

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0650

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 72718). The employer filed a timely request for hearing. On April 7, 2014, ALJ Micheletti conducted a hearing at which claimant did not appear, and on April 11, 2014 issued Hearing Decision 14-UI-14872, affirming the Department's decision. On April 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pioneer Nursing Home employed claimant as a certified nursing assistant (CNA) from May 3, 2013 until January 15, 2014.

(2) As a job requirement, the employer expected claimant to have and maintain a license issued by the Oregon State Board of Nursing (OSBN) authorizing him to work as a CNA. Claimant was aware of this requirement. The employer also expected claimant to refrain from behavior that was "immoral, indecent illegal" or "questionable" when he was away from work. Audio at ~2:45.

(3) On approximately November 11, 2013, claimant was in a vehicle accident and was arrested for possessing marijuana, carrying a concealed weapon and failing to use a seat belt. The vehicle accident, the events leading to the arrest and the arrest occurred away from the workplace.

(4) Sometime after January 8, 2014, the employer learned that claimant had been arrested in November 2013 and on January 8, 2014 had plead guilty to a misdemeanor crime of carrying a concealed weapon in exchange for the dismissal of all other pending criminal charges or traffic violations. The employer thought that claimant's criminal conviction was going to result in the loss of his CNA license

(5) On January 15, 2014, the employer discharged claimant for engaging in the immoral, indecent or illegal behavior that led to his arrest in November 2013, and for the anticipated loss of his CNA license. At the time claimant's discharge, claimant still had his CNA license.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but 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. The willful or wantonly negligent failure to maintain a license, certificate or other authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c). The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer's witness contended at hearing that claimant had violated its attendance policies before he was discharged, she testified the employer discharged for his arrest on November 11, 2013 and his criminal conviction on January 8, 2014. Audio at ~3:02, ~7:06, ~7:37. Since the events surrounding claimant's arrest and conviction were the proximate cause of claimant's discharge, they are the focus of the misconduct analysis.

The employer's witness contended that the fact of claimant's arrest and criminal conviction for events that occurred when claimant was not at work established that claimant violated the employer's policy prohibiting immoral, indecent or illegal behavior both in and away from the workplace. However, ORS 657.176(2)(a) requires that, to be disqualifying, misconduct must be "connected with work." The purpose of this statutory language is to draw a distinction between misconduct while off duty and away from the employer's premises, which is usually not disqualifying, and misconduct in the course and scope of employment, which is disqualifying. *See Levu v. Employment Department*, 149 Or App 29, 33, 941 P2d 1056 (1997). The circumstances where a claimant's off duty behavior may constitute misconduct are generally limited to those in which credible evidence showed that the off-duty behavior affected the employer's workplace or the employer's interests. *See Levu v. Employment Department*, 149 Or App 29, 34, 941 P2d 1056 (1997) (claimant's off duty conviction for shoplifting was work-connected misconduct where claimant's honesty was an integral consideration in hiring her); *Erne v. Employment Division*, 109 Or App 629, 633, 820 P2d 875 (1991) (claimant's off-duty behavior in assaulting an employee of one of the employer's customers was work-connected misconduct where good relations with that customer were very important to the employer). In this case, claimant was neither arrested nor convicted of crimes that implicated his honesty and, when asked at hearing, the employer's witness was unable to draw any connection between the off-duty behavior that led to claimant's arrest or conviction and the employer's workplace. Audio at ~ 6:38. Without something more from the employer, we cannot discern a connection between claimant's alleged marijuana possession, failing to wear a seat belt and carrying a concealed weapon and the workplace or a legitimate employer interest. The employer did not meet its burden to establish that the off-duty behavior that led to claimant's arrest and conviction was work-connected misconduct that disqualifies him from benefits.

The employer's witness also contended that claimant's conviction for the misdemeanor crime of carrying a concealed weapon would inevitably result in claimant's loss of his CNA license and, for this reason the employer was justified in discharging him. Audio at ~6:12, ~9:45, ~11:36, ~12:40. We do not agree with the employer's interpretation of OSBN's standards for suspending or revoking a CNA license. Although OSBN will not renew a CNA license if the CNA has been arrested for or convicted of certain crimes, none of crimes OSBN lists are the crimes with which claimant was charged or convicted. OAR 851-063-0110(1) (July 8, 1999). With respect to all other crimes, including drug-related crimes, OSBN considers them on an individual basis, and they do not result in an automatic loss of a CNA license. OAR 851-063-0110(3). The employer failed to establish that, at the time it discharged claimant, the loss of his CNA license was inevitable based on his criminal conviction or even that it was likely. The alternate ground on which the employer discharged claimant, the anticipated prospective loss of his CNA license, was not sufficiently likely to constitute misconduct.

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

**DECISION:** Hearing Decision 14-UI-14872 is affirmed.

Susan Rossiter and Tony Corcoran;  
D. E. Larson and J. S. Cromwell, *pro tempore*, not participating

**DATE of Service:** May 23, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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