

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0699

Affirmed
Ineligible

PROCEDURAL HISTORY: On March 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of March 9, 2014 through March 15, 2014 (decision # 143940). Claimant filed a timely request for hearing. On April 21, 2014, ALJ Sime conducted a hearing and issued Hearing Decision 14-UI-15684, affirming the Department's decision and concluding claimant was not available for work during the weeks of March 9, 2014 through March 29, 2014. On April 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) During the winter 2013-2014, claimant was enrolled as a student at Portland State University (PSU). Claimant intended to continue at PSU during spring term 2014, which was going to be claimant's last term before graduating.

(2) Sometime before March 8, 2014, claimant learned that his employer was transferring him to a new work site that was located in Portland, Oregon, approximately eight miles from his home. Claimant's previous work location was approximately eight blocks from his home and he walked to work. Claimant did not have a car or a bicycle to commute to work and had no family or friends to provide transportation to the new work site. Claimant needed to rely on public transportation to get to the new location. The employer expected claimant to work a shift starting at 3:30 a.m. in the new location. Claimant learned that public transportation did not operate at the time of day he needed to enable him to arrive at work by 3:30 a.m. On March 8, 2014, claimant left work because he did not have transportation to get to the new work location by the time his shift was scheduled to start, and because he thought that the employer was no longer willing to accommodate his work schedule to his school schedule.

(3) On March 10, 2014, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's claim was valid. Claimant claimed, but was not paid, benefits

during the weeks of March 9, 2014 through March 29, 2014 (weeks 11-14 through 13-14), the weeks at issue.

(4) During the weeks at issue, claimant's labor market was Portland, Oregon. Claimant sought work as an office worker mail sorter and customer service representative. The days and hours of work customary for an office worker and mail sorter in claimant's labor market were Mondays through Fridays, day shifts. The days and hours of work customary for a customer service representative were all days, all shifts.

(5) During the weeks at issue, claimant still had no car or a bicycle. Claimant relied on public transportation or walking to seek work and to report for work opportunities. Claimant did not have any family or friends with cars to assist him in seeking or reporting for work. Claimant estimated that, if public transportation was not operating at an hour when he needed to commute to or from a work opportunity, he was physically able to walk a distance of approximately five miles round trip from his home.

CONCLUSIONS AND REASONS: Claimant was not available for work during the period of March 9, 2014 through March 29, 2014.

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) (February 23, 2014). 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 usual hours and days of the week 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.*

When the Department has paid benefits to a claimant, the Department has the burden to demonstrate, by a preponderance of the evidence, that claimant was ineligible to receive those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By logical extension of this principle, when the Department has not paid benefits, a claimant has the burden to demonstrate that he or she was eligible to receive those benefits. Because the Department did not pay benefits to claimant during the weeks at issue, claimant had the burden to show, by a preponderance of the evidence, that he was available for work and, thus, eligible to receive those benefits.

It was not disputed at hearing that claimant's labor market comprised an area much larger than the five mile radius around his house that claimant thought it was reasonable to expect him to walk to work, and it was not disputed that work opportunities existed in the area of the labor market beyond that five mile radius. Nor was it disputed that public transportation was unavailable all hours and all days – days and hours customary for work claimant was seeking. Claimant candidly admitted that his transportation options were limited during the weeks at issue, but speculated that he would rely on taxis to report for work opportunities if the work was located more than five miles from his home and public transportation was not available to transport him to and from that work. Audio at ~22:07, ~23:39. Given the type of work claimant was seeking, it appears unlikely that, as a matter of common sense, such work would pay sufficiently to make the use of a taxi a realistic option, and the infeasibility of commuting to work by

taxi was confirmed by the fact that claimant quit work rather than using a taxi to commute when the location of his former employment was changed around March 8, 2014. Because the customary days and hours for the type of work claimant was seeking included hours that public transportation did not operate, and claimant's labor market included areas more distant than the five mile walking radius that he thought was reasonable for him, certain work opportunities in claimant's labor market were necessarily foreclosed to him. Although claimant's transportation limitations were understandable in light of his lack of resources, OAR 471-030-0036(3)(a) and (b) require that to establish that he was available for work, claimant must show that he was capable of reporting for *all* suitable work opportunities during *all* of the hours that the work he was seeking was customarily performed in his labor market. In light of his transportation limitations and the geographic size of his labor market, claimant did not meet his burden to show that he was available for all suitable work opportunities in his labor market during the weeks at issue.

Claimant was not available for work during the period of March 9, 2014 through March 29, 2014. Claimant is not eligible to receive benefits during this period.

DECISION: Hearing Decision 14-UI-15684 is affirmed.

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

DATE of Service: May 29, 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.