

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0518

Modified
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On October 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and was disqualified from receiving benefits effective October 10, 2021 (decision # 73939). On November 18, 2021, decision # 73939 became final without claimant having filed a request for hearing. On December 27, 2021, claimant filed a late request for hearing on decision # 73939. ALJ Kangas considered claimant's request, and on January 10, 2022 issued Order No. 22-UI-183636, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by January 24, 2022. On January 21, 2022, claimant filed a timely response to the appellant questionnaire. On April 13, 2022, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 22-UI-183636 was cancelled and that a hearing would be scheduled to determine if claimant's late request for hearing should be allowed and, if so, the merits of decision # 73939. On March 27, 2023, ALJ S. Lee conducted a hearing, and on April 24, 2023 issued Order No. 23-UI-222962, allowing claimant's late request for hearing and affirming # 73939 on the merits. On May 4, 2023, claimant filed an application for review of Order No. 23-UI-222962 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The rest of this decision addresses the work separation.

FINDINGS OF FACT: (1) Rogue Valley Oral & Maxillofacial Surgery PC employed claimant as an office manager from February 22 to October 14, 2021.

(2) In accordance with state regulations, the employer expected that their employees would be vaccinated against COVID-19 by October 18, 2021.

(3) Claimant objected to receiving the COVID-19 vaccine at that time because she was pregnant. Claimant's treating doctor did not recommend that claimant delay getting the vaccine. Nonetheless,

claimant intended to receive the vaccine only after giving birth.

(4) Prior to October 14, 2021, claimant discussed her concerns about the vaccine mandate with the employer's owner. From this conversation, claimant and the employer expected claimant to begin maternity leave on Monday, October 18, 2021, and that her last scheduled working day would therefore have been October 15, 2021, prior to the vaccination deadline.

(5) Claimant believed that since she would be on leave prior to the effective date of the vaccine requirement that the requirement did not apply to her until she returned from leave. The employer expected claimant to comply with the requirement despite being on leave. The employer believed their employees had to be vaccinated, whether or not on leave, by October 18, 2021 to comply with government regulations. The employer did not see a practical distinction in granting claimant unpaid maternity leave until she was vaccinated versus discharging claimant for failure to comply with the requirement and rehiring her when vaccinated.

(6) On October 14, 2021, the employer discharged claimant because she did not intend to be vaccinated by October 18, 2021.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The order under review determined that claimant's belief that the employer's vaccine requirement did not apply to her while on maternity leave "was not based on any specific information provided by the employer," and she therefore "made a conscious choice" to violate the employer's reasonable expectation by refusing to be vaccinated prior to October 18, 2021. Order No. 23-UI-222962 at 6. The record does not support that determination.

The employer discharged claimant because she did not intend to be vaccinated against COVID-19 prior to October 18, 2021. The employer expected, in accordance with government regulations, that their employees would be vaccinated by October 18, 2021. While claimant was aware of this expectation generally, she believed that the employer did not expect her to be vaccinated prior to that date because she would be on maternity leave as of that date. She testified she believed this because, "[The owner] and I had had a verbal agreement that I would be returning to work and that it wasn't an issue that I didn't have a medical or religious exemption filed because I would just take my leave. Become

vaccinated and return to work in three months and be in compliance.” Transcript at 31. Claimant therefore felt “completely blindsided” by the discharge on October 14, 2021. Transcript at 31.

The owner did not rebut, by a preponderance of evidence, claimant’s assertion that there was a verbal agreement to allow claimant to take maternity leave rather than comply with the vaccination requirement deadline. He confirmed that, “[W]e had a discussion about that,” but was confused by claimant’s objection to being discharged, as claimant was going to be on unpaid leave so “in our mind basically we’re just going to take her off the payroll [so that the governmental vaccine] mandate is – is not an issue and then just do a rehire.” Transcript at 32-33. The owner described the difference between claimant going on unpaid maternity leave and being discharged, and then rehired as “complete semantics.” Transcript at 33. He elaborated, “[S]he would go, you know, give birth. Get vaccinated or come up with an exemption and then we would rehire her.” Transcript at 33. Given the owner’s view that there was no distinction between allowing claimant to go on leave to delay her compliance with the vaccine requirement, or discharging her with the intent of rehiring her at the end of what would have been the maternity leave period if vaccinated, claimant’s testimony that her conversation with the employer led her to believe that going on maternity leave exempted her from the employer’s vaccine deadline is likely true.

Because claimant reasonably believed that the vaccination deadline of October 18, 2021 did not apply to her due to her planned maternity leave, she did not willfully violate the employer’s expectation of being vaccinated by that deadline. Similarly, because the record does not show that claimant knew or should have known that the vaccination deadline applied to her under the circumstances, she did not, with wanton negligence, violate the employer’s expectations. At worst, claimant’s differing understanding from the employer of the applicability of the vaccination deadline, given claimant’s impending leave, amounted to a good faith error that is excluded from the definition of misconduct. Accordingly, the employer has not shown that claimant was discharged for misconduct.

For these 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. 23-UI-222962 is modified, as outlined above.

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

DATE of Service: June 8, 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 الاستئناف 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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