

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1399**

*Reversed*  
*Eligible*

**PROCEDURAL HISTORY:** On September 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 80210) concluding that claimant was not available for work from September 20 through September 26, 2015 (week 38-15). Claimant filed a timely request for hearing. On November 2, 2015, ALJ Shoemake conducted a hearing, and on November 10, 2015, issued Hearing Decision 15-UI-47497, concluding that claimant was not available for work from September 20 through October 10, 2015 (weeks 38-15 through 40-15). On November 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Claimant claimed benefits for the weeks from September 20 through October 10, 2015 (weeks 38 -15 through 40-15), the weeks at issue. The Department did not pay claimant benefits for those weeks.<sup>1</sup>

(2) During the weeks at issue, claimant sought work in food service and retail sales. Claimant's labor market is the Portland metropolitan area. Food service and retail sales work is customarily performed seven days a week, from 6 a.m. to 11 p.m.

(3) During the weeks at issue, claimant attended college at Portland Community College. She attended one class on Monday and Wednesday from 2 to 4:50 p.m. She also was enrolled in one online class that was available online at any time. Claimant was in her final term at the college; after completing the term, she expected to receive an associate's degree in multi-media.

(4) Claimant has received financial aid, primarily in the form of a loan, to attend school. During the weeks at issue, claimant really needed work. She was willing to drop her class if her work hours

---

<sup>1</sup> We take judicial notice of the fact that the Department denied benefits for the weeks at issue, which is contained in Employment Department records. Any party that objects to our taking judicial notice of this fact must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

conflicted with her class hours, even though she would have to repay out-of-pocket the money she had received for the class and re-schedule the class for another term.

**CONCLUSION AND REASONS:** We conclude that claimant was available for work during the weeks at issue.

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) (January 8, 2006). 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.* Where, as here, the Department did not initially pay the claimant benefits the claimant has the burden to establish by a preponderance of evidence that she is eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

During a September 24, 2015, phone call to claimant, a Department representative asked claimant what claimant would do if she was offered a job with work hours that that conflicted with the class she was taking during the weeks at issue. Claimant responded that although she would ask the employer to work around her schedule, she would choose a job over school because she really needed to work. Audio Recording at 10:33. At the hearing, claimant testified that she applied for numerous jobs during the weeks at issue, told prospective employers that she had “open availability,” *i.e.*, no restrictions on the hours she was available to work, and would choose work over school if there was any conflict. Audio Recording at 15:01, 15:42, and 18:45. The record provides no basis for doubting claimant’s credibility. Based on her repeated assertions at the hearing that she would drop her class if offered a job with work hour’s incompatible with her class schedule, we conclude that claimant was available for work during the weeks at issue.

The ALJ, however, found that the “time and money claimant that claimant had invested in her schooling” and “her earlier statements to the Employment Department” provided persuasive evidence that claimant’s school attendance imposed a condition that limited her opportunity to return to work. We disagree. Claimant testified that she had invested approximately \$30,000 in her *entire* education at Portland Community College, but was willing to repay out-of-pocket the cost of the single class she was taking during the weeks at issue, if she had to drop it. Audio Transcript at 16:04, 17:36. Although claimant told the Department representative during her September 24 phone call that she told prospective employers about her class schedule, and asked if the employers could work around it, the representative admitted that claimant also stated that she really needed to work and would choose work over school if necessary. Audio Recording at 10:33. We therefore conclude that her statements about what she was telling prospective employers indicated a preference for obtaining work with hours compatible with her class and not a limitation on the hours she was willing to work or a refusal to accept a job with work hours that conflicted with her class.

Claimant therefore met her burden to demonstrate that she was available for work during the weeks at issue. She is eligible for benefits for those weeks.

**DECISION:** Hearing Decision 13-UI-47497 is set aside as outlined above.

Susan Rossiter and J. S. Cromwell

**DATE of Service: January 5, 2016**

**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](http://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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.