

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0156**

*Late Application for Review Allowed*  
*Order No. 20-UI-157108 Reversed ~ No Disqualification*

**PROCEDURAL HISTORY:** On October 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct and claimant was not disqualified from receiving unemployment insurance benefits based on that work separation (decision # 112859). The employer filed a timely request for hearing. On November 24, 2020, ALJ Schmidt conducted a hearing, and on December 2, 2020 issued Order No. 20-UI-157108, reversing decision # 112859 by concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits, effective May 17, 2020. On December 22, 2020, Order No. 20-UI-157108 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On March 2, 2021, claimant filed a late application for review with EAB.

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the written argument claimant submitted with her application for review on March 2, 2021, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to the admission of EAB Exhibit 1 into the record 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 exhibit will remain in the record.

**WRITTEN ARGUMENT:** On March 18, 2021, claimant submitted an additional written argument. That argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's 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 claimant's March 18, 2021 argument only to the extent it was based on the hearing record.

**FINDINGS OF FACT:** (1) USF Reddaway Inc. employed claimant as a weights and research coordinator at its Portland, Oregon facility from February 20, 2017 to May 20, 2020.

(2) Claimant worked full-time shifts, Monday through Friday, beginning at 1:00 a.m. The employer expected its employees to report for work each day as scheduled. The employer also expected its employees to refrain from committing acts of dishonesty, including intentionally falsifying electronic records. Claimant understood the employer's expectations.

(3) Claimant and other employees often used handheld devices to photograph freight. When an employee used their handheld device to take a photograph, it logged a time for the photograph and identified the photograph as having been taken by the employee using the employee's identification number.

(4) On January 1, 2020, claimant was assigned to a new supervisor, the employer's regional weights and research manager (the RM), who worked offsite. On that date, the employer also began using a "dimensioner" machine that automatically scanned and photographed freight whenever the freight was placed in a staging area. Transcript at 6. The dimensioner machine had its own employee identification number. Whenever the dimensioner machine scanned and photographed freight, the employer's computer system logged the time of the scan and identified the photographs as having been taken by the dimensioner machine using the dimensioner's employee identification number. To track usage of the dimensioner machine accurately, the employer's RM believed the dimensioner machine's "researched by" files were "locked out" so that they could not be changed by employees. Transcript at 16.

(5) Beginning in February 2020, the RM received occasional reports from managers at claimant's worksite that claimant was not reporting for work until two or more hours into her shift, based in part on the absence of her car in her assigned parking space. The RM began an investigation but was unable to pursue the matter fully because of work demands created by the COVID-19 pandemic in March 2020. In March, April and May of 2020, the RM received additional reports that claimant was not reporting for work until several hours into her scheduled shift. However, claimant had stopped parking her car in her assigned space because it had been damaged by another car while parked in that space. Thereafter, claimant chose to park her car in a space far away from her assigned space to avoid a similar incident.

(6) On May 19, 2020, the RM investigated claimant's work to see whether there was evidence to corroborate reports that she had not reported for work on time. Initially, the RM found numerous freight photographs registered under claimant's name between 1:00 a.m. and 5:00 a.m. every day she was supposed to be at work, which appeared to indicate that claimant was at work and using her handheld device. However, when the RM looked at the photographs, he observed that they were pictures of freight taken by the dimensioner machine. When he checked the dimensioner files, he found that the "researched by" entries had been changed to exhibit claimant's employee identification number, which he did not believe was possible because such entries were considered to be "locked out." Transcript at 33-34. He then discovered that if he entered a "researched by" screen, exited it, and then reentered it, he was able to alter the employee identification number. In this way, an employee could overwrite the dimensioner employee identification number with their own, making it appear that the employee created the data, including the picture, rather than the dimensioner machine. The RM "suspected" that claimant had used this procedure to alter dimensioner data created during early morning hours to cover up for her tardiness. Transcript at 6.

(7) On May 20, 2020, the RM spoke with claimant and discussed with her what he had discovered. Although claimant asked "multiple times" for the opportunity to demonstrate how she processed

dimensioner data, the RM did not allow claimant to explain the steps she took to do so “to figure out what [she] was doing wrong” and then correct it. Transcript at 19. Later that day, the RM discharged claimant for allegedly falsifying the dimensioner records.

(8) On December 2, 2020, OAH mailed copies of Order No. 20-UI-157108 to the parties, but claimant did not receive her copy in the mail. EAB Exhibit 1.

(9) On January 25, 2021, claimant called the Department and asked a Department representative whether a decision had been issued following the hearing. EAB Exhibit at 1. Claimant learned that a decision had been issued and previously mailed to her, but that because claimant did not receive the order, it would be re-mailed to her. EAB Exhibit at 1. However, claimant again did not receive a copy of Order No. 20-UI-157108 in the mail, and on February 9, 2021 called the Department and was advised the decision issued “was to deny benefits.” EAB Exhibit at 1. Claimant also was told that because the Department had received returned mail, claimant could still appeal the decision, and to call back between February 12 to February 15, 2021. EAB Exhibit at 1. On February 19, 2021, claimant called the Department and was told by a Department representative that the representative would “put in the information” for claimant’s verbal request to appeal. EAB Exhibit at 1.

(10) On February 28, 2021, claimant received a letter from the Department advising her that the verbal appeal request had been done “incorrectly” and “could not be processed.” EAB Exhibit at 1. The letter advised claimant to consult a webpage, but when she did, the webpage stated, “The page you are looking for does not exist.” EAB Exhibit at 1. The February 28, 2021 letter also advised claimant that if she had questions, she could contact OAH at a specified telephone number, but when she dialed the number, a messaging system advised the caller to “send an email.” EAB Exhibit at 1. On March 2, 2021, claimant followed that instruction and sent an email to OAH requesting an appeal of “Hearing Order No. 20-UI-157108.” EAB Exhibit 1.

**CONCLUSIONS AND REASONS:** Claimant’s late application for review of Order No. 20-UI-157108 is allowed. The employer failed to establish that claimant’s discharge was for misconduct.

**Late application for review.** An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 20-UI-157108 was due on December 22, 2020. Because claimant did not file her application for review until March 2, 2021, the application for review was late. With her late application for review, claimant provided a written statement describing the circumstances that prevented her from filing a timely application for review. EAB Exhibit 1.

Claimant's written statement indicates that claimant was unaware of the December 22, 2020 deadline to file an application for review, and likely the manner in which to file an application for review, because she did not receive her service copy of Order No. 20-UI-157108 in the mail. Claimant's statement that a second copy reportedly mailed to her after she contacted the Department on January 25, 2021 also was not received, combined with the fact that mail sent to claimant was returned to the Department, suggests that claimant's statements regarding not receiving the order through the mail were credible. Thereafter, when claimant called the Department on February 9, 2021, she was told that the order in question denied her benefits but that because she never received it, she could still appeal the order and to call back the following week. When she did so, she was told that an application for review would be filed on her behalf. However, on February 28, 2021, she received a letter notifying her that her verbal request to appeal the order that denied her benefits could not be processed because it had been done incorrectly. The letter instructed her to consult a specified webpage, but when she did, the webpage advised, "The page you are looking for does not exist." Because the letter also stated that if she had questions she could contact the Office of Administrative Hearings at a specified telephone number, she did so. However, when claimant dialed the specified telephone number, the messaging system advised the caller to "send an email," which she did on March 2, 2021, resulting in the late filing of her application for review of Order No. 20-UI-157108.

The events claimant described in her written statement show, more likely than not, that circumstances beyond claimant's reasonable control prevented claimant from filing a timely application for review, and that those circumstances did not cease to exist until claimant received the February 28, 2021 letter from the Department. Claimant filed her application for review within seven days of receiving that letter. Thus, because claimant had good cause to extend the filing period a reasonable time and filed her application for review within seven days after the circumstances that prevented a timely filing ceased to exist, her late application for review of Order No. 20-UI-157108 is allowed.

**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) (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).

Order No. 20-UI-157108 concluded the employer discharged claimant for misconduct, reasoning:

The employer discharged claimant for falsifying the dimensioner records to cover up her tardiness for work. . . . At hearing, claimant denied having falsified the records, instead contending that the computer system required her to enter her own name whenever she accessed a dimensioner file. The employer's witness testified that the files were meant to be locked from changes and that the name on the file could only be changed by exiting the file, reentering it, and then deliberately changing the name. Both sides thus provided firsthand

testimony regarding the computer system. However, unlike the employer's witness, claimant has a personal interest in the outcome of the proceeding. As such, the employer's apparently unbiased testimony was more persuasive, and the evidence showed, more likely than not, that claimant falsified records as alleged.

Order No. 20-UI-157108 at 3-4. However, the record fails to show the employer met its burden of proof to establish misconduct.

As a preliminary matter, to the extent the evidence differed on whether claimant reported for work late between January 1, 2020 to May 20, 2020, on whether claimant understood that she was not permitted to insert her employee number when processing dimensioner data in the employer's automated system, or on whether claimant offered during the May 20, 2022 interview to explain how she processed dimensioner data, the evidence on those issues was no more than equally balanced. For example, the employer's witness testified that their records showed that claimant was not reporting for work until after 5:00 a.m. on a consistent basis, based in part on the absence of her car in her assigned parking space. Transcript at 6, 35. Claimant testified that she did not report for work late at all and explained that she stopped parking her car in her assigned space to avoid damage to her car. Transcript at 20-21.

The employer's witness also testified that claimant understood she was not to change dimensioner data because he "had conversation with all my people that we don't change the employee number on that," although he admitted he "wasn't aware that you could even get into it . . . until . . . after the fact." Transcript at 16. Claimant testified that she was never informed about an employer policy that prohibited her from changing dimensioner records. Transcript at 22. Claimant also testified that the employer's system would not let her process dimensioner data "without putting an employee number in there," and did not know that she was violating an employer expectation by inserting her employee number at those times. Transcript at 30-31.

The employer's witness also asserted that on May 20, 2020, claimant had no explanation for the changed data in question, whereas claimant testified that although she asked "multiple times" for the opportunity to demonstrate how she processed dimensioner data, the RM did not allow claimant to explain the steps she took to do so "to figure out what [she] was doing wrong." Transcript at 13, 19. On this record, each witness was credible and the employer did not offer documentary evidence to support its allegations. Accordingly, the disputed evidence on these facts was no more than equally balanced. Where the evidence on an issue in dispute is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy their evidentiary burden.

The employer had the right to expect claimant to refrain from committing acts of dishonesty, including falsifying electronic records, as a matter of common sense. The record shows that from January 1, 2020 to May 20, 2020, claimant sometimes changed electronic records concerning dimensioner data in the employer's automated system by inserting her employee number. However, claimant's explanation for how and why that happened, and that it was not intended to falsify records, was plausible. Claimant explained at hearing that she inserted her employee number because, otherwise, the system would not let her process the data that she accessed and reviewed while performing her job. Transcript at 21, 30. When asked whether she understood that by inserting her employee number when prompted by the machine that she was changing the data the employer needed to evaluate the equipment, claimant responded, "No, I had no idea that what I was doing was so detrimental to the company as a whole. . . .

To be completely honest, I didn't know that that was a bad thing, 'cause it was still being processed, no matter who it was being processed under, so it never crossed my mind that that was something that I was doing wrong, or shouldn't be doing." Transcript at 30-31.

Finally, the order's reasoning that "unlike the employer's witness, claimant has a personal interest in the outcome of the proceeding," and for that reason her testimony was less persuasive than the employer's "unbiased" testimony, was itself not persuasive. The mere fact claimant may have had a greater personal interest than the employer's witness in the outcome of the proceeding is insufficient to support an implied determination that claimant was not a credible witness. Absent another reasonable basis for determining that claimant was not a credible witness, the employer failed to meet its burden to show that claimant intentionally falsified the employer's automated dimensioner data in violation of the employer's expectation that employees refrain from committing acts of dishonesty or falsifying employee records. Absent such a showing, the employer failed to meet its burden of establishing misconduct by a preponderance of evidence.

The employer failed to establish the claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of that work separation.

**DECISION:** Claimant's late application for review of Order No. 20-UI-157108 is allowed. Order No. 20-UI-157108 is set aside, as outlined above.

S. Alba and D. P. Hettle.

**DATE of Service: April 9, 2021**

**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.

**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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# 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**

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 الاستئناف 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.