

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1853

Reversed
Eligible

PROCEDURAL HISTORY: On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 93040) concluding that claimant was not available for work from April 6 through May 3, 2014 (weeks 15-14 through 18-14). Claimant filed a timely request for hearing. On November 14, 2014, ALJ Shoemake conducted a hearing, and on November 18, 2014, issued Hearing Decision 14-UI-28864, affirming the administrative decision. On December 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 4, 2014, claimant filed her initial claim for benefits. Claimant claimed benefits for the period April 6 through May 3, 2014 (weeks 15-14 through 18-14), the weeks at issue. Claimant was denied benefits for week 15-14 (April 6 through 12, 2014). Claimant was paid benefits for weeks 16-14 through 18-14 (April 13 through May 3, 2014).

(2) During the weeks at issue, claimant was employed by Abby's Legendary Pizza, located in Sutherlin, Oregon. Claimant lived in Yoncalla, and it took her approximately 17 to 20 minutes to drive from her home to the employer.

(3) Sometime during the week of March 31 through April 5, 2014, one of the employer's managers told claimant that she would have to "prove herself" as a waitress before the manager would give her more shifts. Transcript at 16.

(4) At the beginning of April, 2014, the employer issued a monthly printed schedule indicating the shifts staff members were expected to work. The printed schedule showed that claimant was scheduled to work on April 6, April 19, April 26 and April 27, 2014. Because of the manager's statement to her, claimant called one of the employer's managers prior to her scheduled shift on April 6 to find out whether she would be working. The manager told claimant that claimant was not permitted to work on that day. Transcript at 18.

(5) Sometime between April 6 and 19, 2014, claimant contacted the employer's general manager and asked why she had been put on the schedule but not allowed to work. The general manager told claimant that he could do nothing, and that she needed to contact the manager who told her she could not work.

(5) Prior to the start of her scheduled shifts on April 19 and April 26, 2014, claimant called the employer and attempted to talk to a manager to determine whether she would be allowed to work. Each time claimant called, she was told the manager was busy, and would call claimant back. No manager ever returned claimant's calls. The waitresses who were assigned to cover claimant's shifts on April 19 and April 26 contacted claimant and told her not to report to work because she would be sent home if she did.

(6) On April 27, 2014, claimant did not contact a manager or coworker to ask if she would be allowed to work, and did not report for her scheduled shift. Based on what had occurred the day before, claimant believed she would not be permitted to work.

CONCLUSION AND REASONS: Claimant was available for work during from April 6 through May 3, 2014 (weeks 15-14 through 18-14).

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). In cases where the Department allows benefits under this statutory provision, the Department has the burden to establish that claimant is eligible; in cases where the Department denies benefits, the claimant has the burden to establish eligibility. *Nichols v. Employment Department*, 24 Or App 195, 544 P2d 1068 (1976). Here, there is no dispute that claimant was able to work and actively sought work during the weeks at issue. Accordingly, we will confine our analysis to determining whether claimant was available to work from April 6 through May 3, 2014.

To be considered "available to work" for purposes of ORS 657.155(1)(c), an individual must meet certain minimum requirements. One of these requirements is that the individual must be willing to work and capable of reporting to full time, part-time and temporary work opportunities throughout the labor market. The ALJ concluded that claimant was not available to work on April 6, 19, 26 and 27, 2014. The ALJ found claimant's testimony – that she was scheduled her to work on these dates, but the employer's manager would not permit her to do so – "unpersuasive," because "[i]t does not make sense that claimant would at least try to report to work as scheduled rather than call ahead" to see if she would be allowed to work. Hearing Decision 14-UI-28864 at 4. We disagree.

The ALJ's conclusion that claimant was not available to work on the four days in April at issue was based on the employer's printed schedule, which contained vague handwritten notations made by an unidentified individual, and the hearsay testimony provided by the Department representative, who spoke with the employer's payroll clerk and not with any of the employer's managers. Claimant provided clear, detailed and unrebutted testimony that the printed schedule was inaccurate; although she was scheduled to work the four days at issue in April, she was not permitted to do so by one of the employer's managers. In addition, claimant provided a reasonable explanation why she did not report to work to find out if she would be permitted to do so. Given the manager's statement at the beginning of April – that claimant would have to "prove herself" before receiving more shifts – claimant

understandably wanted to find out whether she would be allowed to work before making the 17 to 20 minute drive from her home to her workplace.¹ We find claimant's first hand testimony more persuasive than the evidence presented by the Department. Thus, the record fails to show that claimant missed any opportunities to work during the weeks at issue, or that she was otherwise not available for work during that period. Claimant met her burden to show that she was eligible for benefits for week 15-14 (April 6 through 12, 2014), and the Department failed to meet its burden to demonstrate that claimant was ineligible for benefits for weeks 16-14 through 18-14 (April 13 through May 3, 2014). Claimant is therefore eligible for unemployment benefits on the basis of her availability for work for all the weeks at issue.

DECISION: Hearing Decision 14-UI-28864 is set aside, as outlined above.

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

DATE of Service: January 14, 2015

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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¹ On April 27, 2014, claimant failed to contact the employer and was not notified by a coworker that she could not work on that date. Given the employer's repeated refusals to allow claimant to work scheduled shifts— on April 6, 19 and 26, 2014 – we find it more likely than not that the employer would not have permitted claimant to work on April 27 and conclude that claimant was available to work on that date.