

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0777

Late Application for Review Allowed
Reversed
No Disqualification

PROCEDURAL HISTORY: On May 21, 2026, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for a disqualifying act under the Department's drug, cannabis, and alcohol adjudication policy, and was therefore disqualified from receiving unemployment insurance benefits effective March 22, 2026 (decision # L0017641621).¹ Claimant filed a timely request for hearing. On June 26, 2026, ALJ Janzen conducted a hearing, and on July 1, 2026 issued Order No. 26-UI-333989, affirming decision # L0017641621. On July 21, 2021, Order No. 26-UI-333989 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On August 31, 2026, 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 claimant's written statement explaining why the application for review was filed late, has been marked as EAB Exhibit 1, and provided to the parties with this decision. Any party that objects to EAB taking notice of this information must send their objection to EAB in writing, saying why they object, within ten days of EAB mailing this decision. OAR 471-041-0090(2). Unless EAB receives and agrees with the objection, the exhibit will remain in the record.

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 and EAB Exhibit 1. EAB considered any parts of claimant's argument that were based on the hearing record.

¹ Decision # L0017641621 stated that claimant was denied benefits from March 22, 2026 to March 20, 2027. However, decision # L001764162 should have stated that claimant was disqualified from receiving benefits beginning Sunday, March 22, 2026, and until she earned four times her weekly benefit amount. See ORS 657.176.

Claimant's argument objected to the ALJ "admitting" video evidence offered by the employer. Claimant's Written Argument at 10.² However, the ALJ only admitted a single exhibit into evidence, which was offered by claimant, and claimant's objection is therefore not considered. *See* Order No. 26-UI-333989 at 1. It was not improper for the ALJ to allow the employer's witness to testify regarding what he observed in a video that was not admitted into evidence, as such testimony was relevant and material to the issue to be decided. The rules do not require either party to disclose to the other party in advance of the hearing what they might testify to at hearing.

Additionally, claimant requested in her written argument that EAB compel the employer to provide her with copies of video and documents in their possession. Claimant's Written Argument at 9. OAR 471-040-0020 (February 23, 2014) provides a procedure by which a party may seek a subpoena from the ALJ for the production at hearing of "books, records, documents, or other physical evidence" in the possession of another party that they will not produce voluntarily, and requires that the request be "timely" made. OAR 471-040-0020(1). The rule does not assign any role in this process to EAB, and the record fails to show that claimant timely sought a subpoena from the ALJ for these materials. Claimant's request is therefore denied.

EAB reviewed the entire hearing record, 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) Langer Operations, LLC employed claimant as a bartender from October 24, 2022 through March 23, 2026.

(2) The employer had a written policy stating that "no alcohol may be consumed [on the employer's] premises before or during working hours," and that their employees who served alcohol must comply with applicable laws and rules. Transcript at 16. Claimant was provided with a copy of this policy at hire. One such rule, OAR 845-006-0345 (March 31, 2025), prohibits alcohol servers from consuming alcohol while on-duty, except that they "may taste malt beverages, wine, or cider" under certain conditions, including that "[t]he amount of alcoholic beverage consumed per serving does not exceed one ounce," and "[t]he person does not consume more than a total of six ounces of alcoholic beverages pursuant to this section between 7:00 a.m. and 2:30 a.m. on the succeeding calendar day." OAR 845-006-0345(3) and (4). The employer regularly allowed at least some on-duty employees to sample alcohol even though pours were not precisely measured to ensure compliance with this rule. As of March 2026, claimant understood the concept of the rule but did not accurately recall the one-ounce and six-ounce limitations.

(3) On March 21, 2026, while claimant was serving alcohol, she poured and drank two beer samples in glasses which were not full and had a three-ounce capacity. Claimant believed that the samples were consumed in accordance with the rule and with what she understood the employer's standard practices to be based on experience and observation. The employer reviewed surveillance video of claimant's shift based on a report of "odd behavior," and the footage depicted claimant pouring and consuming the two samples. Transcript at 5. The employer believed that the sample glasses had a capacity of five ounces and that they were each at least half full. Based on these beliefs, the employer concluded that

² Citations to page numbers of this 15-page document include the pages that are part of EAB Exhibit 1.

claimant had consumed alcohol in excess of the one-ounce and six-ounce limitations, and decided to discharge her for that reason.

(4) On March 23, 2026, the employer called claimant and asked about the March 21, 2026 shift, and claimant denied “drinking.” Transcript at 7. The employer then discharged claimant based on their belief that she had violated OAR 845-006-0345(3) and (4) on March 21, 2026.

(5) Order No. 26-UI-333989, mailed to claimant’s address on file on July 1, 2026, stated, “You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed.” Order No. 26-UI-333989 at 3. Order No. 26-UI-333989 also stated on its Certificate of Mailing, “Any appeal from this Order must be filed on or before July 21, 2026 to be timely.” Claimant did not receive Order No. 26-UI-333989 in the mail.

(6) On August 31, 2026, in response to an inquiry by claimant regarding the status of the order, the Office of Administrative Hearings (OAH) emailed a copy of the order to claimant. Later that day, claimant responded to the email: “I did not receive this letter in the mail and I do not agree with the decision at all. . . How do I appeal this?” EAB Exhibit 1 at 3.

CONCLUSIONS AND REASONS: Claimant’s late application for review is allowed. Claimant was discharged, but not for a disqualifying act under the Department’s drug, cannabis, and alcohol adjudication policy.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that 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 ended. 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).

“An application for review may be filed on forms provided by OAH or the Employment Department and other similar offices in other states. Use of the form is not required, provided the applicant requests review of a specific ALJ Order, or otherwise expresses intent to appeal an ALJ Order.” OAR 471-041-0060(1) (May 13, 2019). “An application for review may be filed in person, or by mail, fax, or electronic means to EAB, or any office of the Employment Department, including OAH[.]” OAR 471-041-0060(2).

The application for review of Order No. 26-UI-333989 was due by July 21, 2026. Claimant’s application for review was filed on August 31, 2026, and was therefore late. Claimant’s email to OAH expressed disagreement with Order No. 26-UI-333989 and an intent to appeal it, and therefore constituted an application for review under OAR 471-041-0060(1).

Claimant wrote that she did not receive Order No. 26-UI-333989 in the mail despite regularly checking her mail and, eventually, inquiring with WorkSource, the Department, and OAH about the status of the order. EAB Exhibit 1 at 1. While the exact reason for claimant failing to receive Order No. 26-UI-

333989 in the mail is unknown, it can reasonably be inferred that this was a factor beyond her reasonable control, and this prevented timely filing of an application for review. Good cause therefore exists to extend the filing deadline.

OAH replied to one of claimant's status inquiries on August 31, 2026 with an emailed copy of the order, and the factor that prevented timely filing therefore ended on that date. Because claimant's late application for review was filed the same day, it was filed within a "reasonable time" after the factor that prevented filing ended. Accordingly, claimant's late application for review is allowed.

Discharge for a Disqualifying Act Under the Department's Drug, Cannabis, and Alcohol Adjudication Policy. A claimant is disqualified from receiving benefits if they have committed a disqualifying act as described in ORS 657.176(8) or (9). ORS 657.176(2)(h). Under ORS 657.176(8)(a), a claimant has committed a disqualifying act if claimant:

(A) Fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining, which may include blanket, random, periodic and probable cause testing, that governs the use, sale, possession or effects of drugs, cannabis or alcohol in the workplace;

* * *

OAR 471-030-0125 (January 11, 2018)³ states:

* * *

(2) Definitions. For the purposes of this rule:

(a) For purposes of ORS 657.176(9), "workplace" means the employer's premises or any place at or in which an individual performs services for the employer or otherwise acts within the course and scope of employment.

* * *

(d) "Performing services for the employer" as used in ORS 657.176(9) and "during work" as used in ORS 657.176(9) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration.

* * *

(3) For purposes of ORS 657.176(9), (10), and 657.176(13), a written employer policy is reasonable if:

³ The citations in this rule to ORS 657.176(9), (10), and (13) have not yet been updated to account for recent legislative changes which renumbered certain paragraphs under ORS 657.176. Therefore, any reference under the rule to ORS 657.176(9), (10), or (13) should be read as ORS 657.176(8), (9), or (12), respectively.

- (a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; and
- (b) The policy does not require the employee to pay for any portion of the test; and
- (c) The policy has been published and communicated to the individual or provided to the individual in writing; and
- (d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:
 - (A) Probable cause for requiring the individual to submit to the test; or
 - (B) The policy provides for random, blanket or periodic testing.

* * *

- (6) For purposes of ORS 657.176(9), (10), and (13), no employer policy is reasonable if the employer does not follow their own policy.

* * *

- (9) The employee is discharged or suspended for committing a disqualifying act if:

- (a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace; unless in the case of drugs the employee can show that the violation did not result from unlawful drug use.

* * *

* * *

The employer discharged claimant based on their belief that claimant had violated OAR 845-006-0345(3) and (4) during her March 21, 2026 shift. The employer had a written policy requiring employees who served alcohol to comply with applicable laws and rules, and claimant had been made aware of this policy. The employer also had a more restrictive policy prohibiting *all* on-premises alcohol consumption by employees prior to and during their shifts. However, the employer testified at hearing that at least some employees were permitted to consume alcohol samples as part of their work duties. See Transcript at 17-18. The more restrictive policy was therefore not “reasonable” because the employer did not follow it. See OAR 471-030-0125(6). The parties gave conflicting testimony regarding whether the policy requiring compliance with applicable laws and rules was followed by the employer, as well as whether claimant violated that policy. Claimant did not admit to having violated that policy to the employer.

The parties agreed at hearing that claimant consumed two beer samples during the shift at issue, but they disagreed on the volume of beer consumed and whether the employer followed their own policy since it

required strict adherence to OAR 845-006-0345(3) and (4). The order under review concluded that the employer proved by a preponderance of the evidence that claimant consumed more than six ounces of beer between the two samples, in violation of OAR 845-006-0345(3) and (4), and that the employer's policy requiring adherence to that rule was "reasonable" under the criteria in OAR 471-030-0125. Order No. 26-UI-333989 at 3. The record does not support this conclusion.

The employer's general manager testified that the video he reviewed depicted claimant consuming the two samples out of glasses with five-ounce capacities; that each glass was at least half full, with one closer to being full; and that, based on these factors, he estimated that claimant had consumed approximately two to four ounces of beer in each sample. Transcript at 15-16. In contrast, claimant testified that the glasses had three-ounce capacities; that the sample volumes were less than what she observed the employer's managers routinely pouring for themselves while working, and the same as other samples she had poured and consumed in the presence of managers with their authorization on other occasions; and that she believed that the samples on this occasion were consumed in compliance with the rule.⁴ Transcript at 10, 18. In rebuttal, the general manager testified that "nobody that's involved in serving alcohol [for the employer] consumes more than [what claimant consumed on March 21, 2026]." Transcript at 17.

The employer has the burden to establish misconduct by a preponderance of the evidence in a discharge case. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Although this case involves a discharge for the alleged commission of a disqualifying act under ORS 657.176(8), the same principle applies and the burden of proof is therefore on the employer. Here, the evidence is no more than equally balanced as to whether the employer routinely permitted other on-duty employees, including managers, to consume unmeasured beer samples that could have exceeded one ounce per serving. The employer has therefore not met their burden to show that they followed their own policy, and that the policy was therefore "reasonable" under OAR 471-030-0125(6).

Moreover, the conflicting evidence as to the capacity of the glasses was no more than equally balanced, and that fact was therefore found in accordance with claimant's account that they had a three-ounce capacity. While claimant did not rebut the employer's testimony that the glasses appeared approximately half full in the video, that did not establish that the volume of beer contained in each glass necessarily exceeded one ounce, in part because the shape of the glass was not described in the record. For example, a glass that is significantly wider at the top than at the bottom could appear approximately half full by height, yet contain only a third of its capacity by volume, and such a glass with a three-ounce capacity appearing approximately half full by height might contain only one ounce, or less, of liquid. Therefore, even if the policy could be considered "reasonable," the record fails to show that, more likely than not, either of the samples claimant consumed exceeded the one-ounce limit of OAR 845-006-0345(4). Accordingly, the employer has not shown that claimant was discharged for a disqualifying act.

For these reasons, claimant was not discharged for a disqualifying act, and is therefore not disqualified from receiving unemployment insurance benefits based on the work separation.

⁴ Claimant was mistaken in her understanding of the rule, however, as she testified she believed that OAR 845-006-0345(4) had a four-ounce-per-shift limit, and did not mention at hearing being aware of a per-serving volume limit. Transcript at 10.

DECISION: Claimant's late application for review is allowed. Order No. 26-UI-333989 is set aside, as outlined above.

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

DATE of Service: October 15, 2026

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about 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 stated above**. See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 دستورالعمل 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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