyberg conducted a hearing at which the employer failed to appear, and on November 7, 2022 issued Order No. 22-UI-206771, affirming decision # 115044. On November 28, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted two written arguments on November 28, 2022, one by email and one by fax. Claimant also submitted a written argument by mail received on November 29, 2022 and another by fax on December 27, 2022. EAB did not consider claimant's November 28, 2022 written argument submitted by email because it did not include a statement declaring that claimant provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The November 28, 2022 written argument submitted by email also 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 as required by OAR 471-041-0090. Claimant's November 28, 2022 written argument submitted by fax, November 29, 2022 written argument, and December 27, 2022 written argument also each 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, EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's November 28, 2022 written argument submitted by fax, November 29, 2022 written argument, and December 27, 2022 written argument to the extent they were based on the record.

FINDINGS OF FACT: (1) Central City Concern employed claimant as an administrative and money management assistant beginning at least as early as March 2020 until December 7, 2021.

(2) Prior to September 3, 2021, the employer announced that all healthcare employees, including those who worked in billing like claimant, were expected to receive the COVID-19 vaccine unless the employer granted them a medical or religious exception. On September 3, 2021, claimant submitted a religious exception request in which she advised that "My religious belief does not allow me to put unnatural and/or unknown substances in my body. My religious belief is that my body is the temple of the Holy Spirit and I am instructed to keep my body pure." Exhibit 1 at 7. The employer approved claimant's request and excepted her from getting vaccinated against COVID-19.

(3) Claimant took a medical leave due to a leg injury from October 25, 2021 to November 12, 2021. While claimant was on leave, the employer announced that all healthcare employees who had been excepted from getting the COVID-19 vaccine, including excepted billing workers like claimant, would be required to submit to a weekly COVID-19 nasal test. On November 15, 2021, claimant submitted to the employer a letter requesting an exception from the nasal testing requirement.

(4) On November 30, 2021, claimant spoke to an employer representative who advised that claimant had to comply with the weekly nasal testing or else she could not work for the employer. On December 1, 2021, a different employer representative contacted claimant about the nasal testing policy. The employer representative mentioned that he had done some nasal tests and found the swabs did not go very far into his nose. This information surprised claimant and caused her to think the insertion of the nasal swab was less invasive than she suspected. The next day, claimant asked her doctor how the nasal tests were administered. Claimant's doctor advised that the swabs did not go very far into a person's nose. Based on the information from her doctor and the employer representative, claimant concluded the nasal swabbing was not as invasive as she suspected. On December 3, 2021, claimant informed the employer that she would comply with the weekly nasal testing.

(5) That weekend, claimant reconsidered her decision to agree to the nasal testing. She did so because she prayed, believed she received a divine message, and concluded that it was unnecessary for her to take the nasal test when she did not have any symptoms. Exhibit 1 at 3.

(6) On December 6, 2021, claimant informed the employer by letter that she would not submit to the nasal testing because doing so was against her religious convictions. Claimant explained that she had initially agreed to the nasal testing because she wanted to keep her job and with the "understanding being that the rapid test would barely go into [her] nostrils[.]" Exhibit 1 at 10. On December 7, 2021, the employer discharged claimant for refusing to comply with the employer's weekly nasal testing policy.

(7) Claimant's objection to the nasal testing was a personal preference and not in the nature of a sincerely held religious belief. Claimant was opposed to nasal testing because she perceived it as being too invasive and unnecessary for her because she did not have symptoms of COVID-19. Had the employer instead required DNA swabs of her cheek, claimant would have complied with the testing policy.

CONCLUSIONS AND REASONS: The employer discharged claimant 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). 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 for refusing to comply with weekly nasal testing, a requirement claimant asserted conflicted with her sincerely held religious beliefs. As such, this case potentially raises a constitutional issue. A line of United States Supreme Court cases holds that where a claimant loses their job because an employer policy conflicts with their sincere religious belief, denial of unemployment benefits constitutes a substantial burden on the claimant's right to free exercise of religion[1] that is subject to strict scrutiny. *See, e.g., 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

[1] The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*[.]" U.S. Const. amend. I (emphasis added). The Free Exercise Clause was made applicable to the States by incorporation into the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

violation where claimant denied benefits for quitting job that would require producing war materials in conflict with religious beliefs). Another case, *Employment Division v. Smith*, holds that a State may deny unemployment benefits where a claimant violates an employer policy that conflicts with the claimant's sincere religious belief so long as the employer policy the claimant violates is reflected in a valid and neutral State law of general applicability. 494 U.S. 872, 879 (1990) (No Free Exercise Clause violation where peyote use was barred under general State law, claimant used peyote religiously, and was denied benefits after being discharged for breaching employer policy barring peyote use). Under either approach, no Free Exercise Clause violation occurs if the claimant's breach of the employer policy is not because of a sincere religious belief.

Here, more likely than not, claimant's breach of the employer's policy was the result of her personal preference against nasal testing, rather than a sincerely held religious belief. At hearing, claimant testified that she would have complied with a DNA swab of the inside of her cheek but "to do a nasal test up my nose was just too invasive." Hearing Audio at 16:15. It is not evident why one swabbing technique but not the other would be objectionable based on the principles relating to body purity and the like, which claimant raised in her original vaccine exception request and in her November 15, 2021 letter. Exhibit 1 at 7, 8. The record evidence shows that claimant's opposition to the nasal testing was the result of a preference to avoid discomfort from insertion of the swab into her nose and her opinion that nasal swabbing was unnecessary because she had no COVID-19 symptoms.

More likely than not, it was considerations of physical comfort regarding how far into the nose the testing swab is inserted that drove claimant's initial decision to comply with the nasal testing. The record shows that on December 1, 2021 claimant learned from an employer representative who had submitted to some nasal tests that the nasal swab "barely went into his nostril and it wasn't that bad." Exhibit 1 at 3. This information surprised claimant and caused her to think that "it didn't sound quite as invasive as [she] thought it would be." Exhibit 1 at 3. The next day, claimant consulted her doctor and learned that the testing swabs "don't go very far up the nose and that [the doctor] administers hers herself." Exhibit 1 at 3. With this information, claimant formed the understanding that the swabs "would barely go into [her] nostrils" and, on December 3, 2021, agreed to comply with the nasal testing. Exhibit 1 at 10. That weekend, claimant changed her mind and decided to refuse to comply. Although couched in terms of being divinely inspired, claimant attributed her reversal to her view that "[i]t was unnecessary for me to take the test when I didn't have any symptoms and I was not [to be] involved with the deception of assuming I might be sick while having no symptoms." Exhibit 1 at 3. Claimant's rationale for declining to comply shows that her opposition was the result of a personal opinion that nasal swabbing was unnecessary for her because she was asymptomatic. For these reasons, viewing the record as a whole, claimant's objection to the nasal testing was a personal preference and not in the nature of a sincerely held religious belief.

Claimant also devotes much of her written arguments to the contention that the employer's failure to accommodate her objection to the nasal testing was a violation of Title VII of the federal Civil Rights Act of 1964, asserting that the employer's nasal testing policy was unreasonable because it was unlawful under Title VII. *See* November 28, 2022 Written Argument submitted by fax; November 29, 2022 Written Argument at 1; and December 27, 2022 Written Argument. While an unlawful employer policy would be unreasonable and a conscious decision not to comply with an unreasonable employer policy is not misconduct, it is not evident that the employer engaged in unlawful employment discrimination under Title VII. Proving a Title VII employment discrimination claim requires a plaintiff to plead and

prove an elaborate mutli-elemental cause of action, which would be a matter for a court of general jurisdiction to decide following a period of civil discovery and briefing from all parties, if not a jury trial. In any event, to make out a Title VII religious 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). As the above discussion regarding the nature of claimant's objection to nasal testing shows, it is probable that a court would find that claimant's opposition to nasal testing was not a bona fide religious belief but rather a personal preference and that, as a result, claimant failed to prove a Title VII violation. Since it therefore is not plain from the record that the employer's nasal testing policy violated Title VII, claimant failed to establish that the nasal testing policy was unreasonable on that basis.

Nor does the record otherwise demonstrate that the employer's nasal testing policy was unreasonable. The record evidence supports the inference that the employer adopted the program in an effort to mitigate COVID-19 spread among the employees the employer had excepted from the vaccine requirement. Given that COVID-19 is a contagious and deadly disease that caused a worldwide public health emergency, the employer's decision to take additional measures to deter virus spread among employees for whom they had honored medical or religious objections to vaccination was reasonable.

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 understood that the employer expected all healthcare employees who had been excepted from the vaccine requirement, including claimant, to submit to weekly COVID-19 nasal tests. On November 31 and December 1, 2021, two employer representatives reiterated the employer's expectation to claimant. After confirming she would comply on December 3, 2021, claimant reconsidered and informed the employer that she would not submit to the nasal testing. Thus, claimant willfully violated the employer's reasonable policy by declining to comply with the required weekly nasal testing.

Claimant's conduct is not excusable as an isolated instance of poor judgment. Claimant's refusal to submit to nasal testing was not "isolated" because the employer's expectation called for claimant to submit to nasal testing each week. Because claimant's breach was an ongoing refusal to comply with the employer's policy and would have recurred each week, it was not isolated in nature.

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 submit to weekly nasal testing did not violate the employer's expectations. The record instead shows that claimant was aware that the employer expected her to submit to the tests with no exceptions. 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 submit to weekly nasal testing.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective December 5, 2021.

DECISION: Order No. 22-UI-206771 is affirmed.

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

DATE of Service: February 1, 2023

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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