

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0071

Reversed
Eligible

PROCEDURAL HISTORY: On November 19, 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 19, 2014 through July 19, 2014 (decision # 120515). Claimant filed a timely request for hearing. On January 7, 2015, ALJ S. Lee conducted a hearing at which the employer did not appear, and on January 12, 2015 issued Hearing Decision 15-UI-31646, affirming the Department's decision. On January 26, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On March 1, 2014, Triquint Semiconductor laid claimant off from work. On March 6, 2014, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for the weeks of March 9, 2014 through July 19, 2014 (weeks 11-14 through 29-14), the weeks at issue. The Department paid those benefits to claimant.

(2) During the weeks at issue, claimant principally sought work as a materials specialist, but also applied for work as a retail salesperson. Claimant's labor market was the Portland, Oregon metropolitan area. The customary days and hours of work for a materials specialist in claimant's labor market were all days, day shifts. The customary days and hours of work for a retail salesperson were all days, day and swing shifts.

(3) After Triquint released claimant as an employee, claimant relied on his work history to make his initial employment contacts. Soon after March 1, 2014, claimant contacted, Airsoft Outlet Northwest, a hobby shop where he had previously worked, to learn if that employer needed a salesperson. Over the next few days, claimant spoke with several representatives of the employer about a possible job, including having a brief conversation with the employer's owner. At that time, claimant knew that the employer was fully staffed and was not seeking to hire a full-time employee. Claimant stated to the employer's representatives that he knew that Saturdays were the employer's busiest days and asked if, despite the employer's full staff, it would consider "hir[ing] me part-time as just your Saturdays [sic] guy." Audio at ~26:00. On March 13, 2014, the employer hired claimant to work part-time, generally on Saturdays.

(4) During the weeks at issue, claimant regularly worked an eight hour shift for the employer on Saturdays. In addition, claimant was sometimes contacted to work, and did work, other shifts for the employer during the weeks at issue when its regularly scheduled employees were absent from work for some reason. Claimant never expressly told any employer representative that he wanted to work more hours or on different days than the employer offered to him. On approximately July 19, 2014, claimant quit working for the employer because he found a full-time job as a machinist.

(5) In November 2014, approximately eight months after the employer hired him and four months after he quit working for the employer, the Department conducted a random audit of claimant's claim. As part of this audit, a Department investigator contacted the employer's owner. The owner told the investigator that, at the time claimant was hired, claimant had stated that he was only willing to work on Saturdays. Audio at ~17:42. The owner told the investigator that if claimant had stated a willingness to work on more days, he would have been scheduled to work twenty to forty hours per week. Audio at ~18:38. The owner also told the investigator that claimant had mentioned that he wanted to work for the employer to "supplement his unemployment benefits." Audio at ~37:16.

(6) On November 19, 2014, the Department's investigator called claimant as part of her audit of claimant's claim. When claimant agreed that he had initially proposed to work for the employer on its busiest day, Saturday, the investigator concluded that claimant had admitted that he had been unwilling to work for the employer on any days other than Saturdays, Audio at ~23:21. During the conversation between claimant and the investigator, the investigator brought up the commute between claimant's residence and the employer's workplace and asked him whether he thought that the commute was a factor in his decision to work only one day a week for the employer. Audio at ~32:16, ~32:33. When claimant mentioned in partial response that the commute was "bad," as was the cost of commuting to the workplace, the investigator understood him to mean that he was unwilling to commute more than one day a week to the workplace. Audio at ~30:00, ~21:58. During their conversation, claimant also mentioned that the employer generally did not offer him any work other than on Saturdays and, when the investigator asked claimant if he would work other days if they were offered, claimant stated that he would "consider" it. Audio at ~23:44. Based on claimant's response, and claimant's failure to affirmatively assert that he unquestionably would have accepted additional work, the investigator concluded that claimant was unwilling to work for the employer on any days other than Saturdays. Audio at ~23:44. When claimant agreed with the investigator that he had sought the part-time job with the employer to "supplement" what he received each week in unemployment benefits, the investigator concluded that claimant had intentionally restricted the number of hours he worked each week for the employer. Audio at ~21:58.

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks of March 9, 2014 through July 19, 2014 (weeks 11-14 through 29-14). Claimant was 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, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* When, as in this case, the Department initially paid benefits to claimant during the weeks at issue, the Department carries the burden to show, by a preponderance of the evidence, that claimant was not available during those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Hearing Decision 15-UI-31646, the ALJ concluded that claimant was not available for work during the weeks at issue. Although claimant denied ever communicating any work restrictions to the employer, and it was not disputed that the employer regularly called claimant to work on Saturdays and on various other days when it needed him to provide coverage for absent employees, the ALJ nonetheless concluded that the evidence was insufficient to show that claimant had not placed an "impermissible restriction on his availability." Hearing Decision 15-UI-31646 at 4. The ALJ reasoned that, although claimant might have been hired by the employer based on an understanding that he was going to work on Saturdays, he had an affirmative obligation to expressly tell the employer that was willing to work on days other than Saturdays, or that he wanted to be scheduled for additional hours, in order to "correct[] that [initial] understanding with the [employer]." Hearing Decision 15-UI-31646. We disagree.

At the outset, claimant and the Department's witness disagreed on the substance of several important aspects of their November 19, 2014 conversation, and claimant disagreed with the hearsay statements of the employer's owner, as reported by the Department's witness. We agree with the ALJ's implicit conclusion that claimant's testimony must be accepted in preference to that of the Department's witness, because there was no reason in this record to believe or disbelieve either party's testimony and the Department carried the burden of proof. Based on this conclusion, the issue on review is whether, under the circumstances described in this record, claimant had an affirmative obligation to inform the employer that he was willing to work on days other than Saturdays, or wanted more hours that the employer was scheduling him for. As the ALJ found, claimant had been called to work for the employer on days other than Saturdays when the employer needed coverage for absent employees and he never turned down that work. Hearing Decision 15-UI-31646 at 4; Audio at ~27:29, ~27:58, ~28:19. Because claimant had never told the employer that he was limiting his availability to Saturdays only, and the employer was calling him in to work on days other than Saturdays, it was not unreasonable for claimant to conclude that the employer was not operating under any mistaken belief that he was unwilling to work on days other than Saturdays. Indeed, claimant's belief that the employer was going to contact him to cover any available work hours was logical, sensible and reasonable given the employer's practice of calling him to work on disparate days during the weeks at issue. Audio at ~28:03. When a claimant has no reason to believe that an employer has an incorrect understanding of his willingness to work, it

cannot be concluded, without additional evidence, that claimant impermissibly restricted his availability by failing to correct the employer's misunderstanding of which he was reasonably unaware. There was no such additional evidence in this case

Claimant was available for work during the weeks of March 9, 2014 through July 19, 2014 (weeks 11-14 through 29-14). Claimant was not ineligible to receive benefits during those weeks.

DECISION: Hearing Decision 15-UI-31646 is set aside, as outlined above.

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

DATE of Service: March 11, 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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