

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0149

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 1, 2022, 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 # 122633). The employer filed a timely request for hearing. On December 29, 2022, ALJ Snyder conducted a hearing, and on January 6, 2023 issued Order No. 23-UI-211975, reversing decision # 122633 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective November 28, 2021.¹ On January 26, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Oregon Health Sciences University employed claimant as a medical assistant from April 6, 2020 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

¹ Order No. 23-UI-211975 erroneously stated that claimant's disqualification date was effective November 27, 2022. Order No. 23-UI-211975 at 3. Because the work separation in this case occurred on December 2, 2021, claimant's disqualification date would have been effective beginning November 28, 2021. Transcript at 4. The reference to November 27, 2022 is presumed to be a clerical error and the order is presumed to have intended to use the correct date of November 28, 2021.

vaccination against COVID-19 or documentation of a medical or religious exception by October 18, 2021. Thereafter, the employer established a policy that required employees to get fully vaccinated against COVID-19, unless they requested and were granted a medical or religious exception. Claimant was aware of and understood the employer's policy.

(3) To apply for a religious exception, employees were required to state in writing that they were seeking an exception on the basis of a sincerely held religious belief and to describe how the vaccination requirement conflicted with their religious belief. However, the employer excluded certain beliefs from consideration for a religious exception. If an employee asserted one of these beliefs, their request would be denied as a matter of course. Among the beliefs that would be denied automatically were objections to the vaccine "based upon bodily integrity or sanctity, and/or a belief that the vaccine is 'unclean[]'" and objections "on the basis of fetal cell concerns, either in the vaccines or in testing and development." Exhibit 1 at 12-13.

(4) Claimant was a Christian and believed that her body was a temple that she was not allowed to defile. Claimant also believed that terminating a pregnancy was equivalent to murder. After claimant learned of the employer's vaccination requirement, claimant did "research" into the COVID-19 vaccines. Transcript at 19. Claimant thought either that tissue derived from an aborted fetus were included as components of the COVID-19 vaccines or that fetal tissue was used during the testing or development of the vaccines. Based upon this, claimant believed that if she took the COVID-19 vaccine, she would be defiling her body. As a result, claimant opposed taking the COVID-19 vaccine.

(5) The COVID-19 vaccines did not contain fetal tissue or cells. Transcript at 25; Exhibit 1 at 12. However, during the testing process of the COVID-19 vaccines, the vaccines were tested on cells from a particular cell line to confirm that the vaccines worked. Exhibit 1 at 12. The cell line had been in existence since the 1970's, was commonly used in testing of household medicines like aspirin and Tums, and, when originally created, may have been derived from fetal tissue. Exhibit 1 at 12.

(6) On September 20, 2021, claimant submitted a request for a religious exception. Claimant cited the "body is a temple" belief and stated that her objection was "due to the developmental process and contents of the vaccines." Transcript at 22.

(7) On October 11, 2021, the employer informed claimant that her exception request was denied and she was required to become vaccinated against COVID-19. Claimant remained opposed to taking the vaccine. On October 18, 2021, claimant remained unvaccinated. Upon completion of her shift that day, the employer placed claimant on administrative leave. Claimant continued to refuse to become vaccinated. On December 2, 2021, the employer discharged claimant because she refused to become vaccinated.

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).

The order under review concluded that the employer discharged claimant for misconduct because claimant willfully violated the employer’s COVID-19 vaccination policy. Order No. 23-UI-211975 at 3. On this record, the employer did not establish that the aspect of their policy related to denying claimant’s religious exception was reasonable. Therefore, claimant’s willful violation of the policy was not misconduct.

The record evidence outlines a religious exception procedure in which the employer would categorically exclude from consideration any asserted religious objection “based upon bodily integrity or sanctity, and/or a belief that the vaccine is ‘unclean[]’” as well as objections “on the basis of fetal cell concerns, either in the vaccines or in testing and development.” Exhibit 1 at 12-13. At hearing, the employer’s witness cited the above-quoted exclusions and confirmed they were “the broad reasons of why [the employer] did not approve” claimant’s religious exception request. Transcript at 6-7. It is therefore more probable than not that the employer rejected claimant’s religious exception request without any individual consideration as to whether she was asserting a sincere religious belief that conflicted with taking the vaccine.

To establish a process for approving exceptions based upon sincerely held religious beliefs but to deny claimant’s request without any individual consideration of the sincerity of her asserted religious views was problematic. Claimant was a Christian and cited the religious principle that her body was a temple that she could not defile. Transcript at 13. Claimant also asserted a religious basis for her view that terminating a pregnancy was equivalent to murder, citing to a chapter and verse from the Bible. Transcript at 27. Though no constitutional issue need be reached, these views appeared to be rooted in religion and held by claimant in good faith, and thus potentially of the type recognized as sincere for purposes of the First Amendment Free Exercise Clause. *See Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829, 833 (1989) (“[B]eliefs must be rooted in religion—not purely secular—to benefit from Free Exercise Clause protection.”); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 726 (1981) (a reviewing court’s function is to determine if termination resulted from “an honest conviction that such work was forbidden by [claimant’s] religion.”). Yet, the employer’s policy categorically rejected both of these views without individual consideration because one involved bodily integrity and the other use of fetal cells in testing of the vaccines.

The failure of the employer’s policy to individually consider the sincerity of claimant’s views was unreasonable. If sincerely held, the views claimant articulated could be the basis of a sincere religious objection to receiving the COVID-19 vaccine. For example, although the vaccines did not contain fetal tissue or cells, the vaccines were tested on cells from a line that may have been derived originally from fetal tissue. This aspect of the vaccines’ testing could have implicated claimant’s view that terminating a pregnancy and murder are equivalent, which in turn could mean that taking a vaccine that was tested on cells that may have been derived from fetal tissue would conflict with claimant’s belief that her body was a temple that she was not allowed to defile. Because the employer’s policy categorically excluded

claimant's views from consideration, the employer failed to meet their burden to show that the aspect of their policy related to denying claimant's religious exception request was reasonable. Because this aspect of the policy was not reasonable, claimant's subsequent willful 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. 23-UI-211975 is set aside, as outlined above.

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

DATE of Service: March 29, 2023

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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