

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1363

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153359). Claimant filed a timely request for hearing. On November 3, 2015, ALJ Murdock conducted a hearing, and on November 10, 2015 issued Hearing Decision 15-UI-47447, concluding claimant's discharge was not for misconduct. On November 16, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer argued that the ALJ erred in concluding claimant's discharge was not for misconduct. With respect to claimant's absenteeism, the employer argued that because claimant knew she, and not her physician, was responsible for providing medical certification justifying her leave under FMLA, and knew the consequences of not providing the documentation, her conduct therefore satisfied the definition of "wantonly negligent." We agree with the employer that claimant appears to have been fully aware of the employer's expectation that she provide the certification form, and that she did not provide the employer with the form within the specified time period. However, the employer's argument that claimant's failure to provide the form focuses on claimant's failure to achieve a desired result, that is, to provide the employer with a completed certification form, and the rule defining wanton negligence focuses instead on claimant's acts or failures to act. *See* OAR 471-030-0038(1)(c).

In this case, the action the employer required of claimant was first to have her doctor complete a medical certification form, then return the completed form to the employer within a specified time period. Claimant could not have satisfied the employer's expectation by returning an incomplete form within the specified time period, so obtaining her doctor's cooperation was a necessarily prerequisite to achieving the desired result, and our analysis therefore focuses on claimant's acts or failures to act with respect to obtaining her doctor's services in completing the certification form. The record shows that claimant made a sustained effort to get her doctor to complete the medical certification form, including calling, leaving messages, waiting in the doctor's office all day to try to speak with him, in order to be able to comply with the employer's expectation and achieve the result of returning a timely completed form to the employer. Her efforts prove that she was not indifferent to the employer's expectations or the

consequences of failing to meet them. Given those efforts, the fact that claimant was, ultimately, unsuccessful at returning the completed form within the specified time does not make her conduct wantonly negligent.

With respect to claimant's violation of the employer's electronic communications policy, the employer argued that claimant's use of foul language in her emails was wantonly negligent because she used foul language in business emails and personal emails, she knew the employer's policies prohibited her from doing so and the reason behind the employer's policies, and she did not dispute that she repeatedly used foul language and acronyms for phrases containing foul language. We agree that the employer proved claimant repeatedly violated its electronic communications policy in the course of her employment. However, for the violations to constitute misconduct, the violations must have been committed willfully or with a wantonly negligent mental state that required claimant be both conscious of her conduct and indifferent to the consequences of it. In this case, at the time claimant sent the emails, she sincerely believed, and had reason to believe, based on her observations that her coworkers sent similar emails without repercussion, that the employer did not enforce its policy. Thus, when she used foul language in her emails, she was not demonstrating indifference to the policy or consequences of her conduct, but instead acting with the sincere belief that her conduct would have no consequences, and, while it might violate the employer's written policy, it was not a policy she, or her coworkers, were expected to follow. Claimant's violations of the employer's electronic communications policy were, therefore, not misconduct.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

DECISION: Hearing Decision 15-UI-47447 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 18, 2015

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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