

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0876

Affirmed
Ineligible

PROCEDURAL HISTORY: On January 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of November 24, 2013 through November 30, 2013 and December 8, 2013 through January 8, 2014 (decision # 133959). Claimant filed a timely request for hearing. On April 21, 2014, ALJ Lohr conducted a hearing, and on April 29, 2014 issued Hearing Decision 14-UI-16355, affirming the Department's decision and concluding claimant was not available to work during the weeks of November 24, 2013 through November 30, 2013, December 8, 2013 through February 1, 2014 and February 9, 2014 through February 15, 2014. On May 19, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she requested a remand of this case to develop evidence about whether a minor work accident in which she was involved early in her employment might have "influenced" the testimony of the employer's witness at hearing. Written Argument at 2. Claimant only briefly mentioned the work accident in passing at hearing and speculated that she thought it might have affected the hours of work the employer offered her. Transcript at 25. The issue in this case, however, is whether claimant was available for work during the weeks at issue and whether, by limiting the hours she was willing to work, claimant imposed a condition that limited her opportunities to return to work. Claimant did not contend that any physical injury caused her not to limit the hours she was able to work, and she did not draw any apparent connection between the injury that she sustained and any purported bias that might have colored the testimony of the employer's witness about the hours that claimant had told the employer that she was willing to work. Due to the tenuous relevance of the work injury to the issue of claimant's availability and to the credibility of the employer's witness, claimant's request that

EAB remand this matter for further development of the record is denied. EAB otherwise considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On July 15, 2013, Chick, Inc. employed claimant part time as a worker in its fast food restaurant. On her employment application, claimant wrote that she was willing to work Mondays through Fridays from 6:00 a.m. until 6:00 p.m. and on some Saturdays if she had sufficient advance notice. Based on the application, the employer thought claimant was not available after 6:00 p.m. on weekdays for work. Because the employer's swing shift was from 4:00 p.m. until the employer's restaurant closed, the employer scheduled claimant only for day shift work. Also as a result of claimant's statement on the application, the employer did not schedule claimant to work on weekends.

(2) In the late fall and winter, the employer's business customarily slowed down. Sometime in fall 2013, Claimant asked the manager on duty for more hours of work, but did not tell the manager that she was willing to work after 6:00 p.m., or that she could work the swing shift from 4:00 p.m. until closing.

(3) On November 27, 2013, claimant filed a claim for unemployment benefits due to her limited hours working for the employer. The Department determined that claimant's claim was valid. Claimant claimed benefits during the weeks of November 24, 2013 through November 30, 2013 (week 48-13), December 8, 2013 through February 1, 2014 (weeks 50-13 through 05-14) and February 9, 2014 through February 15, 2014 (week 07-14), the weeks at issue.

(4) During the weeks at issue, claimant worked or sought work as a fast food worker. Claimant's labor market was Tangent, Corvallis, Albany and Lebanon, Oregon. The customary days and hours for a fast food worker in claimant's labor market was 7:00 a.m. to 11:00 p.m., all days.

(5) After November 27, 2013, when claimant had applied for benefits, claimant did not tell her manager or the employer that she was able to work hours different from those stated on her application. Claimant did ask the manager if she could be scheduled for more hours, but did not tell the manager that she was willing to work later than 6:00 p.m. or could work the swing shift or on weekends.

(6) On January 3, 2014, the employer sent to the Department its response to a notice of claim filed form and stated that claimant could only work on Mondays through Fridays until 4:00 p.m., which was when its day shift ended. On January 16, 2014, a representative from the Department called claimant to discuss the employer's response. Claimant told the representative that she could not work on some weekends because she attended a class once a month on Saturdays. In response to the representative's questions about why she could not work any later than 4:00 p.m. on weekdays, claimant stated she could work as late as 6:00 p.m. Claimant told the representative that she needed to be with her family in the evenings and it was "best for them" that she was home. Transcript at 7. Claimant noted that her son's behavior had improved since she was at home more hours and that she "had been working too much since he was born." Transcript at 8. At that point, the representative advised claimant that, to remain eligible for benefits, she needed to be willing to work both weekdays and weekends and between the hours of 7:00 a.m. through 11:00 p.m., the days and hours customary for a fast food worker. The representative advised claimant to immediately inform the employer that she was available to work all of those hours.

(7) After January 16, 2014, claimant still did not tell the employer that she wanted to change the days or hours she had written on her application as those she was willing to work. Claimant did not communicate that she was available to work later than 6:00 p.m. on weekdays or on weekends. Claimant did ask her manager for more hours within the 6:00 a.m. to 6:00 p.m. time frame she was willing to work on weekdays.

CONCLUSIONS AND REASONS: Claimant was not available to work during the weeks of November 24, 2013 through November 30, 2014, December 8, 2013 through February 1, 2013 and February 9, 2013 through February 15, 2014. Claimant is 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 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.*

Although claimant contended in her written argument and at hearing that, after she filed her claim for benefits, she was willing to work all the usual and customary days and hours for a fast food worker, this contention is belied by her actions and her failure to clearly inform the employer that she had changed the work hour restrictions that she indicated on her employment application. Written Argument at 1; Transcript at 13, 14. While claimant testified that she had intended the hour limitations on her application only to express that those were the hours that she "preferred" to work, she did not contend that she made it reasonably apparent to the employer on her application that she was not limiting the weekday hours that she was able to work to 6:00 a.m through 6:00 p.m. Transcript at 13. Claimant's testimony about weekend work was that she had written on her application that she "could be available [to work] *some* Saturdays " if the employer gave her sufficient notice of her scheduling. Transcript at 13 (emphasis added). Claimant did not dispute that during her employment the employer never scheduled her for work on weekends or after 4:00 p.m. on weekdays and reasonably should have concluded that the employer was under the impression that the hours she had written on her application were a restriction on her availability to work. Claimant's statement that she would have worked after 6:00 p.m. on weekdays or on weekends if "they would have asked," and that her manager "knew I was open to do other hours," was contradicted both by the testimony of the employer's witness and the hours that the employer actually scheduled claimant to work. Transcript at 19, 20. Claimant's testimony about how the employer would have known that, after November 27, 2013, she had changed the hours and days that she was willing to work was vague and conclusory. Transcript at 15, 17. In the first part of her testimony, the only specific information claimant provided about his issue was that she asked her manager for additional hours, which is hardly the reasonable equivalent of informing the employer that her hours of availability had changed and she was then willing to work after 6:00 p.m. or during the swing shift or on weekends. Transcript at 14, 17. Later in claimant's testimony, after some pointed questions from the ALJ, claimant finally asserted that she had told her supervisor that she was "available at any time" for work. Transcript at 17. The belated timing of this assertion, and the context in which it was stated, undercut its reliability. Finally, while claimant contended she did not tell the Department's

representative on January 3, 2014 that she was unable to work for the employer later than 6:00 p.m., she agreed that, when the representative asked her if she could work after 6:00 p.m., rather than stating her willingness, she explained that she was not working later hours because she wanted to spend the evenings with her family. Transcript at 16. That the representative asked claimant this question suggests, most likely, that claimant had told the representative that she was not willing to work later than 6:00 p.m. and that claimant gave this response to the representative suggests that she was justifying that unwillingness. Although claimant's written argument suggests that claimant's generalized assertions as to her availability during the weeks at issue should be accepted as dispositive, the detailed and consistent testimony of both the Department's witness and the employer's witness about claimant's statements to them and the limitations claimant placed on the hours she was willing to work, outweighs the evidence that claimant presented. Written Argument at 2.

Viewed in sum, the preponderance of the evidence demonstrates that, before claimant applied for benefits and was subject to the Department's availability requirements, claimant limited the hours she was willing to work for the employer. After claimant applied for benefits and during the weeks at issue, claimant did not reasonably inform the employer that she wanted to remove the restriction on her hours but only that she wanted more work time within those restricted hours. Claimant's failure to inform the employer that she was no longer restricting her hours of work indicates, more likely than not, that she wanted to continue working only limited hours even though she was then subject to the Department's work availability rules. The days and hours of the day that claimant was willing to work during the weeks at issue excluded the evening and night hours and the weekend hours that were customary for her job as a fast food worker. By so limiting the hours she was willing to work during the weeks at issue, claimant imposed a condition that substantially reduced her opportunity to return to work at the earliest possible time. *See* OAR 471-030-0036(3)(c).

Claimant was not available for work during the weeks of November 24, 2013 through November 30, 2013, December 8, 2013 through February 1, 2014 and February 9, 2014 through February 15, 2014.

DECISION: Hearing Decision 14-UI-16355 is affirmed.

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

DATE of Service: June 30, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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