

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0133**

*Affirmed*  
*Late Request for Hearing Allowed*  
*No Disqualification, No Cancellation of Wage Credits*

**PROCEDURAL HISTORY:** On January 11, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective October 25, 2020, but concluding that claimant's benefit rights based on wages earned prior to the date of discharge may not be canceled (decision # 85447). On February 1, 2021, decision # 85447 became final without claimant having filed a request for hearing. On February 16, 2021, claimant filed a late request for hearing. On January 7, 2022, ALJ Scott conducted a hearing, and on January 11, 2022, issued Order No. 22-UI-183772, allowing claimant's late request for hearing and modifying decision # 85447 by concluding that claimant was discharged, but not for misconduct. On January 21, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of the order under review allowing claimant's late request for hearing and concluding that claimant's benefit rights based on wages earned prior to the date of discharge may not be canceled are **adopted**. The remainder of this decision addresses whether the employer discharged claimant for misconduct.

**FINDINGS OF FACT:** (1) Bogatay Construction Inc. employed claimant as an accounting manager from March 10, 2020 until October 27, 2020.

(2) The employer expected staff in their accounting department to have approval of the employer's owner when making purchases for the employer. Claimant understood this expectation.

(3) In addition to her work for the employer, claimant was a salesperson for a marketing company that sold kitchen products. Claimant received a commission from the marketing company on her kitchen product sales.

(4) In September or October 2020, the employer's owner authorized claimant to use the employer's funds to buy items from the kitchen products marketing company for the employer's office kitchen and as gifts for the owner's brother. The owner did not state a dollar amount that the purchase could not exceed.

(5) Thereafter, claimant purchased \$450.47 worth of items from the kitchen products marketing company, which included two items for herself and shipping charges. Claimant then drafted a check from the employer to herself in the amount of \$406, which reflected the amount she paid, less the cost of the two items claimant bought for herself and shipping charges.

(6) On October 26, 2020, the owner noticed the check for \$406 in the employer's check run. The owner believed he had authorized claimant to buy only \$200 worth of items. The employer believed claimant's purchases in excess of \$200 amounted to theft and violated the employer's expectation that claimant refrain from making purchases for the employer without approval of the owner. On October 27, 2020, the employer discharged claimant for violating this expectation.

**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 employer did not meet their burden to show that they discharged claimant for misconduct. At hearing, the parties disputed the extent of the authorization the owner gave claimant to purchase items for the employer. Transcript at 27-28, 35-36. The employer's sole witness at hearing was the employer's human resources manager, who testified as to the communications between the employer's owner and claimant based on notes, and characterized the owner as having placed a \$200 limit on claimant's purchase authorization. Transcript at 25, 27-28. In contrast, claimant provided firsthand testimony that the owner did not tell her there was a \$200 limit. Transcript at 35. The hearsay account offered by the human resources manager is entitled to less weight than claimant's firsthand evidence. Given that claimant's firsthand account is entitled to more weight, as well as the fact that the employer bears the burden of proving misconduct in this case, the preponderance of the evidence supports claimant's account of the authorization given by the owner, and on this disputed matter, EAB based its findings on claimant's evidence.

The record therefore shows that the owner authorized claimant to buy items for the employer's office kitchen and as gifts for the owner's brother from the kitchen products marketing company for which claimant was a salesperson. The record also shows, more likely than not, that the owner did not tell claimant that the purchase could not exceed \$200. Claimant therefore did not violate the employer's expectation that she not make purchases for the employer without the owner's approval. As such, the employer did not establish that claimant's conduct constituted a willful or wantonly negligent violation of the employer's standards of behavior, and therefore did not meet their burden to prove that they discharged claimant for misconduct connected with work.

EAB considered the employer's written argument when reaching this decision. In it, the employer contends that "[claimant] discussed with [the owner] purchasing a few items from [the kitchen products marketing company] as a gift for his [b]rother," and that the owner "advised [claimant] that she could pick out a few items and had pre-approval to spend no more than \$200.00 on items." Written Argument at 1. Proceeding from that premise, the employer reasons that claimant spent employer funds without authorization to her financial benefit, which the employer contends was misconduct. Written Argument at 2. However, the argument is not persuasive because it flows from the premise that the owner had authorized a purchase not to exceed to \$200. This was a disputed fact at hearing, which, for the reasons discussed above, EAB has resolved in favor of claimant. Because the owner did not state a dollar amount limit on claimant's purchase, the employer did not show that claimant spent employer funds without authorization, and did not establish that claimant's conduct amounted to misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 22-UI-183772 is affirmed.

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

**DATE of Service:** March 3, 2022

**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.

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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

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## 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

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**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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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