EO: 200
BYE: 201934

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

363
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1071

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 83411). Claimant filed a timely request for hearing. On October 16, 2018, ALJ Snyder conducted a hearing, and on October 24, 2018 issued Order No. 18-UI-118653, concluding the employer discharged claimant for misconduct. On November 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a pharmacy technician from June 11, 2007 until August 30, 2018.

(2) The employer expected employees to have no more than three unscheduled absences in a rolling six month period. Unscheduled absences that were authorized under federal or state family leave statutes were excused and did not count under the employer's attendance policy. If an employee exceeded the number of unscheduled absences allowed under attendance policy, the employer would initiate the corrective action process.

(3) Claimant experienced severe migraine headaches that caused her to miss work. Claimant's daughter experienced acute asthma, which also caused claimant to miss work to care for the daughter.

(4) On September 20, 2017, the employer issued a level 1 corrective action to claimant due to the number of unexcused absences she had accrued as a result of her own and her daughter's health conditions. At the discussion accompanying this corrective action, it was agreed that claimant "would show up for work or call the matrix [the employer] with qualifying incidents [absences that were excused under leave statutes]." Exhibit 1 at 10.

(5) On November 3, 2017, the employer issued a level 2 corrective action to claimant because she had continued to accrue unexcused absences due to her own and her daughter's health conditions after the level 1 corrective action was issued, and the employer considered that "sufficient progress has not been

made [by claimant] to achieve the agreed upon changes discussed during the Initial Discussion, Level 1 of the Corrective Action Process." Exhibit 1 at 12. At the meeting accompanying this second corrective action, it was noted that "claimant did call matrix for self," as specified in the level 1 corrective action, "but was denied [the absences were not excused]." *Id.* During the discussion that accompanied this level 2 corrective action, it was agreed that claimant would "continue to call matrix if ill self or child" necessitated an absence. Exhibit 1 at 13.

(6) On May 1, 2018, the employer issued a level 3 corrective action to claimant because she had accrued still more unexcused absences due to her own and her daughter's health conditions after the level 2 corrective action was issued, and the employer still did not regard her progress sufficient in reaching the goals of the level 2 corrective action. In the level 3 corrective action, the employer noted that it had previously discussed with claimant the "potential for certifying any conditions applicable for self or children," that "improved attendance is important and essential" and that it "encouraged [claimant in] calling matrix as needed & follow[ing] through with medical certification [that would excuse the absences due to claimant's and her daughter's health conditions under leave statutes]." Exhibit 1 at 15. During the discussion that accompanied this level 3 corrective action, the employer noted that the specific issue of concern was claimant's "attendance," and to address that concern it was agreed that claimant's "improved attendance" was expected, that there was a "[p]otential to medically certify any conditions for self or children [and have absences due to those conditions excused]," and that claimant would "arrange for other accommodation to get to work when situations arrise [sic]. Exhibit 1 at 16.

(7) After claimant began receiving the corrective actions in 2017, she tried several times to have her absences due to her own and her daughter's health conditions authorized under the Family Medical Leave Act (FMLA), which would have excused those absences under the employer's attendance policy and would have obviated further corrective actions based on them. Claimant's efforts were unsuccessful. The employer required documentation to support that the medical conditions were serious enough to be excused under FMLA. With respect to having her migraine headaches evaluated as a serious medical condition under FMLA, claimant's physician required her to have seen him twice in one year about them. While claimant had seen him twice, she had not done so specifically complaining about migraines and the physician refused to certify the migraines from which she suffered. With respect to her daughter's asthma, claimant went to the specialist who provided asthma treatments to the daughter, but the specialist felt that the daughter's pediatrician should be the one who certified that the daughter had a serious health condition. Claimant then went to the daughter's pediatrician for the certification, but the pediatrician felt that the asthma specialist should be the one to provide it. Claimant told her supervisor about her difficulties in obtaining the necessary paperwork and authorizations to secure authorizations under FMLA, and to excuse her absences as advised in the corrective actions. Claimant's absences due to the health conditions of her and her daughter continued to be unexcused.

(8) On August 28, 2018, the employer issued a level 4 corrective action for "attendance" because she had continued to accrue unexcused absences due to her own and her daughter's health conditions after receiving the level 3 corrective action. Exhibit 1 at 19. At that time, claimant had another request for a FMLA leave pending with the employer that, if authorized, would excuse the absences she had accrued. Claimant's supervisor explained to her that she was being placed on a one day decision making leave on August 29, 2018 to "choose to change your performance and/or behavior and return to the organization, or to voluntarily resign your employment." Exhibit 1 at 19. The supervisor told claimant that on the next day, August 30, 2018, claimant would meet with the supervisor to state her decision, and if she

chose to remain employed, she needed to complete a draft action plan form setting out the specific steps by which she intended to improve her performance to meet the employer's expectations, and the action plan would from the basis for a last chance agreement between claimant and the employer that would follow. The supervisor informed claimant that if she appeared at the August 30 meeting without a properly completed draft action plan or did not participate in developing a last chance agreement with the employer, she would be subject to discharge unless she agreed to voluntarily terminate her employment.

(9) On August 29, 2018, claimant decided that she was unable to complete the draft action plan because she could not truthfully identify any steps she could take to improve her attendance by limiting the number of days she missed work when her absences were caused by the health conditions of her and her daughter, over which she did not have control.

(10) On August 30, 2018, claimant met with her supervisor and brought with her a draft action plan form on which nothing was written. Claimant explained to her supervisor that she was unable to honestly prepare a draft action plan since there were no steps she could take that would guarantee that she would not miss work due to her own and her daughter's health conditions. Claimant's supervisor asked her if she was going to participate in a last chance agreement by designing an action plan, to which claimant stated that she was not because she could not do so honestly. Claimant's supervisor asked her if she was voluntarily resigning, to which claimant stated that she was not. The supervisor then told claimant she was discharged for not participating in developing a last chance agreement. Sometime after she was discharged, claimant learned that the employer had denied her pending request for FMLA leave.

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. OAR 471-030-0038(3)(a) (January 11, 2018) 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. The employer carries the burden to show claimant's misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-118653, the ALJ concluded that the employer showed that claimant engaged in misconduct for which it discharged her. The ALJ reasoned that, although claimant testified that she did not complete the draft action plan because she did not know what she could honestly state she would have done to improve her attendance, the employer's witness testified that claimant would have adequately completed the draft action plan by stating "what she would attempt to do to improve her attendance, and could have indicated she would pursue FMLA coverage, or make other accommodations in order to reduce the amount of time she needed away from work." Order No. 18-UI-118653 at 3. Because claimant could have honestly completed a draft action plan containing this suggested content

and did not do so, the ALJ determined that claimant willfully failed to complete the draft action plan and participate in developing the last chance agreement. Order No. 18-UI-118653. We disagree.

The three corrective actions issued before the level 4 corrective actions referred to claimant's absences as having been caused by her own and her daughter's health conditions, and all of them referred the possibility of having those absences excused, presumably under FMLA. The employer did not challenge claimant's testimony that she had tried several times since the first corrective action was issued in September 2017 to have her absences excused under FMLA, and for various reasons she had not been able to obtain the necessary physicians' authorizations. Nor did the employer dispute that as of the date of the August 28 level 4 corrective action that directly led to her discharge, claimant had yet another request for FMLA authorization pending with the employer, which was later denied. Notably, the employer's witness did not suggest at hearing that claimant's and her daughter's health conditions were not sufficiently serious to qualify to have claimant's absences excused under FMLA. Nor did the witness suggest that claimant had not diligently pursued the steps needed to have the absences excused, or that the factors that interfered with her obtaining FMLA authorization were other than that she and her daughter did not suffer from qualifying conditions.

Despite the references in each level of corrective action to FMLA authorizations, the employer continued to issue the progressive corrective actions for claimant's absences and to urge her to improve her attendance, despite claimant having informed her supervisor of her difficulties in securing authorizations for the absences under FMLA,. Exhibit 1 at 10-18. When the level 4 corrective action was issued on August 28, it was not unreasonable for claimant to have concluded that, since the employer continued to issue corrective actions to her when it presumably was aware of her efforts to obtain FMLA authorization, an adequate draft action plan would need to include more than that she would continue to seek to have the absences excused under FMLA. That claimant would think that she was unable to complete a draft action plan under these circumstances was also reasonable because she could not guarantee to improve her attendance when the absences at issue were due to medical conditions that were beyond her voluntary control, and her previous efforts to have the absences excused under FMLA had not been sufficient to forestall the continued issuing of progressive levels of corrective actions. Given the limited options of which claimant was aware at the time, her failure to complete a draft action plan was not willful or wantonly negligent violation of the employer's standards, but based on an apparently genuine and sincere belief that there were no steps she could promise to take that would guarantee to improve her attendance.

While the ALJ seized on the testimony of the employer's witness that an adequate draft action plan need only state that claimant would try to attend work and would continue to pursue a FMLA authorization for her absences, there is no evidence in the record showing or tending to show that any employer representative told this to claimant. The evidence in the record is insufficient to show that claimant knew or reasonably should have been aware that the language suggested by the employer's witness would have sufficed to have constituted a sufficient draft action plan. Rather, the backdrop of the corrective actions the employer had issued to claimant most reasonably suggests otherwise. On this record, the employer did not meet its burden to show that claimant's failure to have presented a draft action plan on August 30 was a willful or wantonly negligent violation of the employer's standards.

While the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 18-UI-118653 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: **December 14, 2018**

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 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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