
Civil Rights Division - Bureau of Labor and Industries
NOTICE OF SUBSTANTIAL EVIDENCE DETERMINATION

Complainant: Katherine E Whaley

Respondent: Fred Meyer, Inc.

Case Number: STEMFL150623-52600

DATE ISSUED

Investigator: Andrea Damewood

OCT 22 2015

Filing Date: June 23, 2015

Reviewed By: 

CIVIL RIGHTS DIVISION

I. Jurisdiction

Oregon Revised Statutes chapters 659A, ORS 25.337, 25.424, 171.120, 345.240, 441.178, 476.576, 651.060, 651.120, 652.355, 653.060 and 654.062, and Oregon Administrative Rules chapter 839 divisions 2, 3, 5, 6, 9 and 10 authorize the Civil Rights Division to accept, investigate, amend, resolve and determine complaints alleging unlawful practices in employment, housing, places of public accommodation, state government and career, professional and trade schools.

Specific facts supporting a conclusion that the Division has jurisdiction over respondent(s) are found below.

II. Allegations

On June 23, 2015, Complainant filed a complaint with the Civil Rights Division. Complainant alleges the following violation(s):

1. ORS 659A.183, in that Respondent retaliated against Complainant for invoking the provisions of the Oregon Family Leave Act and terminated her.

III. Identity of Respondent(s)

1. Respondent Fred Meyer, Inc. is a corporation and is a person pursuant to ORS 659A.001(9).

IV. Findings of Fact

1. Respondent Fred Meyer, Inc. employs one or more persons in the state of Oregon and is an employer pursuant to ORS 659A.001(4)(a).
2. At all times material to this complaint, Respondent employed more than 25 people in the state of Oregon and is a covered employer under the Oregon Family Leave Act (OFLA).

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3. Complainant was employed by Respondent since July 30, 1988, and worked more than 25 hours a week, making her an eligible employee for OFLA purposes.
4. Complainant worked at the Santa Clara Fred Meyer store, and was the Electronics Department manager when she was terminated on November 1, 2014.
5. On Friday, October 24, 2014, Complainant was informed by the Oregon Department of Human Services that she was needed to provide emergency foster care for her granddaughter and three siblings.
6. As part of this emergency foster care placement, Complainant was informed she would have to take the children to a medical evaluation and other appointments on Monday, October 27, 2014. Complainant was scheduled to work that day.
7. OAR 839-009-0230 (1) states that OFLA parental leave "is leave taken for the birth of the employee's child, to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age... It includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child."
8. On the morning of Saturday, October 25, 2014, Complainant called her Assistant Manager, who is also a Person in Charge (PIC), Patrick Turner, and notified him that she would be absent Monday due to the emergency foster placement.
9. Complainant states she does not have cell phone service at her home, and a storm knocked out power to her landline that day. So, later that Saturday, when Complainant was off her property, she called Will Carrol, the nighttime assistant manager and another PIC to confirm Mr. Turner changed the schedule. She also texted Russie Evans, a price-change PIC, about the absence.
10. On Sunday, October 26, 2014, Complainant states she confirmed with Mr. Turner that he had also notified Store Director Henry Johnson that Complainant would be absent Monday. Complainant states these were the same actions she had taken for prior absences.
11. On October 28, 2014, Mr. Johnson suspended Complainant for failing to personally notify him of her absence.
12. On November 1, 2014, Complainant was informed she was terminated.
13. Complainant alleges unlawful retaliation (termination) for the invocation of the Oregon Family Leave Act, in violation of ORS 659A.183.

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14. Respondent denies that it discriminated or retaliated against Complainant for her use of OFLA leave.
15. Respondent does not deny that Complainant contacted Patrick Turner or Russie Evans to notify them of her absence Monday. Respondent, however, states that Complainant failed to notify her superior, Henry Johnson, and that is what caused Complainant to be terminated.
16. Respondent states that on October 28, 2014, Complainant returned to work and was questioned as to why she did not contact Mr. Johnson. Respondent writes Complainant first stated it was too hectic to call him, but later admitted that she found Mr. Johnson unapproachable.
17. Respondent provided documentation that Complainant received a written warning and three-day suspension for failing to notify a PIC of an absence on February 6, 2013. Under company policy, the first time an employee fails to notify a PIC of an absence, they are given a three day suspension and on a second violation employees are terminated.
18. Complainant was disciplined for failure to notify a PIC of an absence on January 27, 2013, for a legitimate, non-discriminatory reason. Complainant did not dispute the discipline, but noted that she did not call anyone in that incidence, as she did not know she was scheduled to work that day.
19. Respondent argued that Complainant failed to give required written notice within three days of returning from an unforeseen leave. It cites ORS 659A.165 (3): "If an employee commences leave without prior notice under subsection (2) of this section, the employee must give oral notice to the employer within 24 hours of the commencement of the leave, and must provide the written notice required by subsection (1) of this section within three days after the employee returns to work. The oral notice required by this subsection may be given by any other person on behalf of the employee taking the leave."
20. ORS 659A.165 (1) does not require written notice. It states that a "covered employer *may* require an eligible employee to give the employer written notice." (emphasis investigator's).
21. Respondent argued that ORS 659A.165 (4) also allows "Except as provided in this subsection, if the employee fails to give notice as required by subsections (1) and (3) of this section, the employer may reduce the total period of family leave authorized by ORS 659A.162 by three weeks, and the employee may be subject to disciplinary action under a uniformly applied policy or practice of the employer."

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22. Respondent states that because Complainant did not provide written documentation of her leave within three days and because she did not follow the uniformly applied policy, its reasons for termination were legitimate and non-discriminatory.
23. The Division requested Respondent provide a copy of the attendance policy signed by Complainant, which it supplied. In this policy, signed by Complainant on March 5, 2013, it shows the attendance policy as such:
“The following conduct is regarded and accepted as an associate’s voluntary resignation (quit) of his/her employment:… Failure to notify the PIC of an absence prior to the scheduled work shift. (First incident – 3 day suspension.”
24. The Division requested that Respondent provide a company policy that defines a PIC. On September 8, 2015, Respondent counsel replied, “The company does not have any document that describes what a PIC is.”
25. Documentation supplied by Respondent to the Division includes an email sent by Complainant to several individuals, including Patrick Turner, William Carroll and Russie Evans. In this email, Complainant refers to the recipients as “PICs.”
26. Respondent did not dispute that Patrick Turner, William Carroll and Russie Evans, all of whom were contacted by Complainant regarding her absence, are PICs.
27. OAR 839-009-0250 (3) allows for an employee taking unforeseen leave to circumvent the usual notification standards: “When taking OFLA leave in an unforeseeable situation, an employee must give verbal or written notice within 24 hours before or after commencement of the leave. This notice may be given by *any other person* on behalf of an employee taking unforeseeable OFLA leave.” (emphasis investigator’s).

V. Summary

Complainant bears the burden of proof to overcome any stated legitimate, non-discriminatory reasons supplied by Respondent.

Complainant worked for Fred Meyer starting in 1988. She was promoted in 2003 to the Electronics Department manager. Complainant worked more than 25 hours a week and was therefore an eligible employee for the Oregon Family Leave Act (OFLA). Respondent employs more than 25 people in the state of Oregon and is a covered employer under OFLA.

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Complainant was notified Friday, October 24, 2014, that she was needed for the emergency foster care of her granddaughter and three other siblings that night. Complainant's next scheduled shift was Monday, October 27, 2014. The following day, Complainant contacted her Assistant Manager, Patrick Turner, and told him of her need to miss a shift on Monday for foster placement and care. (OAR 839-009-0230 (1) states that OFLA parental leave "is leave taken for the birth of the employee's child, to care for the employee's newborn, newly adopted or newly placed foster child under 18 years of age... It includes leave time to effectuate the legal process required for placement of a foster child or the adoption of a child.") Mr. Turner is known as a Person in Charge (PIC) at Fred Meyer. Complainant later informed two other PICs, Russie Evans and William Carroll, of her impending absence. Finally, on Sunday, October 26, 2014, Complainant states that she again contacted Mr. Turner to confirm that her absence was covered and that Store Director Henry Johnson was notified of her leave.

Complainant returned to work October 28, 2014, and was questioned by Mr. Johnson regarding her absence. Mr. Johnson told Complainant that she broke company policy because she failed to notify him personally of her absence. Because this was her second absence for failing to notify a PIC, Mr. Johnson informed Complainant on November 1, 2014, that she was terminated.

Fred Meyer's absence policy is as such: "The following conduct is regarded and accepted as an associate's voluntary resignation (quit) of his/her employment:... Failure to notify the PIC of an absence prior to the scheduled work shift. (First incident - 3 day suspension."

Complainant acknowledges that she was given a three-day suspension on January 27, 2013, for a legitimate, non-discriminatory reason. However, she said in that case she called no one about her absence, as she did not know she was scheduled to work. Complainant contends that she has called Mr. Turner and other PICs in the past for absences and was not disciplined.

The record favors Complainant in this circumstance for two reasons: 1) Complainant did follow the written attendance policy set forth by Fred Meyer; and, in the alternative 2) Complainant's leave can reasonably be viewed as unforeseen, so even if she had violated company policy, the law allows any person to notify Respondent of her protected absence on her behalf.

In the first scenario, Complainant followed company policy regarding notification of absences, as the policy states that employees must "notify the PIC of an absence prior to the scheduled work shift." Respondent argues it is protected in its action by ORS 659A.165 (4) which states that "Except as provided in this subsection, if the employee fails to give notice as required by subsections (1) and (3) of this section... the employee

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may be subject to disciplinary action under a uniformly applied policy or practice of the employer.”

However, Mr. Turner, Mr. Carroll and Ms. Evans are all designated as PICs, as shown in an email from Complainant to these staff members and others, referring to them as PICs. If Respondent requires an employee to notify a PIC in its written policy, then Complainant did so: to three different PICs. Complainant was an assistant manager, making Mr. Johnson the only PIC who is also her superior. But Respondent’s policy does not state that an employee must notify both a PIC and a person who is above them in the chain of command. Finally, Respondent does not have a written policy defining who is a PIC. Based on the foregoing, it appears that Complainant followed the written policy for notification set forth by Respondent.

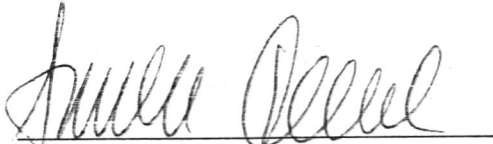
Respondent argued that Complainant failed to give written notice within three days of returning from an unforeseen leave, citing ORS 659A.165 (3): “If an employee commences leave without prior notice under subsection (2) of this section, the employee must give oral notice to the employer within 24 hours of the commencement of the leave, and must provide the written notice required by subsection (1) of this section within three days after the employee returns to work. The oral notice required by this subsection may be given by any other person on behalf of the employee taking the leave.”

However, ORS 659A.165 (1) does not require written notice. It states that a “covered employer *may* require an eligible employee to give the employer written notice.” (emphasis investigator’s). Respondent did not ask for a written notice of this leave when Complainant returned. Instead, Complainant was suspended the day she returned from leave.

Finally, the law provides protection for those taking unforeseeable OFLA leave. A Friday night placement of four foster children can reasonably be seen as an unforeseen event prior to a scheduled Monday shift. Even if Complainant had violated the notification policy, OAR 839-009-0250 (3) states: “When taking OFLA leave in an unforeseeable situation, an employee must give verbal or written notice within 24 hours before or after commencement of the leave. This notice may be given by *any other person* on behalf of an employee taking unforeseeable OFLA leave.” (emphasis investigator’s). In this case, Mr. Turner, Mr. Carroll and/or Ms. Evans are all other people who could (and did) give notice of the commencement of Complainant’s unforeseeable leave.

In this case, Complainant missed one scheduled shift for the emergency placement and care of foster children, which is protected under the Oregon Family Leave Act. She followed the company policy and notified her PICs of her absence in advance of her missing the shift. These PICs then acted in her stead to notify the store director of her unforeseen OFLA leave and to modify the schedule. That she was suspended and terminated upon her return for taking the protected day indicates a violation of ORS 659A.183.

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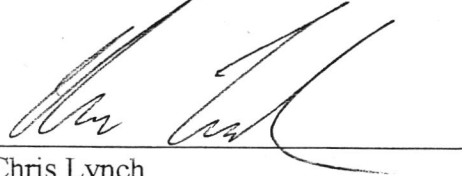


Andrea Damewood
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Civil Rights Division

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VI. Determination(s)

The Bureau of Labor and Industries, Civil Rights Division, finds SUBSTANTIAL EVIDENCE OF AN UNLAWFUL EMPLOYMENT PRACTICE (termination), in violation of ORS 659A.183.



Chris Lynch
Portland Operations Manager
Civil Rights Division