

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0903**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160225). Claimant filed a timely request for hearing. On August 31, 2018, ALJ Janzen conducted a hearing, and on September 4, 2018 issued Order No. 18-UI-115946, reversing the Department's decision. On September 17, 2018, employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB. The employer's argument contained new information in the form of documents that appeared to be from claimant's personnel file. EAB may consider new information on review only if the party offering it shows that it was prevented by factors or circumstance beyond its reasonable control from presenting the information at the hearing. OAR 471-041-0090(2) (October 29, 2006). Although the employer contended that it did not offer the information because it was "unaware at the appeal hearing that the judge would not have the entire file to refer to which had extensive documentation from us," the notice of hearing served on the parties explicitly stated that documents enclosed with it were the "only documents that will be considered by the ALJ at the hearing" and that if the parties wished to have any other documents considered, they were required to provide copies of those documents to the other parties and the ALJ in advance of the hearing. Because carefully reviewing the notice of hearing is within a party's reasonable control, the employer did not show that factors or circumstances beyond its reasonable control prevented it from offering its new information at the hearing. For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Hemstreet Development Corp. employed claimant from September 6, 2012 until July 12, 2018, last as a housekeeper and house person at a hotel.

(2) The employer's handbook permitted claimant to take a fifteen minute break after she had been on shift for at least two hours. However, the general manager had told claimant that she was allowed to take two ten minute breaks in a five hour period, without specifying when those breaks were to be taken. Claimant's shifts typically lasted five hours.

(3) On several occasions in 2018, the employer issued warnings to claimant for allegedly violating the employer's standards.

(4) On July 12, 2018, claimant reported for work at 9:00 a.m. At around 10:30 a.m., claimant went to the employee breakroom and ate a carton of yogurt. Claimant then left the breakroom and went to smoke a cigarette. After claimant smoked the cigarette, she returned to work. The total time claimant was on break and not working did not exceed ten minutes. After claimant returned to work, she cleaned the laundry room, the restrooms and the common areas of the hotel and took out the garbage from those areas.

(5) Sometime before noon on July 12, 2018, the housekeeping manager informed the general manager that based on observations from other employees the housekeeping manager believed that claimant had taken a break of over fifteen minutes that morning. Audio at ~10:52.

(6) On July 12, 2018 at around noon, the employer discharged claimant for abusing break periods that day by taking a break earlier than two hours after her shift started and by being on break for longer than fifteen minutes.

**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) (January 11, 2018) 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 carries the burden to show claimant's misconduct 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's handbook provided that employees were allowed to take a fifteen minute break only after working at least two hours, the witness did not challenge claimant's testimony that the general manager had told her she was allowed to take two ten minute breaks during a five hour shift, apparently at unspecified times during the shift. Audio at ~44:29, ~45:14, ~53:05. With respect to the length of the break that claimant took on the morning of July 12, the employer's evidence was comprised of second-hand testimony that pieced together the alleged observations of two other employees and led it to conclude that claimant's break was for forty-five minutes. Audio at ~8:54, ~10:50. Claimant denied that she took a break longer than ten minutes on the morning of July 12. Absent the opportunity to examine the two employee-witnesses as to the accuracy of the account that the employer presented, claimant's first-hand evidence has greater weight than the employer's hearsay account. The employer did not meet its burden to show that claimant took a longer-than-allowed break on July 12, and that it discharged claimant for misconduct.

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

**DECISION:** Order No. 18-UI-115946 is affirmed.

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

**DATE of Service: October 23, 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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