

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0054

Affirmed
Ineligible

PROCEDURAL HISTORY: On December 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 85505) concluding claimant was not available for work during the week of November 30, 2014 through December 6, 2014 (week 49-14). Claimant filed a timely request for hearing. On January 9, 2015, ALJ Vincent conducted a hearing, and on January 12, 2015 issued Hearing Decision 15-UI-31656, concluding that claimant was not available for work during the weeks of November 30, 2014 through January 3, 2015 (weeks 49-14 through 53-14). On January 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On November 24, 2014, claimant filed an initial claim for benefits. Claimant's claim was valid. Claimant claimed benefits for the weeks of November 30, 2014 through January 3, 2015 (weeks 49-14 through 53-14), the weeks at issue.

(2) During the weeks at issue, claimant was seeking work as a caregiver and Mentor Oregon employed claimant as a part-time caregiver. Claimant's labor market was Portland, Gresham and Clackamas, Oregon and the surrounding areas. In claimant's labor market, the usual and customary days and hours of work for a caregiver were all days and all shifts, day, swing and night.

(3) On November 24, 2014, when claimant filed her initial claim for benefits, she had one child, a one year-old daughter. In the application for benefits that she filed on November 24, 2014, claimant stated that she was unable to work full-time or day and night shifts because she had child care for her daughter only during swing shifts.

(4) Sometime before November 30, 2014, claimant told the employer that, due to her need for childcare, she did not want to work any hours on weekdays other than swing shift hours, beginning no earlier than 4:00 p.m. Audio at ~18:45. Thereafter, the employer did not ask claimant to work any weekday shifts other than those beginning at approximately 4:00 p.m. On Monday, December 1, 2014, claimant

worked for the employer from approximately 4:00 p.m. until 8:00 p.m. On Tuesday, December 2, 2014, claimant worked for the employer from approximately 4:00 p.m. until 8:00 p.m. On Wednesday, December 3, 2014, claimant worked for the employer from approximately 4:00 p.m. until 8:00 p.m.

(5) On December 10, 2014, a Department representative called claimant to determine what hours she was available to work given her need for childcare. Claimant told the representative that her daughter was not registered with any private childcare provider. Claimant told the representative that her daughter's father could provide childcare for her daughter after he was off work, sometime during swing shifts. Claimant also told the representative that her daughter's grandmother could provide childcare, but that the grandmother worked during the day and she needed one day's advance notice to enable her to provide care. The representative asked claimant to call and notify the Department if she was able to arrange childcare that included hours other than swing shift hours.

(6) After December 10, 2014, claimant did not call the Department to notify it that she had made any additional childcare arrangements, or that she had provided incomplete information about the childcare available for her daughter when she spoke to the Department representative on December 10, 2014. After December 10, 2014, claimant did not tell the employer's director for residential programs, who was responsible for filling shifts that became open when a scheduled employee was unable to report for work, that she had become available to work all shifts or that she was no longer limiting her work hours to those that began no earlier than 4:00 p.m. Audio at ~38:20. Claimant also did not tell the house manager, who was responsible for the regular scheduling of caregivers at the house to which claimant was assigned, that she had become available to work all shifts or that she was no longer limiting her work hours to those that began no earlier than 4:00 p.m. Audio at ~37:08. The employer continued to schedule claimant for weekday work only during swing shifts, beginning no earlier than approximately 4:00 p.m.

(7) On Saturday, December 13, 2014, claimant worked for the employer from approximately 8:00 a.m. until 3:00 p.m. On Monday, December 15, 2014, claimant worked for the employer from approximately 5:30 p.m. until 9:30 p.m. On Saturday, December 20, 2014, claimant worked for the employer from approximately 8:00 a.m. until 3:00 p.m. On Wednesday, December 31, 2014, claimant worked for the employer from approximately 4:00 p.m. until 10:00 p.m. For the days between December 1, 2014 and January 3, 2014, the employer had many day shifts and swing shifts beginning earlier than 4:00 p.m. to fill. If the program director or the house manager had been made aware that claimant was willing to work shifts beginning earlier than 4:00 p.m., claimant would have been scheduled for or given more work hours than she actually was.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of November 30, 2014 through January 3, 2014 (weeks 49-14 through 53-14).

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). 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 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.* An individual who is the parent of a child younger than 13 years of age who is not capable of working a particular because of a lack of childcare shall be considered available for work if the work is customarily performed during other shifts in that labor market and the individual is willing to work and capable of working during those other shifts. OAR 471-030-0036(4).

While claimant might still be considered available for work if she was unable to work only day shifts due to her childcare needs, claimant took the position at hearing that she had been able to report for work and was available for "all shifts" and "all hours," apparently including day, swing and night shifts. Audio at ~15:50, ~16:04, ~16:10, ~18:45, ~18:59, ~19:40, ~23:48, ~25:04, ~25:39, ~28:24, ~28:40, ~37:08. Because claimant did not present the evidence required to invoke the child care exception to availability set out in OAR 471-030-0056(4), and the facts that she asserted were fundamentally inconsistent with its applicability, claimant's availability during the weeks at issue must be evaluated under the general requirements of OAR 471-030-0056(3).

Claimant did not dispute the testimony of the employer witness that the employer had many shifts between November 30, 2014 and January 3, 2015 that were available to claimant if the residential director or the house manager had known that she was willing to work shifts that began earlier than 4:00 p.m. or that she wanted to be scheduled for additional hours of work. Audio at ~34:30, ~35:00. Claimant agreed that she initially told the employer that her availability was limited to swing shifts beginning at 4:00 p.m. or later. Audio at ~18:45. While claimant first contended generally that around December 10, 2014, she made it known to the employer that she was willing to "take any shift" and was available for work "around the clock," claimant finally and unequivocally conceded that she never "directly" told any employer representatives that she was available to work during hours other than the limited ones that she had initially expressed, or that she wanted additional work hours. Audio at ~19:40, ~28:40, ~37:08, ~38:20, ~39:20. Notably, claimant never stated on what basis the employer might have known that she was no longer restricting the hours that she was willing to work. It appears, most likely than not, that claimant never specifically notified the employer that her limited hours of work availability had changed or that she had become willing to work all shifts. By failing to notify the employer that she was willing to work weekdays during shifts other than swing shifts beginning on or after 4:00 p.m., claimant imposed a condition substantially interfered with her opportunities to return to regular work.

Claimant was not available for work during the weeks of November 30, 2014 through January 3, 2015 (weeks 49-14 through 53-14). Claimant is ineligible to receive benefits during those weeks.

DECISION: Hearing Decision 15-UI-31656 is affirmed.

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

DATE of Service: March 4, 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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