EO: 200
BYE: 201840

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

035
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1485

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 161229). The employer filed a timely request for hearing. On December 19, 2017, ALJ Frances conducted a hearing, and on December 20, 2017 issued Hearing Decision 17-UI-99452, concluding claimant's discharge was for misconduct. On December 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included information that was not part of the hearing record. Although the information is relevant and material to the issue before EAB, claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered claimant's argument only to the extent it was based upon information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) NW Veterans Security Services, LLC employed claimant as an unarmed security officer from August 10, 2016 to October 18, 2017.

(2) The employer assigned claimant to conduct two patrols of a client's facility every night. The employer developed some evidence that claimant was not performing the patrols as required. On October 9, 2017, the employer instructed claimant to send him a date- and time-stamped photo of the client's facility entrance each time she did a patrol. The employer instructed claimant that the time-stamps on photos from the same shift must be at least an hour apart. The employer told claimant that he would not pay her unless she provided him that proof that she had completed the patrols. Claimant responded to the employer, "No problem." Exhibit 1.

(3) On the night of October 10, 2017, the employer scheduled claimant to perform her customary two patrols. Claimant did not send the employer any photos. The employer sent claimant a text message stating that he assumed since she had not sent him photos that she had not done her patrols. Claimant said she had, but had forgotten to take the photos. The employer reiterated that without the

photographic evidence that she had done her assigned patrols he would not pay her for the night's work. Claimant and the employer exchanged additional text messages.

(4) Thereafter, claimant did not conduct any additional patrols at the client's facility. On October 18, 2017, claimant sent the employer a text message in which she said she had not been to the client's facility since the employer "told me u no longer needed me out there." *Id*. The owner disagreed that he told claimant she was not needed to patrol, and had other disputes with claimant, after which he discharged her by stating in his text message that he was "no longer going forward with you." *Id.* The employer discharged claimant for failing to conduct any additional patrols of the client's facility after the October 10, 2017 text messages.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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 employer testified that when claimant, at the time of her discharge, related to him that he had told her she was no longer needed at the facility, he did not know what claimant was talking about. Transcript at 16. Claimant, however, alleged that the employer, via text message on October 10, 2017, discontinued her assignment at the client's facility. Transcript at 32. Despite that factual dispute, the ALJ found as fact that the employer "had not told claimant that she was no longer needed at" its client's facility, that the employer "counted on claimant to perform her job duties as required," and that claimant failed to patrol the client's facility on six occasions thereafter. Hearing Decision 17-UI-99452 at 2. Reasoning that "claimant did not provide any reasonable basis for her belief that employer had told her she was no longer needed to perform her patrols," the ALJ concluded that claimant repeatedly and consciously neglected to perform a known duty, and was therefore discharged for misconduct. *Id.* at 4. We disagree with the ALJ.

Claimant testified at the hearing that the reason she thought the employer had told her she was no longer needed to perform her patrols was that the employer sent her a text message that specifically stated, "I won't need you to cover [the client's facility] anymore. Thank you." Transcript at 32. Claimant testified that that text message was part of the text message exchange the employer submitted in Exhibit 1, but that that text message was omitted from what the employer submitted. *Id.* Claimant also testified that she replied to that message, stating, "Copy." *Id.* There is nothing unreasonable about claimant's explanation of the basis of her belief that the employer did not want her to continue patrolling the client's facility, and there is no basis in this record for simply disregarding claimant's testimony that the employer discontinued her assignment at the client's facility due to the reasonableness of her assertion.

The record developed at the hearing strongly suggests that the employer probably sent claimant at least one additional text message on October 10th that the employer did not include with its Exhibit 1

submission.[1] The ALJ did not ask the employer or claimant if the text messages the employer submitted into the hearing record as Exhibit 1 were the complete record of text messages he and claimant exchanged on October 10th, nor did the ALJ ask that the employer or claimant read any additional messages into the hearing record. *See* Transcript at 18-19, 20. After claimant testified about the existence of a text message that had been omitted from Exhibit 1, the ALJ asked the employer if there was anything else he wanted to say at the hearing and he said he did not; thus, the dispute between the parties' testimony is unresolved. *See* Transcript at 40.

In a discharge case, the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means that the employer must prove that it is more likely than not that claimant acted as alleged, and that she did so willfully or with wanton negligence. In this case, that means the employer must prove not only that claimant failed to perform patrols after October 10th, but also that she knew the employer expected her to do patrols after that date, and intentionally or consciously failed to do so. While the record in this case fails to conclusively establish whether or not the employer told claimant not to patrol the client's facility after October 10th, the evidence about whether or not the employer directed claimant to stop patrolling the client's facility is at best equally balanced, and where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to satisfy that evidentiary burden.

We therefore conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-99452 is set aside, as outlined above.[2]

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

DATE of Service: <u>February 2, 2018</u>

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

[1] The screenshots of text messages the employer placed into evidence show that messages sent by claimant and the employer on a single day appear in sequence, undivided by system-generated dates or times. The screenshot also show that the employer's messages have a dark background behind light text. The screenshots the employer included of his October 10th text messages with claimant show that an additional employer-originated text message was sent by the employer to claimant. The only visible portion of the additional employer-originated text message is the background; however the background is dark like the employer's other messages, and is not separated from the other messages by a system-generated date or time stamp, suggesting that the message was likely sent by the employer to claimant on October 10th in proximity to the time of claimant's last text message. We therefore find that, although the contents of the final text message are not visible or otherwise in evidence, it is more likely than not that the employer did, in fact, send an additional text message to claimant after her final October 10th message, and that the employer failed to include that message with his Exhibit 1 submission.

[2] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

'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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