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

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0783

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 94858). Claimant filed a timely request for hearing. On June 3, 2015, ALJ R. Frank conducted a hearing, and on June 10, 2015 issued Hearing Decision 15-UI-39851, affirming the Department's decision. On June 29, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Nichols & Associates, Inc. employed claimant as a grocery store food demonstrator from August 2013 to December 1, 2014. Claimant typically worked weekend shifts.

(2) The employer expected claimant to maintain contact with her representative about scheduling matters. Claimant understood that expectation.

(3) Claimant last worked for the employer on October 5, 2014. On October 10, 2014, claimant's mother passed away. On October 13, 2014, claimant left a message for her representative requesting time off work. On October 14, 2014, claimant spoke with her representative, who agreed that claimant could take the following two weekends off work. Claimant asked that her representative schedule claimant to work throughout November, and said she would contact the representative on October 30, 2014 to get her November work schedule. Claimant understood that her supervisor agreed.

(4) On October 30, 2014, claimant called her representative as agreed and left a voicemail message asking about her return to work. The representative did not return claimant's call. Claimant thought her representative might have scheduled her to work but was too busy to return her calls and did not want to miss any shifts, so, on October 31, 2014, claimant visited her usual work site to look for paperwork about her schedule. There was no paperwork.

(5) On November 3, 2014 and November 6, 2014, claimant again called her representative and left voicemails, but the representative did not return either of claimant's calls. Claimant then returned to her usual work site to look for paperwork scheduling her to work to ensure that she did not miss any shifts, but, again, there was no paperwork. Claimant continued trying to contact her representative by sending an email each week through the third week of November, but never received a response to her voicemails or emails.

(6) Claimant did not contact anyone other than her representative at the employer's business or human resources because the employer's policy was for employees to deal with scheduling matters through their representatives. Audio recording at ~ 24:45-25:10. Claimant had always been told to contact her representative rather than others, so it did not occur to her to contact someone else. She assumed that her representative was too busy to return her calls, saw that the employer had scheduled other employees to cover the available shifts, and concluded the employer must not have any available shifts for her. Having made repeated efforts to contact her representative from October 30, 2014 through the week of November 17, 2014, claimant stopped calling and emailing her representative. She remained willing to work for the employer if called.

(7) On December 1, 2014, the employer processed claimant's work separation. At the time, the employer's records showed claimant had been placed in an on-call status for approximately six weeks, and an unknown person at the employer's business had entered notes into the system indicating that she had resigned on an unknown date for "family issues." Audio recording at ~19:55. Claimant never told the employer that she resigned.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

In Hearing Decision 15-UI-39851 the ALJ concluded that claimant quit work, reasoning that, in the absence of an "alternate explanation why the employer's records would contain evidence of a resignation for family reasons," continuing work remained available for claimant. Hearing Decision 15-UI-39851 at 3. The ALJ further reasoned that claimant was the party that "originally stipulated that she stop working" and, by ceasing her attempts to contact her representative and failing to contact other individuals at the employer about her employment status after "unsuccessful cursory attempts to contact her supervisor," she demonstrated she was unwilling to accept the continuing work Hearing Decision 15-UI-39851 at 3.

However, the records to which the ALJ deferred consisted of a note in the employer's system. The employer's witness did not offer any information about the nature of the note at issue to establish that it was, more likely than not, accurate or was the type of record kept in the regular course of business. She did not identify the employee who was supposed to have made the note, or the circumstances under which the note might have been made, and did not claim to have discussed the note with the person who made it. The witness also testified that she had never spoken with claimant, and did not know anything

about claimant's employment or the events at issue beyond that note "in the system." Audio recording at ~20:52, 22:50. Given the circumstances as described, we cannot conclude that the note had more evidentiary value than claimant's firsthand testimony that she did not quit. Nor do we find it significant that claimant was the moving party in asking for time off work, given that the unrefuted testimony on this record is that she asked for only two weekends off work and understood that her representative would return her to the work schedule beginning in November 2014.

We also disagree that claimant demonstrated unwillingness to continue working for the employer, or that her attempts to contact her representative were cursory. Claimant believed she had arranged with her representative to return to work in November, and, when that turned out not to be true, made repeated and sustained efforts to reach her supervisor over approximately four weeks and two trips to her usual work site to ensure that she did not miss any shifts due to communication problems. While there was a phone extension claimant could have dialed to reach "payroll," the employer did not claim or show that there was a similar option for "human resources," "a manager," or "scheduling," and it is not implausible that an individual under the circumstances would miss the intuitive leap necessary to conclude that contacting "payroll" would help resolve claimant's scheduling problems, which she knew, and the employer agreed, were supposed to be handled by her representative. Audio recording at ~24:45-25:10. Under the circumstances, there is little to suggest that claimant knew or should have known, she should contact someone else when she was unable to reach her representative, and claimant's failure to contact her representative's supervisor or human resources does not translate into evidence of an unwillingness to work.

Claimant's understanding that she was going to be on the November 2014 work schedule, followed by her repeated and sustained efforts to contact her representative over an approximately 4-week period and the extra measures she took to make sure she did not miss any shifts because of the communication problems she had with her representative, all demonstrate claimant's willingness to continue working for the employer for an additional period of time. As of December 1, 2014, however, due to a note placed in the employer's business records by an unknown individual and a decision-making process about claimant's circumstances that did not include contacting claimant and were not otherwise described on this record, the employer erroneously concluded that claimant had quit work, and processed her work separation. The employer's December 1, 2014 termination of claimant's employment in its system is the first unambiguous point at which one of the parties to this employment relationship acted to end the relationship. We therefore conclude that the work separation was a discharge, which occurred on December 1, 2014.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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.

On this record, the employer discharged claimant because of a note in its system that erroneously stated that claimant had resigned for family reasons. However, claimant had not actually resigned, the record does not show who made that note or why the person made it, and the employer did not contact or attempt to contact claimant before processing her termination. Notably, the employer's witness did not have any information about claimant's employment or termination beyond that which was recorded in the employer's computer system. Audio recording at ~21:06. The employer did not suggest or show that claimant engaged in misconduct connected with work, or that she was discharged because of it. Therefore, claimant is not subject to disqualification from unemployment insurance benefits because of her discharge.[1]

DECISION: Hearing Decision 15-UI-39851 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: <u>August 20, 2015</u>

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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[1] Even if we had concluded that claimant voluntarily left work, we would still conclude that claimant's separation was not disqualifying because a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would conclude they had no reasonable alternative but to quit work after approximately four weeks of repeated, sustained and unsuccessful efforts to contact her representative about returning to work. *See* OAR 471-030-0038(4). Given the employer's expectation that claimant handle scheduling matters through her representative, claimant's understanding that she was supposed to direct those sorts of inquiries to her representative, and that it never occurred to claimant to do otherwise, contacting her representative's supervisor, payroll or human resources was not a reasonable alternative under the circumstances.