APPLICATION OF THE STATE OF OKLAHOMA
TO THE
UNITED STATES SECRETARY OF LABOR
TO OBTAIN CERTIFICATION FOR THE
INCENTIVE PAYMENT PROVIDED BY
PUBLIC LAW 111-5, §2003 (a)

June 15, 2009

PART 1.

First one-third of incentive payment – 42 U.S.C. 1103 (f) (2) – Alternative Base Period

A. The State of Oklahoma applies for the first one-third of the Unemployment Insurance Modernization Incentive Payment because its alternative base period statute has been brought into compliance with the requirements of §2003 (a) of P.L. 111-5.

B. Oklahoma statutes, Title 40, §2-207 was amended by Senate Bill 1175, Section 1 to comply with requirements of P.L. 111-5, §2003 (a), amending 42 U.S.C. §1103 (f) (2) (B). A copy of Senate Bill 1175 signed by Governor Brad Henry is attached to this Application as "Attachment A".

C. The provisions of Senate Bill 1175, including the provision concerning the Alternative Base Period, will become effective on November 1, 2009. (See Senate Bill 1175, Section 6.)

D. The State of Oklahoma certifies that the amendment to the Alternative Base Period statute is a permanent amendment that will be recorded in the official statute books. The amendment is not subject to discontinuation under any circumstance other than by repeal of the Legislature.

E. The state will request legislative authorization to utilize the Unemployment Insurance Modernization Incentive Payments to supplement its federal base grants for Unemployment Insurance and the Employment Service in Oklahoma. It will be used to prevent the closing of local offices where they are needed, to maintain the level of Employment Service staff to assist in re-employment services, to maintain staff levels in the unemployment insurance call centers to ensure faster service for the adjudication of Unemployment Insurance claims, to maintain Unemployment Insurance Fraud Investigators to prevent benefit claim fraud, to maintain Tax Enforcement Officers to prevent Unemployment Insurance tax evasion, and for any other purpose that will enhance the services of the Oklahoma Employment Security Commission to the people of Oklahoma.

PART 2.

The second two-thirds of the Incentive Payment-42 U.S.C. 1103 (f) (3) (A) and (B) – Part-Time Work and Compelling Family Reasons

A. The State of Oklahoma applies for the second two-thirds of the Unemployment Insurance Modernization Incentive Payment because its statutes have been amended to include the Part-Time Work and Compelling Family Reasons options in compliance with the requirements of §2003 (a) of P.L. 111-5.

B. Oklahoma Statutes, Title 40, §2-408 was amended by Senate Bill 1175, Section 4, to comply with requirements of P.L. 111-5, §2003 (a), amending 42 U.S.C. §1103 (f) (3) (A). This amendment will allow individuals who worked part-time for the majority of the weeks in the individual's base period to meet the individual's work search requirement by seeking only part-time work. A copy of Senate Bill 1175 signed by Governor Brad Henry is attached to this Application as "Attachment A".

C. A new law was created at Oklahoma Statutes, Title 40, §2-210 by Senate Bill 1175, Section 2, to comply with requirements of P.L. 111-5, §2003 (a), amending 42 U.S.C. §1103 (f) (3) (B). This new law provides that individuals who separated from employment due to compelling family reasons will be eligible to receive unemployment benefits. A copy of Senate Bill 1175 signed by Governor Brad Henry is attached to this Application as "Attachment A".

D. In regard to compelling family circumstances involving domestic violence provided for by the new law at Oklahoma Statutes, Title 40, §2-210 (4) (d), the domestic violence can be verified by a variety of sources. This could be the statement of the claimant, the statement of an employer or others with knowledge of the facts, the statement or records of a counselor, the statement or records of a physician, police reports, victim's protection orders, or other court documents. Any one or combination of these sources, or any other reliable source not mentioned could be used to establish separation from employment for domestic violence. A victim's protection order, court order or police report is not required under the Oklahoma Statute to qualify for unemployment benefits under this provision.

E. The Application of Oklahoma's misconduct provisions will not act as a denial for persons qualifying for unemployment benefits due to compelling family reasons pursuant to the new law at 40 O.S. §2-210. Oklahoma's misconduct statute is found at Oklahoma Statutes, Title 40, §2-406. A copy of this statute is found in "Attachment B" to this Application. The statute provides that an individual shall be disqualified for benefits if he or she was discharged for misconduct connected with the last employment. The definition of misconduct in Oklahoma is further defined by the Oklahoma Supreme Court case of Vester v. Board of Review, 1985 OK 21, 697 P.2d 533. It is stated on page 537 of the decision that misconduct is limited:

> [T]o conduct evincing such wilful [sic] or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal

culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

A copy of the Vester decision can be found in "Attachment C" to this Application. Misconduct in Oklahoma requires willful intent on the part of the claimant. If a separation occurs for compelling family reasons, the willful intent required for misconduct will not be present.

F. The provisions of Senate Bill 1175, including the provisions concerning part-time work and compelling family reasons, will become effective on November 1, 2009. (See Senate Bill 1175, Section 6.)

G. The State of Oklahoma certifies that the amendment and new law set out above concerning part-time work and compelling family reasons are permanent and the amendment and new law will be recorded in the official statute books. The amendment and new law are not subject to discontinuation under any circumstance other then by repeal of the Legislature.

H. The state will request legislative authorization to utilize the Unemployment Insurance Modernization Incentive Payments to supplement its federal base grants for Unemployment Insurance and the Employment Service in Oklahoma. It will be used to prevent the closing of local offices where they are needed, to maintain the level of Employment Service staff to assist in re-employment services, to maintain staff levels in the unemployment insurance call centers to ensure faster service for the adjudication of Unemployment Insurance claims, to maintain Unemployment Insurance Fraud Investigators to prevent benefit claim fraud, to maintain Tax Enforcement Officers to prevent Unemployment Insurance tax evasion, and for any other purpose that will enhance the services of the Oklahoma Employment Security Commission to the people of Oklahoma.

PART 3.

Certification of good faith.

It is hereby certified that this Application for the Unemployment Insurance Modernization Incentive Payments is submitted in good faith with the intention of providing benefits to unemployed workers who meet the eligibility provisions on which the Application is based.

PART 4.

Time is of the essence.

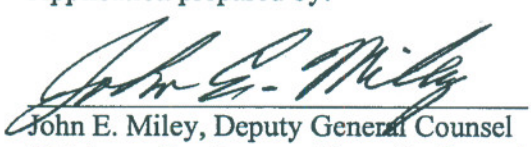
It is provided in Oklahoma Statutes, Title 40, §3-113 that certain conditional factors will go into effect if the balance of the trust fund on July 1 of any given year bears a certain ratio to a four year average of

benefits paid out. It is necessary for Oklahoma to receive its incentive payment on or before June 30, 2009, in order to have a positive effect on the conditional factors set for 2010. Conditional factors will raise taxes on employers and lower benefits for benefit claimants. In 2008 and 2009, no conditional factors were in effect. Taxes were assessed on the lowest tax scale available and benefits were calculated at the highest rates available. There are four conditional factors and tax rates step up and benefits step down as each consecutive conditional factor is achieved. The incentive payment will help keep Oklahoma out of conditional factors for 2010, or it will help the state to stay in a lower conditional factor than it might have been in. If there is any way that approval of the Application could be granted and the money transferred to the Oklahoma Unemployment Trust Fund on or before June 30, 2009, it would be greatly appreciated by the State of Oklahoma. The language of Senate Bill 1175 had been previously reviewed by the National Office of the U.S. Department of Labor on April 6, 2009, and was found to be sufficient to allow Oklahoma to receive the full amount of its incentive payment. A copy of the e-mail notifying Oklahoma of this can be found in "Attachment D".

PART 5.

Signatures

Application prepared by:



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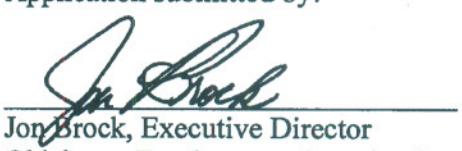
June 15, 2009

Application submitted by:



Jon Brock, Executive Director
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June 15, 2009

ATTACHMENT A

SIGNED COPY OF SENATE BILL 1175

SIGNED BY GOVERNOR BRAD HENRY ON JUNE 2, 2009

FILED WITH THE OKLAHOMA SECRETARY OF STATE ON JUNE 5, 2009

An Act

ENROLLED SENATE
BILL NO. 1175

By: Stanislawski and Mazzei of the Senate

and

Watson and Morgan of the House

An Act relating to labor; amending 40 O.S. 2001, Sections 2-207, as amended by Section 9, Chapter 452, O.S.L. 2002, 2-405, as last amended by Section 6, Chapter 176, O.S.L. 2006, 2-408 and 3-106, as last amended by Section 7, Chapter 354, O.S.L. 2007 (40 O.S. Supp. 2008, Sections 2-207, 2-405 and 3-106), which relate to the Employment Security Act of 1980; modifying wage requirement during base period; providing for compelling family circumstances; defining terms; modifying good cause for voluntarily leaving work; modifying determination of suitable work; modifying relief from benefit wages charged; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 40 O.S. 2001, Section 2-207, as amended by Section 9, Chapter 452, O.S.L. 2002 (40 O.S. Supp. 2008, Section 2-207), is amended to read as follows:

Section 2-207. WAGE REQUIREMENT DURING BASE PERIOD.

A. The unemployed individual, during the individual's base period, shall have been paid wages for insured work of not less than:

1. One Thousand Five Hundred Dollars ($1,500.00); and

2. One and one-half (1 1/2) times the amount of wages during that quarter of the individual's base period in which such wages were highest.

Notwithstanding the preceding provision, an individual with base period wages equal to or more than the highest annual amount of taxable wages that applies to any calendar year in which the claim for unemployment benefits was filed shall be eligible for benefits.

B. 1. If an individual lacks sufficient base period wages under subsection A of this section to establish a claim for benefits, any wages paid in the individual's alternative base period shall be considered as the individual's base period wages.

2. If the Commission has not received wage information from the individual's employer for the most recent calendar quarter of the alternative base period, the Commission shall accept an affidavit from the individual supported by wage information such as check stubs, deposit slips, or other supporting documentation to determine wages paid.

3. A determination of benefits based on an alternative base period shall be adjusted when the quarterly wage report is received from the employer, if the wage information in the report differs from that reported by the individual.

4. If alternative base period wages are established by affidavit of the individual, the employer to which the wages are attributed will have the right to protest the wages reported. If a protest is made, the employer must provide documentary evidence of wages paid to the individual. The Commission will determine the wages paid based on the preponderance of the evidence presented by each party.

5. Provided, no wages used to establish a claim under an alternative base period shall be subsequently used to establish a second benefit year.

~~6. Provided, in any calendar year in which the balance in the Unemployment Compensation Fund is below the amount required to initiate conditional factors pursuant to the provisions of Section 3-113 of this title, this subsection shall not apply and no alternative base period shall be available.~~

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2-210 of Title 40, unless there is created a duplication in numbering, reads as follows:

In addition to the eligibility provisions provided by this act, an individual shall be eligible to receive unemployment benefits, if monetarily and otherwise eligible, if the claimant was separated from work due to compelling family circumstances. For purposes of this section:

1. "Immediate family member" means the claimant's spouse, parents and minor children;

2. "Illness" means a verified illness which necessitates the care of the ill person for a period of time longer than the employer is willing to grant paid or unpaid leave;

3. "Disability" means a verified disability which necessitates the care of the disabled person for a period of time longer than the employer is willing to grant paid or unpaid leave. Disability encompasses all types of disability, including:

   a. mental and physical disabilities,

   b. permanent and temporary disabilities, and

   c. partial and total disabilities; and

4. "Compelling family circumstances" means:

   a. if the claimant was separated from employment with the employer because of the illness or disability of the claimant and, based on available information, the Oklahoma Employment Security Commission finds that it was medically necessary for the claimant to stop working or change occupations,

b. the claimant was separated from work due to the illness or disability of an immediate family member,

c. if the spouse of the claimant was transferred or obtained employment in another city or state, and the family is required to move to the location of that job that is outside of commuting distance from the prior employment of the claimant, and the claimant separates from employment in order to move to the new employment location of the spouse,

d. if the claimant separated from employment due to domestic violence or abuse, verified by any reasonable or confidential documentation, which causes the individual to reasonably believe that the individual's continued employment would jeopardize the safety of the individual or of any member of the individual's immediate family, or

e. if the claimant separated from employment to move with the claimant's spouse to a new location, and if the spouse of the claimant:

(1) was a member of the U.S. Military, the U.S. Military Reserve, or the National Guard,

(2) was on active duty within ninety (90) days of the date of discharge,

(3) has a service-connected disability,

(4) was discharged under honorable conditions from the military service, and

(5) takes up residence at a location more than fifty (50) miles away from the claimant's former employer for the purpose of reentering civilian life.

SECTION 3. AMENDATORY 40 O.S. 2001, Section 2-405, as last amended by Section 6, Chapter 176, O.S.L. 2006 (40 O.S. Supp. 2008, Section 2-405), is amended to read as follows:

Section 2-405. DETERMINING GOOD CAUSE.

Good cause for voluntarily leaving work under Section 2-404 of this title may include, among other factors, the following:

1. A job working condition that had changed to such a degree it was so harmful, detrimental, or adverse to the individual's health, safety, or morals, that leaving the work was justified; or

2. If the claimant, pursuant to an option provided under a collective bargaining agreement or written employer plan which permits waiver of his or her right to retain the employment when there is a layoff, has elected to be separated and the employer has consented thereto~~;~~

~~3. If the claimant was separated from employment with the employer because a physician diagnosed or treated a medically verifiable illness or medical condition of the claimant or the minor child of the claimant, and based on available information, the Oklahoma Employment Security Commission finds that it was medically necessary for the claimant to stop working or change occupations;~~

~~4. If the spouse of the claimant was transferred or obtained employment in another city or state, and the family is required to move to the location of that job that is outside of commuting distance from the prior employment of the claimant, and the claimant separates from employment in order to move to the new employment location of the spouse. As used in this paragraph, "commuting distance" means a radius of fifty (50) miles from the prior work location of the claimant; or~~

~~5. If the claimant separated from employment as part of a plan to escape domestic violence or abuse~~.

SECTION 4. AMENDATORY 40 O.S. 2001, Section 2-408, is amended to read as follows:

Section 2-408. SUITABLE WORK. (1) In determining whether or not any work is suitable for an individual, there shall be considered among other factors and in addition to those enumerated in Section 2-409 the length of his unemployment, his prospects for obtaining work in his customary occupation, the distance of available work from his residence and prospects for obtaining local work.

(2) Suitable work shall be defined as employment in an occupation in keeping with the individual's prior work experience, education or training, or having no prior work experience, special education or training for occupations available in the general area then, employment for which the individual would have the physical and mental ability to perform.

(3) Upon receipt of fifty percent (50%) of his benefits, suitable work shall not be limited to his customary or registered occupation.

(4) If the majority of the weeks of work in an individual's base period includes part-time work, the individual shall not be denied unemployment benefits under any provisions of this act relating to availability for work, active search for work, or failure to accept work, solely because the individual is seeking only part-time work. The phrase "seeking only part-time work", as used in this subsection, means the individual claiming unemployment benefits is available for a number of hours per week that are comparable to the individual's part-time work experience in the base period.

SECTION 5. AMENDATORY 40 O.S. 2001, Section 3-106, as last amended by Section 7, Chapter 354, O.S.L. 2007 (40 O.S. Supp. 2008, Section 3-106), is amended to read as follows:

Section 3-106. BENEFIT WAGES CHARGED AND RELIEF THEREFROM.

A. The Oklahoma Employment Security Commission shall give notice to each base period employer of a claimant promptly after the claimant is issued his or her fifth week of benefits by the Commission or promptly after the Commission receives notice of the amounts paid as benefits by another state under a reciprocal arrangement. Notice shall be deemed given under this subsection

when the Commission deposits the same with the United States Postal Service addressed to the employer at an address designated by the employer to receive the notice or at the employer's last-known address. Notice shall be presumed prima facie to have been given to the employer to whom addressed on the date stated in the written notice. This notice shall give the name and Social Security Number of the claimant, the date the claim was filed, and the amount of benefit wages charged to the employer in each quarter of the base period.

B. Within twenty (20) days from the date stated upon the notice provided for in subsection A of this section, the employer may file with the Commission written objections to being charged with the benefit wages upon one or more of the grounds for objection set forth in subsection G of this section. The employer's written objection must set forth specifically:

1. The date on which the employment was terminated;

2. Full particulars as to the circumstances of the termination including the reason given by the individual for voluntarily leaving the employment, or the nature of the misconduct for which discharged, as the case may be;

3. Full particulars as to the regular scheduled part-time or full-time employment of the employee including the starting date, and ending date if any, of the continuous period of such part-time or full-time employment; and

4. Such other information as called for by the notice.

C. Upon receipt of the employer's written objections, the Commission shall make a determination as to whether or not the employer is entitled to be relieved from the charging of benefit wages. The Commission shall promptly notify the employer of that determination. Provided further, the twenty-day time period for filing written objections with the Commission as provided for in subsection B of this section may be waived for good cause shown.

D. Within fourteen (14) days after the mailing of the determination provided for in subsection C of this section, the employer may file with the Commission or its representative a

written protest to the determination and request an oral hearing de novo to present evidence in support of its protest. The Commission or its representative shall, by written notice, advise the employer of the date of the hearing, which shall not be less than ten (10) days from the date of mailing of the written notice. At the discretion of the Commission, this hearing shall be conducted by the Commission or its representative appointed by the Commission for this purpose. Pursuant to the hearing, the Commission or its representative shall, as soon as practicable, make a written order setting forth its findings of fact and conclusions of law, and shall send it to the employer.

E. If any employer fails to file a written protest within the period of fourteen (14) days, as provided by subsection D of this section, then the determination shall be final, and no appeal shall thereafter be allowed.

F. The employer or the Commission may appeal the order of the Commission or its representative to the district court by filing a petition for review with the clerk of that court within thirty (30) days after the date the order was mailed to all parties. The mailing date shall be specifically stated in the order.

G. The benefit wages charged to an employer for a given calendar year shall be the total of the benefit wages stated in the notices given to the employer by the Commission. Provided, that an employer shall be relieved of a benefit wage charge if the employer proves to the satisfaction of the Commission that the benefit wage charge includes wages paid by the employer to any employee or former employee, who:

1. Left employment with that employer, or with his or her last employer, voluntarily without good cause connected to the work;

2. Was discharged from such employment for misconduct connected with his or her work;

3. Was a regular scheduled employee of that employer prior to the week the employee separated from other employment, and continued to work for the employer through the fifth compensable week of unemployment in his or her established benefit year;

4. Was separated from his or her employment as a direct result of a major natural disaster, declared as such by the President pursuant to the Disaster Relief Act of 1974, P.L. 93-288, and such employee would have been entitled to disaster unemployment assistance if he or she had not received unemployment insurance benefits;

~~5. Was separated from employment with that employer due to a medically verifiable illness or medical condition of the employee or the minor child of the employee;~~

~~6.~~ Was discharged by an employer for unsatisfactory performance during an initial employment probationary period. As used in this paragraph, "probationary period" means a period of time set forth in an established probationary plan which applies to all employees or a specific group of employees and does not exceed ninety (90) calendar days from the first day a new employee begins work. The employee must be informed of the probationary period within the first seven (7) work days. There must be conclusive evidence to establish that the individual was separated due to unsatisfactory work performance and not separated because of lack of work due to temporary, seasonal, casual, or other similar employment not of regular, permanent, and year-round nature;

~~7. Was separated from employment because the spouse of the employee was transferred or obtained employment in another city or state that required the family of the employee to move, and the employee quit current employment to move with the spouse;~~

~~8. Left employment with that employer as part of a plan to escape domestic violence or abuse; or~~

~~9.~~ 6. Left employment to attend training approved under the Trade Act of 1974 and is allowed unemployment benefits pursuant to Section 2-416 of this title; or

7. Was separated from employment for compelling family circumstances as defined in Section 2 of this act.

H. If an employer recalls an employee deemed unemployed as defined by the Employment Security Act of 1980 and the employee continues to be employed or the employee voluntarily terminates

employment or is discharged for misconduct within the benefit year, the employer shall be entitled to have the benefit wage charged against the employer's experience rating for the employee reduced by the ratio of the number of weeks of remaining eligibility of the employee to the total number of weeks of entitlement.

I. An employer shall not be charged with benefit wages of a laid-off employee if the employer lists as an objection in a statement filed in accordance with subsection B of this section that said employee collecting benefits was hired to replace a United States serviceman or servicewoman called into active duty and laid-off upon the return to work by that serviceman or servicewoman. The Unemployment Compensation Fund shall be charged with the benefit wages of the laid-off employee.

J. If the Commission receives a notice of amounts paid as benefits by another state under a reciprocal agreement, and the notice is received after three (3) years from the effective date of the underlying benefit claim, no benefit wage charge will be made against the employer identified in the notice, or if a benefit wage charge is made based on such a notice, the employer will be relieved of the charge when the facts are brought to the attention of the Commission.

SECTION 6. This act shall become effective November 1, 2009.

Passed the Senate the 20th day of May, 2009.

Presiding Officer of the Senate

Passed the House of Representatives the 21st day of May 2009.

Presiding Officer of the House of Representatives

OFFICE OF THE GOVERNOR

Received by the Governor this 22nd
day of May, 2009,
at 10:37 o'clock A M.

By: [signature]

Approved by the Governor of the State of Oklahoma the 2 day of
June, 2009, at 5:25 o'clock P M.

[signature]
Governor of the State of Oklahoma

OFFICE OF THE SECRETARY OF STATE

Received by the Secretary of State this
5th day of June, 2009,
at 4:37 o'clock P M.

By: M. Susan Savage

ATTACHMENT B

OKLAHOMA STATUTES, TITLE 40, §2-406

DISCHARGE FOR MISCONDUCT

Westlaw

40 Okl.St.Ann. § 2-406

C
Oklahoma Statutes Annotated Currentness
Title 40. Labor
Chapter 1. Employment Security Act of 1980 (Refs & Annos)
Article 2. Benefits
Part 4. Disqualification

§ 2-406. Discharge for misconduct

An individual shall be disqualified for benefits if he has been discharged for misconduct connected with his last work, if so found by the Commission. Disqualification under this section shall continue for the full period of unemployment next ensuing after he has been discharged for misconduct connected with his work and until such individual has become reemployed and has earned wages equal to or in excess of ten times his weekly benefit amount.

CREDIT(S)

Laws 1980, c. 323, § 2-406, eff. July 1, 1980.

HISTORICAL AND STATUTORY NOTES

1999 Main Volume

Source:
Laws 1936, Ex.Sess., p. 31, § 5.
Laws 1939, p. 320, § 3.
Laws 1941, p. 143, § 6.
Laws 1945, p. 134, § 5.
Laws 1953, p. 143, § 4.
Laws 1974, c. 302, § 2.
Laws 1975, c. 40, § 1.
Laws 1976, c. 163, § 3.
Laws 1977, c. 20, § 3.
Laws 1977, c. 77, § 3.
Laws 1978, c. 230, § 1.
40 O.S.1971, § 215(b).

40 Okl. St. Ann. § 2-406, OK ST T. 40 § 2-406

Current with emergency effective chapters through Chapter 214 of the First Regular Session of the 52nd Legislature (2009).

END OF DOCUMENT

ATTACHMENT C

VESTER vs. BOARD OF REVIEW,
1985 OK 21, 697 P.2d 533

Westlaw

697 P.2d 533
697 P.2d 533, 1985 OK 21
(Cite as: 697 P.2d 533)

C

Supreme Court of Oklahoma.
Carolyn VESTER, Appellant,
v.
The BOARD OF REVIEW OF the OKLAHOMA EMPLOYMENT SECURITY COMMISSION; Oklahoma Employment Security Commission; and The Charles Machine Works, Appellees.
No. 60013.

March 19, 1985.

The Board of Review of the State Employment Security Commission determined that employee had been discharged for misconduct connected to her work and was therefore disqualified for unemployment benefits. Employee sought judicial review. The District Court, Noble County, Lowell Doggett, J., affirmed. Defendant appealed. The Supreme Court, Lavender, J., held that: (1) adoption, for purpose of determining qualification for unemployment benefits, of definition of misconduct which definition requires only act or course of conduct detrimental to employer's best interest, without element of willfulness or culpable negligence, was contrary to express purpose and intent of State Employment Security Act, and was erroneous as a matter of law; (2) evidence supported finding of appeals tribunal referee of Commission that employee had given notice of her absences, that absences were mainly result of health problems, and that employee had presented documentation as to that fact so that Supreme Court was bound to accept that statement as fact; and (3) findings of fact of referee precluded conclusion that employee had to be disqualified for unemployment benefits due to discharge for job-related misconduct.

Reversed and remanded.

West Headnotes

[1] **Workers' Compensation 413 ⇐652**

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(D) Particular Causes, Circumstances, and Conditions of Injury
413VIII(D)9 Acts for Personal Comfort or Convenience of Employee
413k652 k. In General. Most Cited

Workers' Compensation 413 ⇐659

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(D) Particular Causes, Circumstances, and Conditions of Injury
413VIII(D)9 Acts for Personal Comfort or Convenience of Employee
413k659 k. Resting or Sleeping. Most Cited Cases

Workers' Compensation 413 ⇐661

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(D) Particular Causes, Circumstances, and Conditions of Injury
413VIII(D)10 Acts for Benefit of Employer and Employee
413k661 k. In General. Most Cited
In reviewing actions of Board of Review of State Employment Security Commission, district court's jurisdiction was limited to consideration of transcript and argument of respective attorneys thereon, and its determinations were limited to whether error of law had been committed in hearing and whether or not findings were supported by evidence introduced. 40 O.S.1981, § 2-606.

[2] **Unemployment Compensation 392T ⇐65**

392T Unemployment Compensation

392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk65 k. In General. Most Cited Cases
(Formerly 356Ak388.1, 356Ak388)
Element of deliberate behavior continues to play important part in courts' assessments of what "misconduct" is sufficient to impose penalty of disqualification of potential unemployment benefits recipient. 40 O.S.1981, § 2-406.

[3] **Unemployment Compensation 392T ⚖5**

392T Unemployment Compensation
392TI In General
392Tk3 Constitutional and Statutory Provisions
392Tk5 k. Purpose and Intent of Provisions. Most Cited Cases
(Formerly 356Ak251)

Unemployment Compensation 392T ⚖65

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk65 k. In General. Most Cited Cases
(Formerly 356Ak251)
Purpose of unemployment compensation legislation is to provide some form of relief to those unemployed through no fault of their own. 40 O.S.1981, §§ 1-101 to 9-104.

[4] **Unemployment Compensation 392T ⚖65**

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk65 k. In General. Most Cited Cases
(Formerly 356Ak388.1, 356Ak388)
Adoption, for purpose of determining qualification for unemployment benefits, of definition of misconduct which definition requires only act or course of conduct detrimental to employer's best interest, without element of willfulness or culpable negligence, was contrary to express purpose and intent of state Employment Security Act, and was erroneous as a matter of law. 40 O.S.1981, §§ 1-101 to 9-104.

[5] **Unemployment Compensation 392T ⚖78**

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk78 k. In General. Most Cited Cases
(Formerly 356Ak390)
Absenteeism or tardiness, especially of chronic variety, may constitute "misconduct" such as will disqualify potential recipient from unemployment benefits, but such absences must be unexplained, unexcused, unjustified or unreported in order to preclude receipt of compensation. 40 O.S.1981, § 2-406.

[6] **Unemployment Compensation 392T ⚖418**

392T Unemployment Compensation
392TVIII Proceedings
392TVIII(G) Weight and Sufficiency of Evidence
392Tk412 Fault or Misconduct
392Tk418 k. Absence or Tardiness. Most Cited Cases
(Formerly 356Ak584.10)
Evidence, including testimony of employee, supported finding of appeals tribunal referee of Employment Security Commission that employee had given notice of her absences, that absences were mainly result of health problems, and that employee had presented documentation as to that fact, so that Supreme Court was bound to accept that statement as fact. 40 O.S.1981, § 2-610(1).

[7] **Unemployment Compensation 392T ⚖80**

392T Unemployment Compensation
392TIV Cause of Unemployment
392TIV(B) Fault or Misconduct
392Tk77 Absence or Tardiness
392Tk80 k. Illness or Chemical De-

pendency. Most Cited Cases
(Formerly 356Ak390)
Findings of fact of appeals tribunal referee of Employment Security Commission that employee had given notice of her absences, that absences were mainly result of health problems, and that employee had presented documentation as to that fact, precluded conclusion that employee had to be disqualified for unemployment benefits due to discharge for job-related misconduct. 40 O.S.1981, §§ 2-406, 2-610(1).

***534** Appeal from District Court, Noble County; Lowell Doggett, Trial judge.
Appellant challenges trial court's affirmance of administrative action denying unemployment benefits as being erroneous as a matter of law. Appellant was held to be disqualified on a finding that she had been discharged for misconduct connected with her work. Challenges are presented to the definition of misconduct used in the administrative action and to the question of ***535** whether the findings of fact supported the conclusion of misconduct.

REVERSED AND REMANDED.
Gary W. Swimley, Stillwater, for appellant.

McKinney, Stringer & Webster by Robert D. Tomlinson, Oklahoma City, for appellee, The Charles Machine Works.

LAVENDER, Justice:

Appellant, Carolyn Vester, appeals to this Court, under the provisions of 40 O.S.1981 § 2-610(3), from a judgment of the district court affirming the determination of the Board of Review of the Oklahoma Employment Security Commission that appellant had been discharged for misconduct connected with her work and was therefore disqualified for unemployment benefits by 40 O.S.1981 § 2-406.

Appellant initially filed a claim for unemployment benefits. Notice of this claim was given to appellant's last employer, appellee The Charles Machine Works, Inc. (CMW). By letter, CMW protested appellant's claim. This letter recited that appellant had been discharged due to misconduct connected with her work. The nature of the misconduct was alleged to be chronic absenteeism.

Two days after the date of CMW's protest, appellee Employment Security Commission mailed notice of determination to appellant. This notice stated that appellant was disqualified for benefits by the provisions of section 2-406.

Appellant appealed this determination and a hearing was set before a referee of the Appeal Tribunal of the Employment Security Commission. At the hearing appellant testified on her own behalf and the employment manager of CMW testified on behalf of the employer.

A copy of the Appeal Tribunal's decision was subsequently mailed to the parties. This decision contained requisite findings of fact and conclusions of law. As findings of fact the referee stated:

The employer testified the claimant was discharged because of a very unsatisfactory attendance record. During 1979 she missed 638.7 hours. She had missed 355 hours due to a job injury, and this was not counted against her. She missed 283 other hours for illness and personal reasons. In 1981 she missed 169.5 hours from January 1, 1981, through September 16, 1981. She was repeatedly counseled about her attendance problems, and the employer gave her every opportunity to correct her attendance problems. Her work was very satisfactory when she was there, but her attendance was not improving.

The claimant testified that she did have numerous absences, and has no disagreements with the attendance record as submitted by the employer. She always called the employer when it was necessary that she was absent. Her absences were caused mainly because of health factors. She did provide medical statements on many of the absences.

From these facts the referee drew the following conclusions of law:

The claimant was discharged. When an individual is discharged, it is the responsibility of the employer to establish that the individual was discharged for cause measuring to misconduct connected with the work. The term "misconduct" has been defined as an act or course of conduct detrimental to the employer's best interests or a willful failure to abide by reasonable and known rules of the employment. Decisions of this Tribunal, and the Board of Review, have consistently held that a history of numerous and repeated absences is an action measuring to misconduct connected with the work as defined. It has been held by both bodies that a history of excessive absenteeism is misconduct, even if those absences may have been for health reasons. The testimony and evidence establishes that the claimant was discharged for an excessive absenteeism rate, and she is subject to the disqualifying provisions under this section of the Act.

***536** Appellant requested a review of the Appeal Tribunal's decision by appellee Board of Review. The Board of Review subsequently adopted the findings of fact and conclusion of law of the referee and affirmed the decision of the Appeal Tribunal.

Review of this administrative action by the district court was then initiated by appellant. The trial court, on examination of the record, held that the Board of Review had not misapplied the proper standards in the determination of misconduct and affirmed the Board's determination.

On appeal to this Court, appellant presents two challenges: first, that the referee's conclusion of law adopts an erroneous definition of misconduct; and second, that the referee's conclusion of law is not supported by the statement of facts.

I.

[1] In reviewing the actions of appellee Board of Review, which is charged with exercising a judicial function by the provisions of 40 O.S.1981 § 2-606, the district court's determination was limited by the guidelines set forth by this Court in the case of *In re White:* [FN1]

FN1. 355 P.2d 404, 406 (Okla.1960).

"We have also held the district court sits as an appeal tribunal and its jurisdiction is limited to the consideration of the transcript and the argument of the respective attorneys thereon. We have also held that in an appeal, such as was perfected herein, the district court is limited to determinations whether an error of law was committed in the hearing and whether or not the findings are supported by the evidence introduced...." (Citations omitted)
The challenges presented by appellant charge that the trial court erred in its determination that the decision of the Board of Review was not contrary to law.

II.

Appellant first argues that the Board of Review's decision was erroneous as a matter of law because it adopted a definition of misconduct contrary to the Legislative intent behind the Employment Security Act of 1980.[FN2] In section 1-103, the Legislature stated the public policy which was to guide interpretation of the Act:

FN2. 40 O.S.1981 §§ 1-101 through 9-104.

As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with nationwide system of employment services, by de-

vising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

In view of this policy, the Oklahoma Court of Appeals [FN3] adopted a definition of misconduct to be applied to the disqualifying provisions of section 2-406, designed to *537 narrow the construction of this section and to thus allow maximum fulfillment of the Act's stated purpose. The definition adopted by the Court of Appeals is taken from the case of *Boynton Cab Company v. Neubeck.*[FN4] In *Boynton Cab,* the Supreme Court of Wisconsin, in considering the provision of a statute disqualifying prospective unemployment compensation recipients discharged for "misconduct," determined that the broad public policy favoring the allowance of benefits to cushion the societal effects of unemployment required the limitation of the term:

> FN3. *Tynes v. Uniroyal Tire Co.,* 679 P.2d 1310 (Okla.App.1984).
>
> FN4. 237 Wis. 249, 296 N.W. 636, 640 (1941).

to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

[2] *Boynton Cab's* imposition of the element of willful or wanton conduct, or of negligence of such a degree as to manifest equal culpability, to the conceptual determination of "misconduct" sufficient to deny unemployment benefits, has been cited with at least tacit approval by a majority of American jurisdictions.[FN5] This requirement of an element of deliberate behavior continues to play an important part in the courts' assessments of what "misconduct" is sufficient to impose the penalty of disqualification on a potential unemployment benefits recipient.[FN6]

> FN5. See *Employment Security Commission v. Myers,* 17 Ariz.App. 87, 495 P.2d 857 (1972); *B.J. McAdams, Inc. v. Daniels,* 269 Ark. 693, 600 S.W.2d 418 (Ct.App.1980); *Maywood Glass Co. v. Stewart,* 170 Cal.App.2d 719, 339 P.2d 947 (1959); *Langlois v. Administrator, Unemployment Compensation Act,* 24 Conn.Sup. 177, 188 A.2d 507 (1963); *Spaulding v. Florida Industrial Commission,* 154 So.2d 334 (Fla.Ct.App.1963); *Mandes v. Employment Sec. Agency,* 74 Idaho 23, 255 P.2d 1049 (1953); *Mattson v. Dept. of Labor,* 118 Ill.App.3d 724, 74 Ill.Dec. 248, 455 N.E.2d 278 (1983); *Massengale v. Review Board,* 120 Ind.App. 604, 94 N.E.2d 673 (1950); *Employment Sec. Bd. v. LeCates,* 218 Md. 202, 145 A.2d 840 (1958); *Garfield v. Director, Div. of Employment Sec.,* 377 Mass. 94, 384 N.E.2d 642 (1979); *Carter v. Michigan Employment Sec. Commission,* 364 Mich. 538, 111 N.W.2d 817 (1961); *In re Tilseth,* 295 Minn. 372, 204 N.W.2d 644 (1973);

Wheeler v. Arriola, 408 So.2d 1381 (Miss.1982); *Laswell v. Industrial Commission,* 534 S.W.2d 613 (Mo.Ct.App.1976); *Gaunce v. Board of Labor Appeals,* 164 Mont. 445, 524 P.2d 1108 (1974); *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981); *Barnum v. Williams,* 84 Nev. 37, 436 P.2d 219 (1968); *In re Miller,* 122 N.H. 993, 453 A.2d 1269 (1982); *Board of Review v. Bogue Elec. Co.,* 37 N.J.Super. 535, 117 A.2d 669 (1955); *Mitchell v. Lovington Good Samaritan Center, Inc.,* 89 N.M. 575, 555 P.2d 696 (1976); *In re Collingsworth,* 17 N.C.App. 340, 194 S.E.2d 210 (1973); *Perske v. Job Service North Dakota,* 336 N.W.2d 146 (N.D.1983); *In re Yaroch,* 333 N.W.2d 448 (S.D.1983); *Continental Oil Co. v. Board of Review,* 568 P.2d 727 (Utah 1977); *In re Gray,* 127 Vt. 303, 248 A.2d 693 (1968); *In re Employees of Edgewater Inn,* 10 Wash.App. 437, 517 P.2d 973 (1974); *Cooper v. Rutledge,* 286 S.E.2d 920 (W.Va.1982).

FN6. See *Exson v. Everett,* 9 Ark.App. 177, 656 S.W.2d 711 (1983); *Amador v. Unemployment Ins. Appeals Bd.,* 35 Cal.3d 671, 677 P.2d 224, 200 Cal.Rptr. 298 (1984); *Zelingers v. Industrial Commission,* Colo.App., 679 P.2d 608 (1984); *Roll v. City of Middleton,* 105 Idaho 22, 665 P.2d 721 (1983); *Starks v. Director, Div. of Employment Security,* 391 Mass. 640, 462 N.E.2d 1360 (1984); *Evenson v. Omnetic's,* 344 N.W.2d 881 (Minn.App.1984); *McCorison v. City of Lincoln,* 215 Neb. 474, 339 N.W.2d 294 (1983); *Douglas v. J.C. Penney Co.,* 67 N.C.App. 344, 313 S.E.2d 176 (1984).

[3] The stated purpose of unemployment compensation legislation, as set forth specifically in the Oklahoma law and as noted in most of the cases adopting the definition of misconduct from *Boynton Cab,* is to provide some form of relief to those unemployed through no fault of their own. The definition of "misconduct" adopted by the Appeals Tribunal referee in ***538** the present case appears likely to thwart this purpose. It is readily conceivable that a course of conduct could result from causes divorced from the employee's control, and yet could be readily determined to be detrimental to the employer's best interests. A dismissal in such a case might clearly be justifiable; however, it could not be attributed to the employee as a matter of fault.

[4] Thus, we find the adoption by the Appeals Tribunal referee of a definition of misconduct which definition requires only an act or course of conduct detrimental to an employer's best interest, without the element of willfulness or culpable negligence, to be contrary to the expressed purpose and intent of the Oklahoma Employment Security Act, and to be erroneous as a matter of law. It was therefore error for the trial court to affirm the Board of Reviews subsequent adoption of the conclusion of law which was based on this definition.

III.

[5] The second challenge presented by appellant is based on the assertion that the Appeals Tribunal referee's findings of fact do not support a finding of misconduct sufficient to preclude appellant from receiving unemployment compensation. In the present case we must agree. This is not to say that absenteeism or tardiness, and especially of the chronic variety, may not constitute misconduct within the meaning contemplated in section 2-406.[FN7] However, as noted in the cited cases, such absences have been required to be unexplained, unexcused, unjustified or unreported to constitute misconduct as to preclude receipt of compensation.

FN7. See *Evenson v. Omnetic's,* supra note 6; *McCorison v. City of Lincoln,* supra note 6; *Gettig Engineering v. Commonwealth,* 81 Pa.Commw.Ct. 416, 473 A.2d 749

(1984); *Shadduck v. Commonwealth,* 80 Pa.Commw.Ct. 478, 471 A.2d 1298 (1984); *In re Bertram,* 343 N.W.2d 382 (S.D.1984).

[6] In the present case the Appeals Tribunal referee specifically found that appellant had given notice of her absences, that the absences were mainly the result of health problems and that appellant had presented documentation as to this fact.[FN8] The provisions of 40 O.S.1981 § 2-610(1), require that we treat this finding as conclusive if supported by evidence. Upon review of the record we do find evidentiary support and are thus bound to accept this statement as fact.

FN8. Additionally, we note that in the instance of a claim of disqualification due to misconduct raised by an employer, the employer must bear the burden of proving that the claimant was guilty of misconduct. *Tynes v. Uniroyal Tire Co.,* 679 P.2d at 1312.

The presence of this fact element in the present case brings appellant's claim within the rule stated by the Supreme Court of South Dakota in the case of *In re White:* [FN9]

FN9. 339 N.W.2d 306, 307 (S.D.1983).

Claimant maintains that mere illness cannot evince "wilful or wanton disregard of an employer's interests." She equates it instead with "failure in good performance as the result of inability or incapacity," which, under *Boynton Cab,* does not constitute misconduct. We agree. While absence from work for illness may justify an employer in discharging an employee, such absence does not amount to willful misconduct precluding payment of unemployment compensation. *Kirk v. Cole,* 288 S.E.2d 547 (W.Va.1982); *Schultz v. Herman's Furniture, Inc.,* 52 Ohio App.2d 161, 368 N.E.2d 1269 (1976); *Scevers v. Employment Division,* 26 Or.App. 659, 554 P.2d 575 (1976); *Crib Diaper Service v. Unemployment Compensation Board of Review,* 174 Pa.Super. 71, 98 A.2d 490 (1953); 81 C.J.S. Social Security and Public Welfare § 223 (1977)."

[7] The citations of authority offered by appellee CMW to support the referee's conclusion that appellant's absenteeism constituted misconduct also contain limiting language requiring such factors as lack ***539** of sufficient reason,[FN10] or lack of sufficient cause.[FN11] None of appellee's citations are persuasive in this case where the referee has specifically found the cause of appellant's absences to be related to a factor beyond appellant's control.

FN10. *Goff v. Administrator,* 157 So.2d 268 (La.Ct.App.1963).

FN11. *Hannon v. Administrator, Unemployment Comp. Act.,* 29 Conn.Sup. 14, 269 A.2d 80 (1970).

We find that the referee's finding of facts precludes a conclusion that appellant must be disqualified for unemployment benefits due to discharge for job-related misconduct.

IV.

The trial court's judgment in this case affirming the Board of Review's adoption and affirmation of the decision of the Appeals Tribunal denying appellant unemployment benefits is reversed, and the cause remanded for further action by the trial court consistent with this opinion.

DOOLIN, V.C.J., and HARGRAVE, OPALA, WILSON and SUMMERS, JJ., concur.
SIMMS, C.J., not participating.
KAUGER, J., disqualified.
Okl.,1985.
Vester v. Board of Review of Oklahoma Employment Sec. Com'n
697 P.2d 533, 1985 OK 21

END OF DOCUMENT

ATTACHMENT D

E-MAIL OF APRIL 6, 2009, NOTIFYING OKLAHOMA OF THE SUFFICIENCY OF ITS PROPOSED LEGISLATION TO QUALIFY FOR THE INCENTIVE PAYMENT

Miley, John

From: Shahin, Margie - ETA [Shahin.Margie@dol.gov]
Sent: Monday, April 06, 2009 8:37 AM
To: Miley, John
Cc: Kenyon, Robert - ETA; Cole, Ann - ETA; Lowery, Diann - ETA; Pectol, Jerry
Subject: RE: Oklahoma - Reed Act legislation

We reviewed and consulted with the National Office on the revised statutes that will be submitted to qualify for the UI Modernization incentive payments. It is our informal opinion that the revisions meet the requirements for the incentive payments. We appreciate the opportunity to comment on the proposed legislation and request you keep us apprised of the bill as it proceeds through the legislative process. If the bill is revised, please submit a copy of the revised version for review.

Please be advised that any advice provided in this e-mail represents an informal, staff-level opinion. If you would like a formal opinion, please write Cheryl Atkinson, Administrator, Office of Workforce Security, 200 Constitution Ave. NW, Room S-4231, Washington, DC 20210.

Attached is the revised statutes that will be submitted to qualify for the current Reed Act distribution. We are working to get our legislation reconsidered by the legislature. It is currently not included in any bill. If it is reconsidered, we want to be ready with language that will meet all federal requirements. The attached version has been changed a little from what was submitted in February based on UIPL 14-09, Parts III – 12 and III – 13. In the new section 2-210, I used the language from the UIPL to define "immediate family," "illness," and "disability." If the legislature were to pass the language contained in the attachment, will this language qualify Oklahoma for its complete share of the 2009 Reed Act distribution?

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