

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1414

Reversed
Eligible Weeks 30-15 through 40-15

PROCEDURAL HISTORY: On October 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from July 26 through October 10, 2015 (weeks 30-15 through 40-15). Claimant filed a timely request for hearing. On November 18, 2015, ALJ Murdock conducted a hearing, and on November 25, 2015, issued Hearing Decision 15-UI-48385, affirming the administrative decision. On November 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On March 8, 2015, claimant filed an initial claim for unemployment insurance benefits after separating from a full time job as a human relations professional. Claimant filed weekly claims for benefits from July 26 through October 10, 2015 (weeks 30-15 through 40-15), the weeks at issue.

(2) In March 2010, claimant began working part time as a server for the employer at its Olive Garden restaurant. When claimant began working at the Olive Garden, he worked 15 to 20 hours per week at the restaurant on the weekends, and also worked full time as a human resources professional. Sometime in spring 2014, claimant reduced the hours he worked as a server to 8 or 9 hours per week, on the weekend. Claimant reduced his hours on the recommendation of his doctor; claimant had been diagnosed with high blood pressure and the doctor wanted him to reduce his work hours and more effectively manage his health through changes in diet and exercise.

(3) Sometime in June 2015, after claimant had separated from his full time job as a human relations professional, the employer asked if he was willing to work more hours as a server. Claimant said he could not work any more hours, but was willing to work occasional extra shifts to help out the employer. Claimant refused to work more hours as a server because any additional work he performed as a server would have interfered with his search for a full time job as a human relations professional. In addition, claimant believed more work as server would have been too physically demanding for him. When

claimant worked on his feet for long periods of time, his high blood pressure caused him to retain fluid in his ankles.

(4) During the weeks at issue, claimant looked for work as a human relations professional, a field in which he has extensive work experience.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant was available for work during the weeks at issue.

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 during all the usual hours and days of the week 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.*

In Hearing Decision 15-UI-48385, the ALJ concluded that claimant was not available for work during the weeks at issue because he refused to accept additional hours of work as a server for the employer. We agree that claimant was unwilling to work more than 8 or 9 hours per week as a server. Claimant was not, however, seeking work as a server; instead, he was looking for work as a human relations professional, work in which he has extensive experience. Under OAR 471-030-0036(3), an individual must be available for “the work being sought.” *Crothers v. Employment Department*, 250 Or App 62, 279 P3d 304 (2012). In *Crothers*, the court found that the Department erred by denying benefits to an individual who was not available for work as a CPR instructor during all the days and hours that this work was performed. The court found that the individual’s part time work as a CPR instructor was an “avocation,” and that during the weeks at issue, he sought work in his customary occupation as a construction supervisor. *Id.* at 64. Because the record showed that the individual was available during the usual hours and days of the week that work as a construction supervisor was customarily performed, the court concluded that he was available for work and eligible for benefits. Here, as in *Crothers*, claimant’s part time work as a server was his avocation. The record shows that he sought work as a human relations professional and was available during the usual hours and days that this work was customarily performed.¹ We conclude, as the court did in *Crothers*, that claimant was available for the work he sought and therefore eligible for benefits.²

Claimant was available for work during the weeks at issue. He is eligible for unemployment benefits for these weeks.

¹ The ALJ failed to determine what days and hours work as a human relations professional is performed, and whether claimant was available during those days and hours. Based on claimant’s testimony that when he worked full time as a human relations professional, he also worked part time at the Olive Garden, we infer that during the weeks at issue, claimant was available during the usual days and hours that human relations work is customarily performed.

² Under OAR 471-030-0036(1)(a), the Department may require an individual to seek less desirable work of another type if the individual is unable “to secure the individual’s customary type of work” in the labor market where the work is sought. The record contains no evidence that the Department imposed such a requirement on claimant.

DECISION: Hearing Decision 15-UI-48385 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. 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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