EO: 200
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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
2017-EAB-1271

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 19, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144728). Claimant filed a timely request for hearing. On October 18, 2017, ALJ Scott conducted a hearing and issued Hearing Decision 17-UI-94886, concluding the employer discharged claimant, but not for misconduct. On November 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments when reaching this decision.

FINDINGS OF FACT: (1) New Seasons Market, LLC employed claimant as a floral clerk at one if its stores in Portland, Oregon.

(2) The employer had a point-based attendance policy under which an employee was subject to discharge if the employee accumulated 10 attendance points in a rolling six month period. Unless an absence was "protected," 3 attendance points were accrued for an absence regardless of the reason for it. An absence that was covered under an approved leave, including under the Family Medical Leave Act (FMLA), was considered a protected absence and no attendance points were accrued as a result of it. Claimant understood the employer's point-based attendance policy. The employer expected employees to remain in reasonable contact when absent from work. Claimant understood the employer's expectation as a matter of common sense.

(3) The employer had scheduled claimant for work on June 9 and 10, 2017. Before her shift began on June 9, 2017, claimant was notified that her mother who lived in Colorado might have had a heart attack. Before she was scheduled to report for work, claimant sent a text message to her manager notifying the manager that she was not going to report for work at the start of her shift, but might be in at 1:00 p.m. However, claimant later decided to travel to Colorado to be with her mother and began the 18 hour drive to reach her mother's home. As a result, claimant did not report for work at 1:00 p.m. On the morning of June 10, 2017, claimant sent a text message to her manager apologizing for her absence

on June 9, 2017. In the afternoon, an assistant manager received a phone call from a person she understood to be claimant's mother, stating that claimant was not going to report for work because she was "experiencing a family emergency." Transcript at 24. The assistant manager relayed this information to claimant's manager.

(4) Claimant was scheduled to work on June 12, 13, 15 and 17, 2017. Claimant neither reported for work on those days nor called her manager or any other employer representative to notify the employer of her absences. Unless those absences were covered by a leave and were protected, claimant would be subject to discharge based on the attendance points she accrued as a result of them.

(5) Between June 10 and June 19, 2017, claimant's manager and the employer's human resources assistant manager tried to contact claimant by phone and by email to learn more about claimant's situation, but both were unsuccessful. Claimant's cell phone often did not receive a signal at her mother's residence. Sometime between June 10 and June 19, 2017, the assistant manager for human resources received information that claimant needed to miss work to take care of her mother. On June 21, 2017, the human resources assistant manager sent an email to claimant telling her that although "you have a lot going on," claimant should apply for a leave as an "important step for us to ensure your time away is protected [not an absence under the attendance policy]." Exhibit 1 at 15. In the email, the assistant manager also asked claimant to "reach out" to her because she wanted to check in with her and make sure that she understood the "leave of absence process." *Id.*

(6) By June 21, 2017, claimant had not contacted the assistant manager in response to the June 19, 2017 email. On that day, the assistant manager contacted the employer's third-party benefit administrator, Matrix, to initiate a FMLA leave for claimant. Also on June 21, 2017, the assistant manager sent an email to claimant advising claimant that she had applied for a FMLA leave on claimant's behalf with Matrix, which would contact claimant about the medical certification it required to approve the FMLA leave for claimant, and providing claimant with the name and contact information for the Matrix representative assigned to claimant's claim and leave application. Exhibit 1 at 11. The email concluded, "If *we* do not hear from you by Friday [June 23, 2017], *we* will need to move forward with an employment decision." *Id.* (emphasis added). Sometime before June 25, 2017, claimant contacted the Matrix representative assigned to her claim and inquired about what she needed to do and the documents she needed to submit to secure an approved FMLA leave. The Matrix representative did not inform claimant of any deadlines by which Matrix needed to receive paperwork to approve the requested FMLA leave. Claimant did not contact the assistant manager for human resources in response to her emails of June 19 and 21, 2017 because claimant thought that by contacting the Matrix representative she had received the information she needed about FMLA and the leave of absence process, and that she had complied with the assistant manager's instruction to contact "us."

(7) On June 25, 2017, claimant sent an email to the employer's assistant manager for human resources in which she notified the assistant manager that she was and had been in touch with the Matrix representative and "just wondered how the leave of absence process was going. **** Let me know!" Exhibit 1 at 15. The assistant manager did not respond to claimant's email.

(8) Sometime around approximately early to mid-July 2017, claimant arranged for the physician treating her mother to obtain the medical certification paperwork that the physician needed to complete and submit to Matrix for approval of her FMLA leave. Sometime during this same time, claimant's mother

informed her that the physician had returned the required medical certification to Matrix. Around approximately mid-July 2017, claimant called the Matrix representative and understood from the call the Matrix had received the medical certification from the physician and that Matrix would "go ahead and get it [claimant's FMLA leave] approved." Transcript at 31.

(9) On July 16, 2017, claimant sent an email to the assistant manager for human resources informing her that "my mom said her doctor sent a note in. Wondering how the process is going? Will my position be open at New Seasons or do I need to apply for a new position when I come back?" Exhibit 1 at 14-15. On July 17, 2017, the assistant manager responded to claimant's email stating that she had checked the status of claimant's claim and "it looks like it is still pending." Exhibit 1 at 14. She did not tell claimant that the medical information sent by the physician had not been received by Matrix or that it was inadequate. She did not inform claimant of any deadlines by which Matrix needed to receive adequate medical information to approve claimant's application for a FMLA leave. The assistant manager concluded her email by assuring claimant that her position would be protected so long as it was covered by protected leave and that, if the leave was not approved, they would at that point discuss the next steps. *Id.*

(10) On July 25, 2017, Matrix informed the assistant manager for human resources that it was denying claimant's claim for a leave under FMLA because it had not received the required medical certification from the physician treating claimant's mother within 25 days of the initiation of claimant's claim for a leave under FMLA. On that day, the assistant manager left a voicemail message for claimant asking claimant to contact her. Later that day, claimant sent an email to the assistant manager stating that she had been unable to receive the assistant manager's call because she was in appointments, and inquiring as to the assistant manager's availability to take a call from her later that day. The assistant manager responded to that email setting out her availability, but claimant did not call her that day.

(11) On July 26, 2017, the employer discharged claimant. In a letter sent to claimant that day, the employer stated that it was discharging claimant because claimant had been absent from work since June 9, 2017, the employer had not been able to reach claimant by phone or speak to her in live time after June 9, 2017, and Matrix had denied her claim for a FMLA leave of absence, which would have protected claimant's absences beginning on June 9, 2017.

(12) Shortly after July 26, 2017, Matrix notified the employer that it had received the medical certification from claimant's mother's physician and asked if the employer wanted it to reopen claimant's request for a FMLA leave. The employer declined the request because it had already discharged claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. OAR 471-030-0038(3)(a) (August 3, 2011) 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) (August 3, 2011) 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. A discharge for compelling family reasons where claimant has made the attempt to preserve the employer-employee relationship is not misconduct. OAR 471-030-0038(3)(d). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Given the employer's statements in its July 26, 2017 discharge letter to claimant and its witnesses' testimony at hearing, it appears that it discharged claimant due to claimant's failure to obtain an approved FMLA leave from Matrix, which resulted in the accrual of a sufficient number unprotected absences to subject claimant to discharge under its attendance policy, and claimant's alleged failure to maintain contact with the employer during the time she was communicating with the Matrix representative about the requirements for an approved FMLA leave.

With respect to claimant's alleged violation of the employer's attendance policy by the number of absences she accrued, the issue before EAB as it determines whether or not claimant is disqualified from benefits is not the number of times she was absent and if that number exceeded the number permissible under the employer's policy, but whether those absences arose from claimant's willful or wantonly negligent behavior. *See* OAR 471-030-0038(3)(a). Here, it was undisputed that claimant began missing work on June 9, 2017 and continued to miss work after that date due to her need to travel to Colorado to attend to and care for her ill mother who had experienced heart attack in Colorado. Claimant's absences therefore arose from "compelling family reasons" and the absences were not misconduct if claimant tried to maintain her employment, made efforts to do so that were reasonable under the circumstances and the employer was unable or was unwilling to accommodate those efforts. *See* OAR 471-030-0038(1)(e)(B), OAR 471-030-0038(3)(d); June 26, 2009 Memorandum to UI Manager, Supervisors and Adjudicators from George Berriman, Manager UI Programs and Methods at 2-3 (if claimant was discharged due to violations of an employer attendance policy that resulted from claimant's inability to notify the employer of an absence and to make arrangements for a leave as a result of an immediate to travel to an ill immediate family member, this violation was not misconduct if claimant tried to keep his job, made efforts to do so that were reasonable under the individual circumstances and the employer was unable or unwilling to accommodate claimant's efforts).

Because the employer conceded both the reason for claimant's absences beginning on June 9, 2017 and that it ultimately did not accommodate claimant's efforts to obtain a leave but discharged her instead, the remaining issue is whether claimant made "an attempt to maintain the employer-employee relationship" that was reasonable under the circumstances *See* OAR 471-030-0038(3)(d). As of June 21, 2017, when the assistant manager of human resources initiated a request for a FMLA leave on behalf of claimant, it does not appear that the employer thought claimant did not to want to maintain her employment relationship with the employer. Although the testimony of the employer's witnesses was not clear as to how it came about, as of the time claimant's request for the FMLA leave was initiated with Matrix, the employer was aware that the health of claimant's mother had caused claimant to leave Oregon to attend to and care for her mother in Colorado. Transcript at 6-7; 15; Exhibit 1 at 12. Within at most four days after June 21, 2017, claimant was in touch with a Matrix representative about the requirements to obtain a FMLA leave and apparently continued to be in regular contact with that representative. After claimant's FMLA claim was initiated, claimant twice communicated by email with

the employer's assistant manager of human resources inquiring about the status of her requested leave, whether it had been approved, and whether her job would be maintained, on June 25 and on July 16, 2017. Since the employer's responses to both of claimant's emails suggested that claimant would maintain her position with the employer by obtaining the FMLA leave, which she could only achieve through Matrix, it was reasonable that claimant did not contact the employer more frequently during these three weeks, particularly since the employer had not instructed claimant to contact it directly rather than Matrix, as of approximately mid-July 2017, claimant was under the impression that all necessary documentation that would entitle her to a FMLA leave had been submitted to Matrix, neither the employer nor Matrix had informed her that the medical documentation required for the FMLA leave was incomplete and that she needed to have it submitted by any particular deadline date or by July 25 or 26, 2017 when she specifically inquired about the status of her claim for a FMLA leave, and the reassuring response of the assistant manager for human resources to her July 16, 2017 email which reasonably led claimant to believe that nothing was nothing awry with her request for the FMLA leave.

In addition, from claimant's question in the July 16, 2017 email to the assistant manager, "Will my position be open at New Seasons or do I need to reapply for a new position when I come back?", it appears most likely that claimant wanted to come back to work, anticipated returning to her job and made reasonable attempts to maintain the employment relationship by remaining in contact with the human resources assistant manager and the Matrix representative after June 21, 2017. While claimant was not aware that Matrix would deny her claim for the FMLA leave if it did not have all documentation by July 25 or 26, 2017, or that Matrix might not have received all necessary medical documentation by that date, her lack of awareness was reasonable under the circumstances, since neither alleged fact was clearly and directly communicated to her. Because claimant sought an accommodation to take care of an ill immediate family member that necessitated her absence from work and made reasonable attempts to maintain the employment relationship, and the employer discharged claimant when its agent, Matrix, denied her request for the FMLA leave or the accommodation, claimant's discharge for violating the employer's attendance policy was based on a compelling family reason, which under the circumstances, was not for misconduct.

The employer contended at hearing and in its written argument that it also discharged claimant because she failed to call an employer representative on the phone between June 19 and July 26, 2017. As discussed above, the frequency with which claimant was in email contact with the employer during this time was reasonable under the circumstances. While the employer might have asked claimant on June 19 and 21, 2017 to "reach out" to it and complained that it had not "heard" from claimant, she responded to both communications by email, and the employer did not explicitly instruct claimant to make a voice call to the employer. Exhibit 1 at 15. As well, in view of the suggestion in the employer's emails to claimant that all she needed to achieve in order to maintain her position with the employer was to obtain an approved FMLA leave, it was reasonable for claimant to infer that being in contact with Matrix, the entity that would approve such a leave for the employer, was tantamount to contact with the employer for purposes of maintaining the employer-employee relationship. On this record, claimant did not willfully, or with wanton negligence, violate the employer's instructions or its standards by the manner and frequency with which she was in contact with the employer from June 19, 2017 from July 26, 2017.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-94886 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: December 13, 2017

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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