

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0750

Reversed

Ineligible Weeks 50-13 Through 07-14

PROCEDURAL HISTORY: On December 23, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the week of December 8, 2013 through December 14, 2013 (decision # 142005). Claimant filed a timely request for hearing. On February 19, 2014, ALJ S. Lee conducted a hearing, and on April 23, 2014 issued Hearing Decision 14-UI-15778, reversing the Department's decision and concluding that claimant was available for work during the weeks of December 15, 2013 through February 15, 2014. On May 5, 2014, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's written argument when reaching this decision.

FINDINGS OF FACT: (1) In September 2011, claimant enrolled in a nursing program at ITT Technical Institute. Claimant attended classes at ITT's campus. Claimant's intention was to obtain a bachelor's degree in nursing.

(2) Until approximately August 2013, claimant worked as a technician for Legacy Health Systems while she was also attending school. Although claimant technically remained employed by Legacy until December 31, 2013, she did not actually perform work for Legacy after sometime in August 2013. Until sometime in October 2013, claimant also worked as an on-call certified nursing assistant (CNA) for Providence Medical Center while attending school. Before she was hired, claimant had told her supervisor at Providence that she would work only one shift per week due to school attendance and gave her class schedule to the supervisor to allow her to schedule claimant's work around it. After Providence repeatedly called claimant to work additional shifts, claimant decided to leave that job because she thought that she was unable to work the requested hours while still "concentrating on school." Transcript

at 28. During the 12 weeks comprising third quarter of calendar year 2013 (July 1, 2013 through September 30, 2013), claimant worked 223 hours for Providence, or approximately 19 hours per week.

(3) On December 4, 2013, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid with a weekly benefit amount of \$399. Claimant claimed benefits for the weeks of December 8, 2013 through February 15, 2014 (weeks 50-13 through 07-14), the weeks at issue. Claimant was not paid those benefits.¹

(4) During the weeks at issue, claimant sought work at medical facilities as a CNA and ward clerk. Claimant's labor market was the metropolitan area of Portland, Oregon and Vancouver, Washington. The days and hours customary in claimant's labor market for the type of work she sought were all days, all shifts. Each week when claimant filed her weekly claims, claimant reported to the Department that she had made at least three employment related contacts during that week.

(5) During the weeks at issue, claimant had stopped working at both Legacy and Providence. Claimant was attending the last or next to last quarter of school before she received her bachelor's degree in nursing in March 2014. Claimant had accrued approximately \$35,000 in student loan debt for her education. During the weeks at issue until February 1, 2014, claimant attended classes on the ITT campus on Monday and Wednesdays from 9:00 a.m. until 1:00 p.m. and on Fridays from 9:00 a.m. until 4:30 p.m. After February 1, 2014, claimant was no longer required to attend classes on the ITT campus as part of the nursing program and her school work entailed clinical work, "pass and review" classes, preparing papers and attending "simulations." Transcript at 13.

(6) Sometime during the weeks at issue, claimant submitted a completed student eligibility questionnaire to the Department in which she responded that, if she was offered work that conflicted with her schooling, "I am in my last quarter of nursing school. I would see if work could work around my school schedule." Transcript at 8. In a later telephone discussion with an authorized representative, claimant said she had left the job at Providence because her "main focus was going to be school." Transcript at 10.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of December 8, 2013 through February 15, 2014 and was not eligible to receive benefits during those weeks.

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 hours and days customary for the type of work sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

¹ We take notice of this fact, which is contained in Employment Department records. Any party who objects to our doing so must submit such objection to this office in writing, also setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

In Hearing Decision 14-UI-15778, the ALJ found as fact that claimant was "not willing to drop school for work" during the weeks at issue, but still concluded that claimant was available for all suitable work during those weeks. Hearing Decision 14-UI-15778 at 2. The ALJ appeared to reason that, because claimant presented evidence that at a time prior to the weeks at issue she had worked at two jobs while attending school, school attendance did not impose a condition that substantially limited her availability for work during the weeks at issue. Hearing Decision 14-UI-15778 at 3-4. The ALJ further reasoned that "[a]s long as claimant ensured that work was given priority over her school attendance, claimant satisfied the requirements of the [Department's] rules [on availability for work]" and was eligible to receive benefits. Hearing Decision 14-UI-15778 at 4. We disagree.

At the outset, claimant had the burden to demonstrate, more likely than not, that she was available for all suitable work during the weeks at issue. This conclusion follows from the court's decision in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), which held that the burden is on the Department to demonstrate that a claimant was not eligible to receive benefits during periods when the Department paid benefits to claimant. The logical implication of this holding is that the burden is on a claimant if the Department has not paid benefits to a claimant during the period when claimant's eligibility is at issue. Since the Department did not pay claimant any benefits during the weeks at issue, claimant had the burden to establish that she was eligible to receive benefits during that period, including that she was available for work.

Although claimant contended at hearing that she would have accepted a job as a CNA or a ward clerk during the weeks at issue even if it conflicted with her schooling, the actions that claimant took at the time demonstrate otherwise. Transcript at 14. By the weeks at issue, claimant had stopped working for Legacy and had left her other job with Providence to "focus on school." Transcript at 10, *see also* Transcript at 28. The restriction that claimant stated to her supervisor at Providence, that she only was willing to work one shift a week due to her schooling, most strongly suggests not only that she was unwilling to accept a job that conflicted with her schooling, but that she was also unwilling to accept a job that might require a time commitment that would jeopardize her ability to graduate on time in March 2014. Claimant's repeated emphasis to the Department that she was in her final quarter at school also appears most consistent with the conclusion that she would not entertain any employment that would delay her anticipated graduation date. Transcript at 6, 8, 10. Significantly, claimant did not state on the Department's eligibility questionnaire that she would drop school if a suitable job opportunity arose that conflicted with her school, but only that she would "see if work could work around my work schedule." Transcript at 8. Finally, although claimant generally contended in her testimony that she quit her job with Providence due to its very burdensome hours, she did not dispute the Department's evidence that, in fact, she only worked part time for Providence, approximately 19 hours per week, between July and September 30, 2013. Transcript at 22, 24, 25, 30. The most logical inference from this evidence is that claimant thought that even working part-time was too much for her to handle along with her school commitments, and she was unwilling to remain at that job or, presumably, to accept another job if she perceived that the job might with her schooling or her academic performance. All of claimant's actions and statements, combined with the circumstantial facts of the large student loan amount on which she would need to start making repayment if she dropped school for a job and her proximity to graduation, militate toward the conclusion that claimant's school attendance imposed a condition that impermissibly restricted her opportunities to work full-time or part-time as a CNA or a ward clerk during the weeks at issue until at least February 1, 2014, when her school attendance became more "flexible." Claimant's

apparent priority was to successfully complete the nursing program in which she was enrolled on a timely basis, and that desire, more likely than not, ruled out many full-time and part-time job opportunities in claimant's labor market during the period of December 8, 2013 through February 1, 2014. Although the ALJ was persuaded by claimant's work search activities that she was available for work, the mere fact that claimant made acceptable reports to the Department as part of its weekly claim requirements does not establish that she was willing to accept the jobs for which she had made employment-related contacts. Hearing Decision 14-UI-15778 at 2, 5. We conclude, based on the evidence as opposed to claimant's assertions, that claimant was not willing to accept them.

Claimant testified that, as of February 1, 2014, her school requirements became much more flexible, class attendance was not required and, presumably, she had more freedom to pursue jobs that previously conflicted with school requirements. Transcript at 14. The only difference that we can discern from the record was that after February 1, 2014 claimant began reporting to the Department that she was looking for work as an RN. Transcript at 9. Claimant did not present any specific evidence that her focus on timely completing the nursing program had changed between February 1, 2014 and February 15, 2014. Claimant did not meet her burden to establish that, during the last two weeks of the weeks at issue, her school commitments no longer imposed a condition that substantially reduced her opportunities to return to work at the earliest possible time.

Claimant was not available during the period of December 4, 2013 through February 15, 2014. Claimant is not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 14-UI-15778 is set aside, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 11, 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.