

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0113

Affirmed
Ineligible in Part; Eligible in Part

PROCEDURAL HISTORY: On October 21, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of September 29, 2013 through October 12, 2013 (decision # 143405). Claimant filed a timely request for hearing. On December 30, 2013, ALJ M. Davis conducted a hearing, and on January 6, 2014 issued Hearing Decision 14-UI-07816, modifying the Department's decision and concluding claimant was not available for work during the weeks of September 29, 2013 through December 14, 2013, but was available for work during the week of December 15, 2013 through December 21, 2013. On January 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On July 20, 2012, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was allowed. Claimant claimed, but was not paid, benefits during the weeks of September 19, 2013 through December 21, 2013 (weeks 40-13 through 51-13), the weeks at issue.

(2) During the weeks at issue, claimant was seeking work in customer service, food service and housekeeping. Claimant's labor market was Madras, Culver and Warm Springs, Oregon. The days and hours of work customary in this labor market for a customer service worker were all days, from 8:00 a.m. until 10:00 p.m. The days and hours customary for a food service worker were all days, from 6:00 a.m. until 11:00 p.m. The days and hours customary for a housekeeper were all days, from 8:00 a.m. until 6:00 p.m.

(3) During the weeks at issue, claimant was enrolled as a student in the nursing program at Central Oregon Community College (COCC). From the start of the weeks at issue until the end of the fall 2013

academic term on December 12, 2013, claimant attended a class on Tuesdays and Thursdays from 10:15 a.m. until noon. COCC did not offer this class online. COCC did not offer this class on campus at any other time.

(4) During the weeks at issue, claimant wrote on the job applications that she submitted to potential employers that she attended classes on Tuesdays and Thursdays from 10:15 a.m. until noon. Audio at ~14:12. Claimant also attached her class schedule to the applications that she submitted. On a Student Eligibility Questionnaire that claimant submitted to the Department covering the weeks at issue, claimant answered she expected a potential employer to “work around her class schedule” if that employer offered her a job that required her to work during her class times. Audio at ~9:36.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of September 29, 2013 through December 14, 2013 (weeks 40-13 through 50-13). Claimant was available for work during the week of December 15, 2013 until December 21, 2013 (week 51-13).

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (January 8, 2006). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market during all of the days and hours customary for the work the individual is seeking, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.*

When the Department has paid benefits to an individual, the Department has the burden to demonstrate, by a preponderance of the evidence, that the individual was not eligible to receive those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By logical extension of the principal, when the Department has not paid benefits to an individual, the burden is on the individual to demonstrate, by a preponderance of the evidence, that he or she was eligible to receive those unpaid benefits. Since the Department did not pay benefits to claimant during the weeks at issue, claimant carries the burden to demonstrate that she was available for work, and therefore eligible to receive those benefits during the weeks at issue.

Claimant contended at hearing and in her written argument that she would have dropped her classes if she was offered employment that conflicted with her class schedule. Audio at ~ 14:05, ~14:34; Written Argument. She agreed that she attached her class schedule to job applications, but contended she was “available at all times.” Audio at 15:15, ~15:26. That claimant took the trouble to attach her class schedule to those applications most strongly suggests she was not willing to work during her class times, and that she was attempting to provide to potential employers some objective corroboration for her reasons. Claimant understood, or should have understood, that potential employers would most likely interpret the class schedule attached to the application to mean that claimant was not willing to work during her class hours. Claimant’s assertions of her willingness to work are insufficient to rebut the most plausible inferences to be drawn from her attaching the class schedule to job applications. Claimant therefore did not demonstrate, more likely than not, that she was willing to work if the scheduled work conflicted with her scheduled classes. Because the days and hours of claimant’s classes were within the days and hours customary for all three types of jobs she was seeking, claimant was not

willing to work during *all* of the usual days and hours customary for the work she sought, as required by OAR 471-030-0036(3)(a) (emphasis added). As a consequence, claimant did not show she was available for work during the weeks she was attending classes, from at least September 29, 2013 through the end of her classes on December 12, 2013. Because December 12th was more than halfway through the week of December 8 through 14, 2013, claimant was unavailable for that entire week.

We agree with the ALJ's conclusion that claimant was available for work, and eligible to receive benefits, for the week of December 15, 2013 through December 21, 2013. Hearing Decision 14-UI-07816 at 3. It is undisputed that claimant's school term ended on December 12, 2013, and her class attendance was not a barrier to her availability to work during the week of December 15, 2013 through December 21, 2013.

Claimant was not available for work during the weeks of September 29, 2013 through December 14, 2013 (weeks 40-13 through 50-13), and is not eligible to receive benefits during those weeks. Claimant was available for work during the week of December 15, 2013 through December 21, 2013 (week 51-13), and is eligible to receive benefits during that week.

DECISION: Hearing Decision 14-UI-07816 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: February 25, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.