

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1351

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 132325). The employer filed a timely request for hearing. On November 29, 2016, ALJ Frank conducted a hearing, and on November 30, 2016 issued Hearing Decision 16-UI-71963, affirming the Department's decision. On December 2, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Clackamas County employed claimant as a family nurse practitioner from sometime around January 2014 until August 19, 2016.

(2) The employer expected claimant to maintain a valid nurse practitioner license issued by the Oregon State Board of Nursing (OSBN) as a condition of her employment. To maintain a valid nurse practitioner license claimant was also required to hold a valid registered nurse license issued by OSBN. Claimant understood the employer's licensing expectations.

(3) On July 27, 2016, representatives from Clackamas County Sheriff's Office, accompanied by representatives of the federal Drug Enforcement Administration (DEA), arrested claimant, who was off-duty, for crimes involving unlawful distribution of narcotics. Around that same time, OSBN notified the employer that it had entered an interim consent order that prohibited claimant from providing health care services as a nurse practitioner or an RN. The consent order stated it was "not considered to be discipline," that claimant had agreed to its entry, and that claimant was prevented from practicing under

either or both of her licenses “until further order by the Board or “until the Board vacated the [consent] order.” Audio at ~11:19. The employer understood that the consent order had been entered to enable OSBN to investigate the facts that gave rise to the criminal charges that had been brought against claimant and to make a determination on the statuses of claimant’s licenses.

(4) On July 28, 2016, claimant did not report for work because she had been taken into custody and incarcerated upon her arrest. On July 28 or 29, 2016, claimant informed the employer that she had been arrested and incarcerated and that at that time, she was unable to practice under either her nurse practitioner or her RN license.

(5) Sometime after July 28, 2016, claimant entered pleas of not guilty to the crimes with which she was charged. Claimant never explained to the employer the facts and circumstances that led to the criminal charges that were brought against her. The employer obtained no information about these matters from any other sources.

(6) On August 19, 2016, the employer notified claimant that she was discharged, citing as grounds for her discharge that she had failed to notify the employer of her absence from work on July 28, 2016 and that as a result of the interim consent order issued by OSBN she was unable to perform the essential functions of her job as a family nurse practitioner.

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 11, 2011) states that the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct so long as the failure is reasonably attributable to the individual. 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. The employer carries the burden to show claimant’s willful or wantonly negligent behavior by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer’s witness testified that the employer justified its discharge of claimant on both her absence from work on July 28, 2016 and that the interim consent order prohibited her from performing her job, the witness testified that claimant would not have been discharged if she only had been absent on July 28, 2016 and that it was her inability to work as a nurse practitioner that caused the employer to discharge her. Audio at ~10:52, ~17:00, ~18:20, ~18:45. As such, the proximate cause of claimant’s discharge was the interim loss of her nursing credential under the interim consent order and that is the appropriate focus of the inquiry into whether claimant was discharged for misconduct.

The employer based its decision to discharge claimant on the fact that the OSBN consent order barred claimant from performing functions as a nurse practitioner at the time she was discharged. However, the employer presented no evidence showing that claimant’s willful or wantonly negligent behavior caused OSBN to issue the consent order. The employer did not show that any willful or wantonly negligent

behavior of claimant gave rise to the criminal charges that presumably were the basis for OSBN's interim consent order pending its investigation into claimant's participation, if any, in the crimes for which she was charged. Nothing in the record suggests that claimant made admissions to OSBN or any person from which it might be inferred that her willful or wantonly negligent behavior led to the charges that were brought against, or that she was guilty of them. Significantly, claimant pleaded not guilty to those charges in criminal court and on the advice of her counsel did not divulge any information about the circumstances surrounding them at the hearing. Given the state of this record, there is insufficient evidence to show more likely than not that any willful or wantonly negligent behavior on claimant's part caused her to lose her nursing credential on an interim basis.

In addition, the employer also presented no evidence showing or tending to show that claimant's consent to the entry of the OSBN consent order that prohibited her from practicing under her nurse practitioner and RN licenses was tantamount to a willful or wantonly negligent failure to maintain that license because it demonstrated neither that claimant admitted to having engaged in the conduct that led to the loss her nursing credentials or that claimant's agreement to the consent order caused OSBN to impose a more severe disciplinary sanction that it would have had claimant not agreed to its entry. *See Franklin v. Employment Department*, 254 Or App 656, 663-664, 294 P3d 554 (2013) (not misconduct for claimant to agree to the entry of an order suspending her nursing license when there was no evidence that a lesser penalty would have been imposed if claimant had not agreed to the suspension).

The employer did not meet its burden to show that claimant's inability to practice under the interim consent order was the result of claimant's willful or wantonly negligent behavior or was reasonably attributable to her own actions. As such, the employer did not show that it discharged claimant for misconduct. Claimant is not disqualified from benefits.

DECISION: Hearing Decision 16-UI-71963 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: January 6, 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. 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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