

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1034

Affirmed
Benefits Are Not Payable

PROCEDURAL HISTORY: On June 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding benefits were not payable to claimant during the recess period between two academic years (decision # 92006). Claimant filed a timely request for hearing. On August 6, 2015, ALJ Ruth Shoemake conducted a hearing, and on August 11, 2015 issued Hearing Decision 15-UI-42819, affirming the Department's decision. On August 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record and claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) From November 2010 to February 28, 2015, Coos County School District – North Bend (CCSD), an educational institution, employed claimant as a full-time nurse during its academic years. On February 28, 2015, claimant quit her job with the employer to accept a higher paying job from another employer.

(2) Claimant filed an initial claim for benefits on April 21, 2015, during the second quarter of 2015. The base year for an initial claim filed during that quarter includes January 1 through December 31, 2014. Claimant's only base year employer was CCSD. The Department determined that claimant had a monetarily valid claim for benefits based on her base year wages and that her weekly benefit amount was \$549.

(3) CCSD's summer recess period between its 2014-2015 and 2015-2016 academic years began June 10, 2015 and ended September 8, 2015 (weeks 23-15 through 36-15). Claimant claimed benefits for the weeks including June 14 through August 1, 2015 (weeks 24-15 through 30-15), the weeks at issue.

(4) Claimant earned more than \$549 from CCSD during at least one week of the 2014-2015 academic year. Claimant understood that had she not quit work on February 28, 2015, she likely would have continued to work for the employer during the 2015-2016 academic year.

CONCLUSIONS AND REASONS: Benefits are not payable to claimant for the weeks at issue which commenced during the summer recess period between the 2014-2015 and 2015-2016 academic years.

The Department determined claimant had a valid claim for benefits, i.e., was monetarily eligible for benefits, based on the total amount of her base year wages and that her weekly benefit amount was \$549. However, when claims for benefits are based solely or primarily on base-year wages from an educational institution, both ORS 657.167 and ORS 657.221 require a reduction in those benefits¹ under certain prescribed conditions. Claimant seeks benefits based on services performed for CCSD as a full-time nurse. CCSD is an educational institution as defined in ORS 657.010(6). Therefore, ORS 657.221 - which applies to services performed for educational institutions by individuals, such as claimant, in *other than* an instructional, research or principal administrative capacity - limits when those benefits may be paid, if prescribed conditions are satisfied.

ORS 657.221 provides, in relevant part, as follows:

657.221 Amount and time period for payment of benefits to educational institution employees.

(1) Benefits based on service in other than an instructional, research or principal administrative capacity for an educational institution or institution of higher education shall be payable to an individual in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter. However,

¹ The unemployment insurance program is a joint federal and state program that was established in 1935 to provide a safety net for workers who become involuntarily unemployed. *See* Federal Unemployment Tax Act (FUTA), 26 USC §§ 3301 to 3311 and *Unemployment Compensation, Federal – State Partnership*, US Department of Labor, Office of Workforce Security, Division of Legislation, April 2005. Benefits are payable based not on need, but on a qualified wage record and re-employability. FUTA did not cover employment in educational institutions until the Employment Security Amendments of 1970 extended limited coverage to employment in higher educational institutions. In 1976, limited coverage was extended to elementary and secondary school employment. Pub L 94-566. The limitation was that benefits based on such employment would not be payable during periods between and within academic terms. *Id.* The policy reason for that reduction in benefits was that the cost of coverage, without the limitations, placed too great a financial burden on “educational employers,” whose sole resource, usually, is tax dollars. Most, if not all, educational employers are “reimbursable employers,” i.e., they are not entitled to “relief of charges,” but must reimburse the Employment Department Trust Fund dollar for dollar for any benefits paid their unemployed workers. *See* ORS 657.471(6).

The reduction in benefits mandated by the Unemployment Compensation Amendments of 1976 (PL 94-566) applies to specified employment and is based on established criteria in terms that have a precise meaning. Oregon was not required to conform to the federal law in this area but chose to do so to obtain the substantial financial benefits that would result. The choice to engage in this “cooperative federalism” led Oregon to adopt ORS 657.167 and ORS 657.221, among other state provisions, and requires Oregon to interpret them in a manner consistent with federal legislative intent. *See Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25 (1985). If found to be out of conformity, Oregon stands to lose all of administrative funding for the unemployment insurance program (e.g., \$48.6 million in federal fiscal year 2004), and its employers would have to pay their full FUTA tax obligation (e.g., an increase of approximately \$471 million over the \$71 million they paid in 2005). *See* Fiscal Impact Statement on SB 447 by the Employment Department, prepared by Robin Kirkpatrick, March 13, 2005.

(a) Benefits shall not be paid on the basis of such services for any week of unemployment that commences during a period between two successive academic years or terms if the individual performs such services in the first academic year or term and there is a reasonable assurance that the individual will perform any such services in the second academic year or term for any institution; except that

(b) If benefits are denied to an individual for any week under paragraph (a) of this subsection and such individual was not offered an opportunity to perform such services for the institution for the second of such academic years or terms, such individual shall be entitled, if otherwise eligible, to payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of paragraph (a) of this subsection.

(2) With respect to the application of this section, the following shall apply:

(b) In the event the institution does not extend to the individual an offer of work or provide a reasonable assurance the individual is expected to return to work for the institution following the period between the academic years or terms, the separation from work shall be considered an involuntary leaving or layoff.

(3) With respect to any services described in subsection (1) of this section, compensation payable on the basis of such services shall be denied to any individual for any week that commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is reasonable assurance that such individual will perform such services or any services described in ORS 657.167 (1) in the period immediately following such vacation period or holiday recess.

The Employment Department adopted a rule, effective January 29, 2007, exempting certain individuals from the reduction in benefits required by ORS 657.221.² That rule, OAR 471-030-0074, provides in relevant part:

(1) ORS...657.221... appl[ies] only when the individual claiming benefits was not unemployed as defined by ORS 657.100 in the period immediately preceding the holiday, vacation or recess period... Where the week(s) claimed commenced during a customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.

² OAR 471-030-0074 (January 29, 2007). See also ORS 657.100(1); *Hutchinson v. Employment Division*, 126 Or App 717 (1994) and *Salem-Keizer School District #24J v. Employment Department*, 137 Or App 320 (1995).

(2) The provisions of ORS...657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

The Court of Appeals has interpreted the term “academic year” to refer to the traditional fall through spring school year. *Friedlander v. Employment Division*, 66 Or App 546, 552, 676 P2d 314 (1984). CCSD established its summer recess period between the 2014-2015 and 2015-2016 academic years to begin June 10, 2015 and end September 8, 2015. Therefore, that period is CCSD’s “customary recess period between academic years” for purposes of applying 657.221 and OAR 471-030-0074(1).

Because claimant seeks benefits for the period June 14 through August 1, 2015, during the customary recess period between academic years at CCSD, the relevant period under OAR 471-030-0074 is the 2014-2015 academic year. ORS 657.100 provides that an individual is unemployed in any week in which the individual earns less than her weekly benefit amount. Because claimant earned more than her weekly benefit amount of \$549 during at least one week of the 2014-2015 academic year, she is not exempted by OAR 471-030-0074 from the provisions of ORS 657.221.

For non-exempt individuals, ORS 657.221 requires a reduction in benefits if certain prescribed conditions are met. The first condition that must be met is that the benefits sought must be for a week that commenced during a customary vacation period, holiday or summer recess observed by the educational institution for which the services were performed during the base year.³ Claimant claimed benefits for the weeks including June 14 through August 1, 2015 (weeks 24-15 through 30-15), each of which commenced during CCSD’s designated summer recess period. Therefore, the first condition is satisfied with respect her claims for those weeks.

The second condition is that claimant must have performed services for one or more educational institutions during the academic year immediately prior to the recess period. Claimant worked as a full-time nurse for CCSD, during the 2014-2015 academic year. Therefore, the second condition is satisfied.

The third condition is that claimant must have had “reasonable assurance” of continuing work in the 2013-2014 academic year. The Department has defined reasonable assurance by rule:

(1) With respect to the application of ORS 657.167 and 657.221, "reasonable assurance" means a written contract, written notification or any agreement, express or implied, that the employee will perform services immediately following the academic year, term, vacation period or holiday recess which is in the same or similar capacity unless the economic terms and conditions of the employment in the second year or period are substantially less than the employment in the first year or period. A finding of reasonable assurance may be based on the totality of circumstances.

³ ORS 657.221.

(3) With respect to (1) of this rule, "same or similar capacity" refers to the type of services provided: i.e., a "professional" capacity as provided by ORS 657.167 or a "nonprofessional" capacity as provided by 657.221.

(4) Reasonable assurance cannot be ended or abated by any unilateral action of the individual. A decision to quit work, even for good cause, and even if the employer accepts the resignation, does not end or abate reasonable assurance.

OAR 471-030-0075 (January 29, 2007).

Claimant had worked in a permanent full-time position as the district's nurse during CCSD's academic years for over four years when she quit on February 28, 2015 to accept a job with another employer. Her contract had been renewed each year since she began working for the district. Although she asserted that she had been told her contract "might not" be renewed, she quit before the district had decided whether or not to renew the contract. Audio Record ~ 17:00 to 23:00. Ultimately, the Department established that claimant had reasonable assurance of continued employment as the district's school nurse, at an increased rate of pay, during the 2015-2016 academic year. Exhibit 1. Based on the totality of the circumstances, reasonable assurance of continuing employment has been shown. Because reasonable assurance cannot be ended or abated by a unilateral decision to quit work, the third condition is satisfied.

The prescribed conditions of ORS 657.221 have been shown to have been satisfied with respect to benefits based on claimant's base-year wages. Accordingly, those benefits are subject to the reduction contemplated by that statutory section, and benefits are not payable for the weeks that commenced during the recess period between CCSD's academic years, the weeks at issue.

DECISION: Hearing Decision 15-UI-42819 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 7, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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