

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0342**

*Late Requests for Hearing Allowed*  
*Order No. 20-UI-146601 Modified ~ Not Disqualified*  
*Order No. 20-UI-146589 Modified ~ Overpayment and Monetary Penalty Reduced, 52 Penalty Weeks*

**PROCEDURAL HISTORY:** On November 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and claimant was disqualified from benefits effective January 6, 2019 (decision # 135343). On November 18, 2019, the Department served notice of a second administrative decision assessing a \$4,785.00 overpayment that claimant was required to repay, a \$1,196.25 monetary penalty, and 52 penalty weeks (decision # 194160). .

On December 3, 2019, decision # 135343 became final without claimant having filed a timely request for hearing. On December 9, 2019, decision # 194160 became final without claimant having filed a timely request for hearing.

On January 27, 2020, claimant filed late requests for hearing on decisions # 135343 and 194160. On February 4, 2020, ALJ Kangas issued Order No. 20-UI-143831, dismissing claimant's late request for hearing on decision # 135343, and Order No. 20-UI-143832, dismissing claimant's late request for hearing on decision # 194160, both of which were subject to claimant's right to renew the requests by responding to appellant questionnaires by February 28, 2020.

On February 18, 2020, claimant responded to the appellant questionnaires. On February 24, 2020, the Office of Administrative Hearings (OAH) mailed letters stating that Orders No. 20-UI-143831 and 20-UI-143832 were canceled. On February 25, 2020, OAH mailed notice of two hearings scheduled for March 16, 2020.

On March 16, 2020, ALJ Wyatt conducted two hearings. On March 19, 2020, the ALJ issued Order No. 20-UI-146601, allowing claimant's late request for hearing on decision # 135343 and affirming the Department's decision, and Order No. 20-UI-146589, allowing claimant's late request for hearing on decision # 194160, affirming the Department's assessment of a \$4,785 overpayment and 52 penalty weeks, and concluding that claimant's monetary penalty should be reduced to \$717.75.

On April 3, 2020, claimant filed timely applications for review of both orders with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-146601 and 20-UI-146589. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0341 and 2020-EAB-0342).

Based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), the portions of Orders No. 20-UI-146601 and 20-UI-146589 allowing claimant's late requests for hearing are **adopted**.

**FINDINGS OF FACT:** (1) Bradford's on Halsey employed claimant as a bartender until January 12, 2019.

(2) The employer had concerns about claimant's cash handling because claimant's till was short on a number of occasions. Claimant's till was short because she was not good with numbers. She never caused a till shortage by taking money from the till for personal use.

(3) The employer expected employees to obtain advanced authorization from the manager or owner for payroll advances. Claimant understood the expectation.

(4) On approximately January 12, 2019, claimant took \$125 cash from the till as a payroll advance. She had an emergency situation and needed money to pay her living expenses. Claimant typically texted or called the then-manager to get permission before taking payroll advances. Claimant also left a note in the till about her payroll advance on January 12<sup>th</sup>. She expected the employer to deduct the payroll advance from her next paycheck.

(5) The employer saw claimant's note and concluded that claimant had taken the cash without authorization. On January 12, 2019, the employer discharged claimant for taking an unauthorized cash advance. Claimant knew that the employer had discharged her, and believed the reason she had been discharged was her repeated till shortages.

(6) Claimant's gross earnings for the week ending January 12, 2019 was \$249.36. Claimant had expected to be paid for the work she had done during the week ending January 12<sup>th</sup>, and expected the employer to deduct the payroll advance from her pay for that week. On or after January 12<sup>th</sup>, the employer paid claimant as she had expected.

(7) During the week ending March 31, 2018, claimant filed an initial claim for unemployment insurance benefits (benefit year ending (BYE) week 12-19). Claimant's weekly benefit amount was \$366; the maximum weekly benefit amount in effect at the time was \$604.00.

(8) On January 22, 2019, claimant reopened the BYE 12-19 claim for unemployment insurance benefits. When claimant reopened her claim, she did not report to the Department that the employer had discharged her even though she knew that they had. Instead, she reported to the Department that the employer had laid her off due to a lack of work, even though she knew that was not true and, to her understanding, she had actually been fired for till shortages. Based upon claimant's report that the employer had laid claimant off work, the Department did not investigate claimant's work separation

from the employer or find her disqualified from benefits, and paid weekly benefits to claimant each time she claimed.

(9) Claimant filed a weekly claim for unemployment insurance benefits for the week of January 6, 2019 through January 12, 2019 (week 2-19). Claimant knew she was required to report her earnings to the Department when claiming benefits. She had done so during prior claims, and was specifically asked by the Department to enter her earnings and hours each week when claiming benefits. She reported to the Department that she did not have any earnings during week 2-19. In fact, claimant's gross wages during week 2-19 were \$249.36. She knew that she had worked during that week, and expected to receive pay for her work with the \$125 payroll advance she had taken being deducted from her gross pay. Based upon claimant's false report that she had no earnings during week 2-19, the Department paid claimant \$366.00 in benefits for that week.

(10) Claimant continued to file weekly claims for benefits under the BYE 12-19 claim for weeks including January 13, 2019 through February 2, 2019 (weeks 3-19 through 5-19) and February 10, 2019 through February 23, 2019 (weeks 7-19 through 8-19). The Department paid claimant \$366.00 in benefits for each of those weeks, for a total of \$2,196.00.

(11) Claimant's BYE 12-19 claim expired. Claimant subsequently filed a new initial claim for benefits, effective during the week ending March 6, 2019 (BYE week 13-20). Claimant's weekly benefit amount under the new claim was \$171.00; the maximum benefit amount in effect at the time was \$624.00.

(12) Claimant filed weekly claims for benefits under the new BYE 13-20 claim for weeks including March 17, 2019 through July 13, 2019 (weeks 12-19 through 28-19). The Department paid claimant benefits in the amount of \$171.00 per week for weeks including April 7, 2019 through July 6, 2019 (15-19 through 27-19), for a total of \$2,223.00.

(13) In total, the Department paid claimant \$4,785.00 in benefits for weeks claimed between January 6, 2019 and July 13, 2019 (weeks 2-19 through 28-19). Payment was made based upon her false claims that the employer had laid her off work and that she had not had any earnings during the week of January 6, 2019 through January 12, 2019 (week 2-19).

(14) On May 14, 2014 and August 12, 2019, the Department determined that claimant had committed fraud to obtain benefits. Those decisions have become final.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct. Claimant is liable to repay a reduced overpayment and monetary penalty, and 52 penalty weeks.

**Discharge.** 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) (December 23, 2018). "[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).

Order No. 20-UI-146601 concluded that the employer discharged claimant for misconduct, based upon the ALJ being persuaded that it was more likely than not that claimant left a note that she was taking \$125 from the employer’s till without having obtained prior authorization to do so. *See* Order No. 20-UI-146601 at 4. The record does not support that conclusion.

In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (so stating). The employer did not meet its burden in this case, however, because the employer provided only hearsay about whether or not claimant had permission to take the \$125 payroll advance. The employer’s witness was not present at the time of the events, and had no first-hand information about what happened. She did not rebut claimant’s testimony about claimant’s usual practices with respect to payroll advances, or establish that claimant did not follow her usual practices with respect to the January 12<sup>th</sup> payroll advance. Although claimant also was not certain what happened with respect to the \$125 she took on January 12, 2019, well over a year prior to the date of the hearing in this matter, claimant testified that she customarily obtained authorization from the former manager to take payroll advances, had done the same prior to January 12<sup>th</sup>, and had expected that the employer would deduct the amount of any payroll advances from her next paycheck, as the employer had previously done.

Given claimant’s firsthand testimony about her customary practices, and the lack of firsthand or eyewitness evidence that she did not adhere to those practices on January 12<sup>th</sup>, the evidence about claimant’s conduct with respect to the January 12<sup>th</sup> payroll advance is no better than equally balanced. Where the evidence is equally balanced, the party with the burden of proof – here the employer – has not satisfied its evidentiary burden. To the extent the employer discharged claimant because of the January 12<sup>th</sup> cash advance, the employer did not establish that the discharge was for misconduct.

The employer also alleged at the hearing that claimant constantly had till shortages, and implied that claimant was willfully or with wanton negligence responsible for the till shortages. The record does not support the employer’s allegation, however. Claimant testified that the till shortages occurred because she was not good with numbers, and not because she took money from the till for her own use. Absent evidence that claimant’s till shortages were the result of her intentional or knowing disregard for the employer’s expectations, the record does not show that the till shortages were the result of claimant’s willful or wantonly negligent conduct.

For the foregoing reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**Remuneration.** ORS 657.150(6) states:

An eligible unemployed individual who has employment in any week shall have the individual’s weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

(a) Ten times the minimum hourly wage established by the laws of this state; or

(b) One-third of the individual's weekly benefit amount.

During week 2-19, claimant had employment and earned \$249.36, which far exceeded both ten times the minimum hourly wage and one-third her weekly benefit amount. Her weekly benefit amount for week 2-19 is therefore subject to reduction.

The minimum hourly wage in effect during week 2-19 was \$12.00 in the Portland Metro area where claimant worked.<sup>1</sup> Ten times the minimum hourly wage was \$120. One-third claimant's weekly benefit amount was \$122.00.<sup>2</sup> Because one-third claimant's weekly benefit amount is greater than ten times the minimum wage, claimant's weekly benefit amount for week 2-19 must be reduced by \$122.00.

Claimant's weekly benefit amount was \$366.00. \$366.00 minus the \$122.00 reduction equals \$244.00. The benefit amount payable to claimant for week 2-19 was therefore \$244.00.

**Overpayment.** ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

Order No. 20-UI-146589 concluded that benefits were not payable to claimant for the entire period at issue, including weeks between January 6, 2019 and July 13, 2019 (weeks 2-19 through 28-19), because decision # 135343, which concluded she was disqualified from receiving benefits, was final without appeal and not modified or set aside. *See* Order No. 20-UI-146589 at 6. The record does not support that conclusion.

With respect to week 2-19, the benefit amount payable to claimant was \$244.00, as explained above. The Department paid claimant \$366.00 in benefits for that week. Claimant therefore was overpaid \$122.00. The reason claimant was overpaid by \$122.00 was that she failed to report to the Department that she had earnings when filing a weekly claim for benefits for week 2-19. Because the amount of claimant's earnings was a material fact, and she failed to disclose that material fact to the Department when filing her claim for week 2-19, claimant is liable to repay the \$122.00 overpayment to the Department.

With respect to the remaining weeks at issue, between weeks 3-19 and 28-19, claimant was not overpaid. EAB has concluded in these consolidated decisions that claimant's work separation was not

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<sup>1</sup> EAB has taken notice of this fact, which is a generally cognizable fact. OAR 471-041-0090(1) (May 13, 2019). A copy of the information is available to the parties at [https://www.oregon.gov/boli/TA/Pages/T\\_FAQ\\_Minimum-Wage.aspx](https://www.oregon.gov/boli/TA/Pages/T_FAQ_Minimum-Wage.aspx). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

<sup>2</sup> Claimant's weekly benefit amount was \$366. \$366 divided by 3 equals \$122.

disqualifying. There being no other basis upon which to conclude that claimant was overpaid, claimant is liable to repay only the \$122.00 overpayment accrued during week 2-19.

**Penalty Weeks.** An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. When an individual has two previous disqualifications under ORS 657.215, and those determinations have become final, the disqualification period “shall be 52 weeks.” OAR 471-030-0052(3)(b).

Claimant earned \$249.36 during week 2-19, but withheld that information from the Department when she filed her weekly claim for that week. Claimant knew she was required to report earnings to the Department and was specifically asked for that information when she filed her claim for week 2-19. She also would have known she had earnings to report because she had worked during week 2-19, had taken a payroll advance from the till, and had expected the payroll advance to be deducted from her paycheck for that week. The totality of the evidence suggests that claimant’s failure to report her earnings when claiming week 2-19 was done willfully. Claimant also willfully misreported her work separation from the employer as a layoff due to lack of work when, as she understood it at the time, the employer had actually discharged her for till shortages. Claimant is subject to penalty disqualification period for making those two willful misrepresentations to the Department to obtain benefits.

Claimant would ordinarily have been subject to a minimal penalty disqualification period of only 4 weeks.<sup>3</sup> However, since claimant has two previous penalty disqualifications for making prior material misrepresentations when claiming benefits, OAR 471-030-0052(3)(b) requires that claimant’s penalty disqualification period be increased to 52 weeks. Claimant therefore is disqualified from receiving future benefits otherwise payable for 52 weeks.

**Monetary Penalty.** An individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

Order No. 20-UI-146589 concluded that claimant was liable for a \$717.75 monetary penalty. *See* Order No. 20-UI-146589 at 8. That conclusion is not supported by the record because, for the reasons explained above, it was based upon an incorrect overpayment amount.

In this case, the record shows that there were two incidents of misrepresentation: willfully failing to report her earnings for week 2-19; and willfully misreporting her work separation as a layoff for lack of work when she knew that the employer had actually discharged her.<sup>4</sup> OAR 471-030-0052(7)(a) provides

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<sup>3</sup> OAR 471-030-0052(1)(a) and (b), read together, provide that a disqualification for failing to accurately report earnings and failing to report a work separation is the greater of four weeks or the result reached by dividing the total overpayment by the maximum benefit amount in effect at the time of the claim, rounding off to the nearest two decimal places, multiplying by four, and rounding up to the nearest whole number. Claimant’s misrepresentations occurred during her BYE 12-19 claim; the maximum weekly benefit amount in effect at the time of her BYE 12-19 claim was \$604. In claimant’s case, the result of calculating claimant’s overpayment (\$122) ÷ the maximum benefit amount (\$604) = .20, multiplied by 4 = .8, rounded up to the nearest whole number = 1 week. 4 weeks is greater than 1 week; claimant’s disqualification period would therefore have been 4 weeks.

that a 15 percent penalty be assessed for the first or second misrepresentation occurrence within 5 years of the occurrence for which a penalty is being assessed. Claimant is therefore liable for a 15 percent monetary penalty based upon the total overpayment amount of \$122.00. 15 percent of \$122.00 equals \$18.30.

**Conclusion.** In sum, the employer discharged claimant, but not for misconduct. Claimant was overpaid \$122.00 in benefits that she is liable to repay. She is also liable to repay a monetary penalty of \$18.30, and is assessed 52 weeks of disqualification from future benefits that would otherwise be payable to her.

**DECISION:** Order Nos. 20-UI-146589 and 20-UI-146601 are modified, as set forth above.

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

**DATE of Service:** May 11, 2020

**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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<sup>4</sup> The record is silent as to the nature and quality of the occurrences associated with claimant's May 14, 2014 and/or August 12, 2019 fraud determinations. The record includes actual evidence of only the two occurrences associated with the weeks at issue here.



# 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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.

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