

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0330**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 13, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective December 13, 2020 (decision # 120302). Claimant filed a timely request for hearing. On April 5, 2021, ALJ Amesbury conducted a hearing, and on April 7, 2021 issued Order No. 21-UI-164341, affirming decision # 120302. On April 27, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant's argument contained information that was not part of the hearing record, and did not 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 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

Claimant also asserted that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

**FINDINGS OF FACT:** (1) Market Decisions Corp. employed claimant as its director of human resources from May 19, 2016 until December 17, 2020.

(2) On December 15, 2020, the employer audited their payroll and discovered what appeared to be discrepancies in claimant's paid time off (PTO) balance, specifically relating to her having used bereavement leave in July and August 2020. The employer felt that claimant had allocated her own bereavement leave in a way that violated "the spirit of [the employer's PTO] policy. . . [but] maybe not the letter of the policy." Transcript at 38.

(3) On December 16, 2020, the employer discovered that both claimant and the employer's accounting manager, who worked closely together, were slated to receive \$5,000 bonuses in their upcoming paychecks. The employer did not authorize the \$5,000 bonuses, and by policy gave employees bonuses ranging from \$100 to \$1,000. Claimant and the accounting manager had already been slated to receive \$500 bonuses during the same pay period, and both of them had access to the employer's payroll system. The employer notified the payroll vendor about the issue before paychecks were disbursed, and neither claimant nor the accounting manager received the additional \$5,000 bonuses.

(4) On December 17, 2020, due to suspicion that claimant and/or the accounting manager had allocated the \$5,000 bonuses to themselves, the employer discharged both claimant and the accounting manager.

**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. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "[W]antonly negligent" means 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." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The order under review concluded that claimant was discharged for misconduct because she had been, more likely than not, responsible for the erroneous allocation of the \$5,000 bonuses to herself and the accounting manager, and that, "whether she was actively involved or merely a beneficiary of the bonus-rigging scheme, claimant's pattern of other behavior violated employer's policies and reasonable expectations willfully or at least through wanton negligence" because she "silently [took] advantage of employer's generous bereavement leave policy to benefit herself . . . and she essentially gave [the accounting manager] an extra week of paid vacation without supervisory approval." Order No. 21-UI-164341 at 7. The record does not support that conclusion.

While both of the employer's witnesses offered extensive testimony on the question of whether claimant had violated the employer's policy in the handling of her own bereavement leave, the company's president, who personally discharged claimant, testified at hearing that he would not have discharged her if only the bereavement leave issue had come to light. Transcript at 37. Additionally, while the employer only learned about the bereavement leave issue the day before they discovered the bonus issue, the record does not show that the employer had been considering discharging claimant until they discovered the bonus issue. Further, while the accounting manager was also fired in connection with the bonus issue, the record does not show either that she was involved in, or suspected to have been involved in, the misallocation of bereavement leave. For those reasons, the employer's concern about the \$5,000 bonus was, more likely than not, the proximate cause of claimant's discharge, and the analysis must therefore focus on that issue. See e.g. *Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct

before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

Claimant testified at hearing that she was not aware of the bonus discrepancy at the time that she was discharged and did not participate in the sequence of events which led to the creation of the excess bonuses. Transcript at 52–53. The employer offered only circumstantial evidence that claimant was culpable for the discrepancy. For example, the human resources manager testified that she reviewed the final payroll reports after claimant and the accounting manager processed payroll for the relevant pay period, and at that time the \$5,000 bonuses were not listed on either of their paychecks—suggesting that the line items were added after that review. Transcript at 44. However, the president of the company admitted in testimony that either of the two, or both, could have been responsible for the discrepancy, and that he had no evidence to show which of the two actually were responsible. Transcript at 35. Further, claimant testified that on the day she and the accounting manager were discharged, the accounting manager called claimant and told her that the accounting manager “had made an error in payroll and had fixed it. And it had to do with our bonuses or something.” Transcript at 59.

Overall, the record lacks sufficient evidence to show either that the bonus discrepancy was the result of an intentional act, rather than a genuine error, or that claimant was responsible for it. As such, the employer has not met their burden to prove that claimant committed the act for which she was discharged.

For the above reasons, the employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Order No. 21-UI-164341 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;  
S. Alba, not participating.

**DATE of Service: June 3, 2021**

**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](https://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.

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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