

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0468**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73814). Claimant filed a timely request for hearing. On April 19, 2018, ALJ Schmidt conducted a hearing, and on April 20, 2018 issued Order No. 18-UI-107809, concluding the employer discharged claimant not for misconduct. On May 3, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB that contained new information not offered at hearing. EAB may consider new information that is not part of the record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). The employer offered statements from additional employees. The employer failed to show that it was beyond its reasonable control to offer the information at the hearing and for that reason we did not consider it in reaching this decision. We considered the remainder of the employer's argument to the extent it was based on information already contained in the record.

**FINDINGS OF FACT:** (1) Kozy Kitchen employed claimant from July 2015 until March 2, 2018 as a cook in one of its restaurants.

(2) The employer prohibited employees from taking anything from its restaurant, including food, without paying for it. Claimant understood the employer's policy against theft both as a matter of common sense and because the employer told him about the policy.

(3) On February 23 and 24, 2018, claimant left work carrying a takeout bag with food at the end of the shift each day.

(4) On March 1, 2018, claimant took home a used produce box from the employer's restaurant. The employees were permitted to take home used boxes from the restaurant.

(5) On March 1, 2018, employees told the employer's owner claimant had been taking bags and boxes of food from the restaurant at the end of his shift. The owner reviewed security video from February 23 and 24, 2018 and March 1, 2018. In the video, the owner saw claimant leaving the restaurant at the end of his shifts with takeout bags on February 23 and 24, and with a box on March 1. The owner did not see claimant pay for food at the end of his shifts on those days in the portion of the video that he viewed.

(6) On March 1, 2018, the owner asked other employees and a customer if they had seen claimant take food at the end of his shift. They told the owner that they had seen claimant take food. A customer told the owner that claimant gave food to a cab driver in exchange for a ride home. The owner spoke to claimant about his concerns. Claimant did not admit to taking food from the restaurant without paying for it.

(7) On March 2, 2018, the owner discharged claimant for allegedly stealing food from the employer's restaurant on February 23 and 24, 2018 and March 1, 2018.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant 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.

There is no dispute that claimant took home food on February 23 and 24, 2018, and a box on March 1, 2018. Based on the information the employer's owner collected from employees, a customer and the security videos of claimant at the end of his shifts those days, the owner concluded that claimant engaged in theft of food from the restaurant. Claimant denied having engaged in theft, and alleged that he paid for the food he took home at the beginning of his shift on February 23 and 24, and did not have any food from the restaurant in the box on March 1. Audio Record at 28:44 to 28:51, 32:34 to 33:28, 26:04 to 26:35. However, although the owner concluded that the statements he collected from other employees and one customer (*See* Exhibit 1) outweighed claimant's denial, absent a reason to conclude that claimant was not credible, EAB gave more weight to claimant's firsthand testimony than to the hearsay statements from other employees and a customer who did not testify at hearing. The only other firsthand testimony regarding the alleged theft was from the owner regarding what he observed on the video of claimant. However, the portion of the video the owner viewed did not conclusively show that claimant took food without paying for it because claimant testified that he paid for the food earlier in his shifts, and the owner did not view that portion of the video before the hearing. Nor is it clear from the photos in the record that claimant took restaurant food in the box he took home on March 1. Audio Record at 32:34 to 33:28, Exhibit 1.

In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because the employer's evidence of theft presented at hearing is based primarily on hearsay, we conclude that the evidence is no more than equally balanced against claimant's denial. Where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden.

Therefore, the employer failed to show it discharged claimant for misconduct and claimant is not disqualified from receiving unemployment insurance benefits because of his discharge from work.

**DECISION:** Order No. 18-UI-107809 is affirmed.

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

**DATE of Service:** June 5, 2018

**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](http://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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