

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0586

Affirmed
Ineligible

PROCEDURAL HISTORY: On February 1, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of October 28, 2012 through January 26, 2013 (decision # 121934).). Claimant did not file a timely request for hearing and decision # 121934 became final on February 21, 2013. On October 21, 2013, the Department issued notice of an administrative hearing assessing a \$4,004 overpayment based on decision # 121934 (decision # 93855). On October 29, 2013, claimant filed a timely request for hearing on decision # 93855 and a late request for hearing on decision # 121934. On November 22, 2013, the Office of Administrative Hearings (OAH) sent two notices to the parties, one scheduling a hearing on decision # 121934 for December 12, 2013 at 8:15 a.m. and one scheduling a hearing on decision # 93855 for December 12, 2013 at 9:30 a.m. On December 12, 2013, ALJ Vincent convened the 8:15 a.m. hearing at which claimant failed to appear, and issued Hearing Decision 13-UI-0728, dismissing claimant's late request for hearing on decision # 121934. Also on December 12, 2013, ALJ Vincent conducted the 9:30 a.m. hearing, and on December 31, 2013 issued Hearing Decision 13-UI-7422, affirming decision # 93855. On January 6, 2014, claimant filed a request to reopen the hearing on decision # 121934. On March 20, 2014, ALJ Seideman conducted a hearing, and issued Hearing Decision 14-UI-13746, allowing claimant's request to reopen and claimant's late request for hearing on decision # 121934, and concluding on the merits that claimant was not available for work during the weeks of October 28, 2012 through January 19, 2013. On April 4, 2013, claimant filed an application for review with the Employment Appeals Board (EAB).

Because no adversely affected party sought review of those portions of Hearing Decision 14-UI-13746 that allowed claimant's late request for hearing and claimant's request to reopen, EAB confined its review to the issue of claimant's availability.

FINDINGS OF FACT: (1) On July 18, 2012, claimant filed an initial claim for benefits. The Department determined that the claim was valid and that claimant's weekly benefit amount was \$364.

Claimant claimed and was paid benefits during the weeks of October 28, 2012 through January 19, 2013 (weeks 44-12 through 03-12), the weeks at issue.

(2) During the weeks at issue, claimant was seeking work as a waitress, a retail sales clerk and a hair salon clerk. In claimant's labor market, the days and hours of work customary for a waitress were all days and all shifts. The days and hours of work customary for a retail sales clerk were all days, day and swing shifts. The days and hours of work customary for a hair salon clerk were all days, day shift.

(3) In October 2012, claimant enrolled in a cosmetology school. During the weeks at issue, claimant attended classes at the school on Mondays through Fridays from 8:00 a.m. until 1:00 p.m. Claimant was still attending classes at the school one year later on October 2013.

(4) Sometime in approximately December 2012 or January 2013, claimant became aware of the Training Unemployment Insurance Program (TUI) and sought to enter that program. At that time, the Department became aware that claimant was attending school while receiving benefits through the regular benefits program. The Department sent claimant a student eligibility questionnaire to complete. Claimant completed the questionnaire and returned it to the Department in approximately January 2013. In response to the question "What would you do about school if you were also working and could not change your class schedule?[,]" claimant wrote "I would be unable to take [the] position because I would have to pay back the tuition that has already been paid." Transcript at 17, 18.

(5) On January 29, 2013, a Department representative called claimant to discuss her response to the student eligibility questionnaire. The representative explained to claimant the requirements to receive benefits while participating in the regular benefits program, including the requirement that she needed to remain available for all suitable work. In that call, the representative asked claimant, "Since now you were made aware that [we] have these rules, what would you do about classes if you were offered work during your class schedule?" and claimant responded, "I have a goal to graduate, to get a better paying job. That would be a hard decision. I'm trying to better myself. If the job was something that is full-time and paid good [I would accept it]." Transcript at 22.

(6) On February 6, 2013, claimant was approved for the TUI benefits program. Claimant's eligibility for that program was backdated to become effective during the week of January 20, 2013 (week 04-13).

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of October 28, 2012 through January 19, 2013 and was not eligible to receive benefits during those weeks.

To be eligible to receive benefits through the regular benefits program, 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) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all suitable full time, part time and temporary work opportunities throughout the labor market during all of the usual hours and days customary for the work being sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

The crux of this case is whether, despite claimant's attendance at school, she was willing to look for and accept work that might interfere with that schooling during the weeks at issue. Although claimant asserted repeatedly at hearing that she had been willing during the weeks at issue to quit school if she found suitable work, her first communication to the Department, the completed student eligibility questionnaire, stated emphatically that she was not. Transcript at 17, 19, 20, 28, 29. Claimant's initial communication is entitled to significant weight in determining claimant's true intentions because it was made before she was aware of the potential impact on her eligibility for regular benefits of any statement that attending school was limiting her efforts to locate suitable employment. In addition, claimant did not dispute that she told the Department's representative on January 19, 2013, after she had been made aware of the availability requirement to receive regular benefits, that she might be willing to quit school to accept work but only if the work was "full time and paid good." Transcript at 22. However, to meet the requirement of availability, claimant needed to be also willing to accept part-time and temporary work, not just full-time work, and she needed to be willing to work even if the pay was not "good." See OAR 471-030-0036(3)(a); Transcript at 22. Claimant's explanation that her first communications to the Department should be discounted because, by the time she made them, she had invested significant time and money in her schooling, as distinct from the earlier weeks at issue, is not persuasive. Transcript at 21. There is no indication in the record that the representative was not asking claimant about all of the weeks at issue, and there is no evidence that indicates that claimant was confused about the weeks the representative was inquiring about. In addition, the representative spoke to claimant when claimant had been attending school for only three months, and there is no evidence in the record that there was a significant difference in the financial cost to claimant if she quit work to accept employment during the first of the weeks at issue or if she quit school during the last of the weeks at issue.

Claimant's explanations at hearing were insufficient to overcome the weight of her initial communications to the Department about her unwillingness to accept work that might interfere with her schooling during the weeks at issue. Claimant's second statement to the Department representative showed that, even after she was generally aware of the availability requirement, she still qualified her availability during the weeks at issue in a manner that excluded some work opportunities. By claimant's own words, claimant showed that her attendance at school during the weeks at issue imposed a condition that limited her opportunities to return to work at the earliest possible time. See OAR 471-030-0036(3)(a).

Claimant was not available for work during the weeks of October 28, 2012 through January 19, 2013 (weeks 44-12 through 03-13). Claimant was not eligible to receive benefits during that period.

DECISION: Hearing Decision 14-UI-13746 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J. S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 9, 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.