

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1196**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122924). Claimant filed a timely request for hearing. On October 5 and October 6, 2017, ALJ Monroe conducted a hearing, and on October 11, 2017 issued Hearing Decision 17-UI-94372, affirming the Department's decision. On October 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pierce Distributing, d.b.a. Industrial Craters & Packers, employed claimant as a technician until August 10, 2017.

(2) The employer had a policy manual that specified employees could be allowed to take leaves of absence under certain circumstances. The policy stated that the employer may grant a leave of absence in its discretion, and "In exercising its discretion, the Company will rely upon such factors as it deems appropriate, including, but not limited to, production requirements as well as the reason for the request."<sup>1</sup> If the leave situation involved family medical leave pursuant to FMLA, the employer did not require employees to provide a reason or end date as a condition of allowing the leave of absence. The employer notified claimant of its policy upon hire by providing him with a copy of the policy manual.

(3) Claimant last worked for the employer on July 20, 2017. On Friday, July 21, 2017, claimant took a pre-approved day off work. He was not scheduled to return to work until the following Monday, July 24, 2017.

(4) Over the weekend claimant received news that his brother was critically ill and decided he needed to take some time off work. On July 24<sup>th</sup>, claimant called the employer, spoke to a foreman, and said he would be taking the week of July 24<sup>th</sup> off work because of an unspecified personal or family matter. Later during the week of July 24<sup>th</sup> claimant called the employer, spoke to the general manager, and

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<sup>1</sup> Exhibit 1.

requested an indefinite leave of absence. Claimant mistakenly thought based upon his call with the general manager that he was on a family medical leave of absence for 30 or 60 days and should let the employer know when he was ready to return to work. Unbeknownst to claimant at the time, the employer had not approved his leave request.

(5) On five occasions between July 31, 2017 and August 8, 2017, the employer's general manager sent claimant text messages stating that corporate human resources was asking for the reason and duration of his leave of absence. Claimant did not receive most of the messages because his phone had been disconnected for non-payment. Claimant obtained phone service, and on August 8, 2017, responded that he did not know how long a leave period he needed and asked the general manager to provide corporate human resources with claimant's phone number. Human resources did not contact claimant.

(6) On August 9, 2017, the general manager sent claimant an email that stated, "the Corporate . . . HR Manager was out when I called, but if a leave of absence is to be approved they will need to know the reason and duration. An . . . open-ended leave of absence is unlikely to be approved, particularly if it is not a verified medical FMLA situation."<sup>2</sup> Claimant promptly replied, "as of now my leave will be indefinite as well as confidential" and asked "[a]ny further details?"<sup>3</sup> The employer did not respond with a request for any further details.

(7) As of August 10, 2017, the employer considered claimant's absence from work to constitute job abandonment because he was not at work and had not submitted information the employer wanted. That day, the employer sent an email to claimant terminating his employment, effective immediately.

(8) As of August 13, 2017, claimant had returned home and was ready to return to work. He contacted his foreman about his work schedule and subsequently learned that his employment had been terminated.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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) 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

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<sup>2</sup> October 5, 2017 hearing, Transcript at 10.

<sup>3</sup> *Id.* at 11; Exhibit 1.

The ALJ concluded that claimant's discharge was for misconduct, reasoning that the employer's expectations that employees provide specific information about the reason for and duration of a leave of absence and obtain approval for leaves of absence were reasonable, and since claimant "was aware" that the employer "expected him to provide the information necessary to make a determination about the approval of his leave of absence," claimant's failure to provide the information was a willful or wantonly negligent violation of the employer's expectations.<sup>4</sup> We disagree.

On this record, it is not more likely than not that claimant understood his failure to provide a reason for or duration of his leave of absence would either violate the employer's expectations or result in his discharge from employment. There is no dispute that the general manager asked claimant to provide the reason and duration for the leave of absence, or that the policy stated the reason for the request was among the factors the employer would consider in deciding whether to allow a request. However, the general manager wrote to claimant that his request was "unlikely to be approved" without the requested information, and appears never to have communicated to claimant prior to claimant's discharge that his request would be, or had been, denied.

Furthermore, it is not clear on this record that claimant actually refused to provide the information. For example, in response to one request for specific information, claimant asked the general manager to give human resources his phone number. In response to the second and final request he received, claimant declined to provide the information but asked the general manager, "Any further details?" Given that it appears claimant was asking, in that final communication, whether he needed to provide any further details to the employer, at no time does it appear that claimant was not cooperating with the employer about his leave request, that he understood he was not permitted to decline to provide the requested details, that the employer notified claimant that he would be discharged or subject to discipline if he refused to provide the information, or that claimant understood his responses to the general manager's questions were inadequate. Claimant's failure to provide a reason for or duration of his leave of absence therefore was not willful or wantonly negligent.

Even if claimant had understood he was being told, rather than asked, to provide the information the general manager requested, the outcome of this decision would remain the same because claimant believed, albeit mistakenly, that, at the time the general manager was requesting details about the reason for and duration of his leave of absence, he was on an approved family medical leave. According to the general manager's testimony, employees on family medical leaves of absence were not required to provide the employer with the reason for or duration of their leave periods; consequently, claimant would not have understood that he was required to provide that information to the employer as a condition of maintaining his employment. That claimant's mistaken belief that he was on a family medical leave of absence was sincere is supported by the fact that he contacted the employer on August 13<sup>th</sup> when he was ready to return to work, in accordance with the agreement he thought he had reached with the general manager when they spoke on the phone about claimant's leave of absence request during the week of July 24<sup>th</sup>. Had claimant not believed he was on a leave of absence and free to return to work when ready, or had he understood that he had been discharged for violating the employer's leave of absence policy by refusing to provide required information, claimant would have had no reason to contact the employer on August 13<sup>th</sup> about returning to work. At worst, claimant's sincerely held but

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<sup>4</sup> Hearing Decision 17-UI-97372 at 4.

mistaken belief that he was on a family medical leave of absence and did not need to provide the employer with additional information justifying his leave was a good faith error. Good faith errors are not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 17-UI-94372 is set aside, as outlined above.<sup>5</sup>

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

**DATE of Service:** November 15, 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](http://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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<sup>5</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.