EO: 200
BYE: 202010

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0488

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 125126). Claimant filed a timely request for hearing. On May 9, 2019, ALJ Janzen conducted a hearing, and on May 13, 2019 issued Order No. 19-UI-129769, affirming the Department's decision. On May 24, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) State Farm employed claimant as a sales and service person from October 1, 2018 until March 11, 2019.

(2) The employer expected claimant to perform her work satisfactorily. The employer also expected claimant not to miss work excessively. Claimant was aware of the employer's expectations as a matter of common sense.

(3) To meet performance standards, the employer expected claimant to make 75 to 125 outbound calls each day to potential customers with the goal of "transferring" prospects to an agent for insurance quotes, or to explore the financial products that the employer offered. While claimant tried to meet the employer's standards, she often was unable to do so because she needed to perform other work or answer incoming calls. When answering incoming calls, the employer wanted claimant to make "pivots," speaking to customers about insurance or financial products other than what they had called about, and set them up for appointments for further discussion. While claimant tried to answer incoming calls, she often was unable to do so because she was occupied with other work.

(4) During her employment, claimant had several health issues. Sometime around early December 2018, claimant developed a stomach ulcer that caused her to have a miscarriage. As result, claimant was hospitalized for approximately two weeks in December and missed work. In February 2019, claimant passed out and fell. As a result, claimant missed many days of work.

(5) On December 31, 2018, the employer issued a warning to claimant for failing to meet performance standards for "transfers" and "pivots." Exhibit 1 at 3. Claimant had made no pivots and had developed no prospects. Exhibit 1 at 6. The warning stated that claimant needed to make five to six transfers per day and an unspecified number of pivots. Exhibit 1 at 3. On February 12, 2019, the employer issued a warning to claimant for failing to meet performance standards for "pivots" and outbound calls. Exhibit 1 at 4. Claimant had made no pivots. Exhibit 1 at 6. The warning stated that claimant needed to make 75 to 125 outbound calls per day and an unspecified number of pivots. Exhibit 1 at 4.

(6) As of early March 2019, claimant had missed around 45 days of work since she was hired. On March 11, 2019, claimant called the owner to state that she was going to be absent that day due to an out-of-town medical appointment in the afternoon. The owner asked claimant to come in that morning, before the appointment, for a review of her recent work performance. Claimant agreed.

(7) On March 11, claimant met with the owner and the office manager. The owner presented claimant with a third warning, dated that day, for absenteeism, failing to meet performance standards, not being dependable, and for taking out a regular trash disposal that included sensitive information. Exhibit 1 at 5, 6. Until claimant received the warning, she had not known that the employer expected her to take steps to segregate sensitive information from the regular trash disposal. The warning further indicated that claimant had made only four pivots since January 2019, and detailed claimant's history of warnings for failing to meet performance standards. Exhibit 1 at 6. The warning did not include any corrective action steps that claimant was expected to take in response. Exhibit 1 at 5-6.

(8) On March 11, the owner told claimant that they were meeting for the third time to discuss her inadequate performance. The owner also told claimant that she had missed an "unusual" number of days since she was hired, and her absences had become a "pattern." Transcript at 14, 17. The owner asked claimant if she wanted to work for the employer and if claimant thought she was a "good fit" for work as an insurance salesperson. Transcript at 6, 7, 15-16, 26. Claimant responded that she had been discussing with her husband whether she should take additional time off from work to recover her health. The owner was "shocked" that claimant was thinking about requesting additional time off from work. Transcript at 21. Claimant also stated that she was "potentially" not a good fit for the job. Transcript at 26.

(9) The owner then presented claimant with a work resignation form that the owner had brought to the meeting. The owner told claimant that it was procedure to have departing employees sign the form. The preprinted reason on the form for the resignation was that the position was not a "good fit." Exhibit 1 at 7. The owner filled out the form and gave it to claimant to sign. Claimant did not agree with the form and did not want to quit. However, claimant thought the employer was discharging her and signed the form because she did not think she had any choice.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

The employer contented that claimant voluntarily left work. Transcript at 13, 20-21. Claimant contended that the employer discharged her. Transcript at 5, 27. OAR 471-030-0038(2) (December 23, 2018) sets forth the standard for determining the nature of the work separation. 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). 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).

Order No. 19-UI-129769 determined that claimant voluntarily left work. The order found that claimant signed the resignation form and testified that she and the owner "mutually agreed" in their meeting on March 11 that she would no longer work for the employer. Order No. 19-UI-129769 at 2. Citing to *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998), for the proposition that when the parties mutually agree that the employment relationship will end, the separation is voluntary leaving and not a discharge, the order found that the separation was a discharge. Order No. 19-UI-129679 at 2-3. However, the conclusion about the nature of the work separation in the order under review is not supported by the record.

The order is correct as to the language paraphrased from the *Shurin* case. However, while claimant did state at one point in her testimony that she believed her work separation was a "mutual decision," she went on to state that she did not agree with the resignation form and that she signed it because "that's what I thought I had to do." Transcript at 5, 6. Regardless of the reference to a "mutual decision," it does not appear likely that claimant agreed to resign in the sense of concurring in a decision that she would no longer work for the employer. Claimant's reference likely was an acknowledgment that she was not going to protest against the decision to let her go. That claimant called the employer earlier in the day on March 11 to seek time off to attend the medical appointment corroborates her testimony that she was willing to continue working for the employer as of that time. Transcript at 8.

The circumstances surrounding the March 11 meeting and how claimant came to sign the resignation instead show that the employer was not willing to allow her to continue working. The employer had been displeased with claimant's performance for a lengthy period of time, and her performance was not improving. The employer was displeased with the days of work that claimant had missed. The owner brought the resignation form with her to the meeting with a preprinted reason for the resignation, indicating that she anticipated a work separation occurring during the meeting. The warning the owner presented to claimant during the meeting laid out all of claimant's alleged defaults since she was hired and for the first time left completely blank the section about the corrective action steps that claimant was required to undertake in response to it, implying that the owner did not intend to allow claimant an opportunity to continue working. Exhibit 1 at 5, 6. Finally, in a summary of the March 11 meeting as well as in her testimony, the owner stated that she "had" claimant sign the resignation form, suggesting that she, and not claimant, was initiating the separation. Exhibit 1 at 1; Transcript at 16. Viewed as a whole, the preponderance of the evidence shows that the employer was not willing to allow claimant to continue working after March 11, while claimant was willing to do so. The work separation therefore was a discharge on March 11, 2019.

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) (December 23, 2018). "'[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). Among other things, absences due to illness and mere inefficiency resulting from a lack of job skills or inexperience are not misconduct. OAR 471-030-0038(3)(b). 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)

From the record, it appears that the employer discharged claimant due to inadequate performance, allowing sensitive information to remain in the regular trash, and excessive absenteeism. The employer did not challenge claimant's testimony that she tried to meet the employer's performance standards, but could not despite her best efforts, and because she was hindered by other job responsibilities. Transcript at 10-12, 28. The employer did not show that claimant's failure to perform adequately arose from willful or wantonly negligent behavior, and not a lack of job skills.

The employer also did not challenge claimant's testimony that she was not aware before March 11 that she was responsible for ensuring the sensitive information was not discarded in the regular trash. Transcript at 7. As such, accepting that claimant allowed sensitive information to be disposed of in the regular trash, the employer did not show that such behavior exhibited indifference to the employer's standards and arose from a willful or wantonly negligent violation of those standards.

The parties also did not dispute that claimant's absences were due to medical issues. Even if excessive in number, absences due to illness are not misconduct. On this record, the employer did not meet its burden to show that claimant engaged in misconduct.

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

DECISION: Order No. 19-UI-129769 is set aside, as outlined above.

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

DATE of Service: <u>June 27, 2019</u>

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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