

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0058

*Hearing Decisions 16-UI-50548, 16-UI-50556,
16-UI-50555 and 16-UI-50545 Are Affirmed
Ineligible and Disqualified*

PROCEDURAL HISTORY: On September 30, 2015, the Oregon Employment Department (the Department) served notice of four administrative decisions, the first concluding that claimant was not available for work during the weeks of July 5, 2015 through September 12, 2015 (decision # 100804), the second concluding claimant failed without good cause to accept suitable work on July 29, 2015 (decision # 102717), the third concluding claimant failed without good cause to accept suitable work on July 21, 2015 (decision # 101554) and the fourth concluding claimant was not available for work during the week of July 12, 2015 through July 18, 2015 (decision # 110626). Claimant filed timely requests for hearing on all four administrative decisions. On December 29, 2015, ALJ Wyatt conducted a consolidated hearing, and on January 6, 2016 issued four hearing decisions, the first affirming decision #100804 and concluding claimant was not available for work during the weeks of July 5, 2015 through September 19, 2015 (Hearing Decision 16-UI-50548), the second affirming decision # 102717 (Hearing Decision 16-UI-50556), the third affirming decision # 101554 (Hearing Decision 16-UI-50555) and the fourth affirming decision # 110626 (Hearing Decision 16-UI-50545). On January 15, 2016, claimant filed applications for review of all four hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-50548, 16-UI-50556, 16-UI-50555 and 16-UI-50545. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2016-EAB-0058, 2016-EAB-0059, 2016-EAB-0060 and 2016-EAB-0061).

FINDINGS OF FACT: (1) Some years before 2015, claimant began working full-time as a baker for a company known as Sodexo. During the same time, claimant also worked part-time at another job, as a cook for Redmond Health Care Center two or three evenings per week. Sodexo usually laid claimant off when schools was in recess beginning in late June each year until sometime late in the following September. During the period school was in recess, claimant continued to work part-time for the employer.

(2) Sometime before 2015, claimant and her husband began operating a food stand during the summer vacation season at a nearby resort, Eagle Crest Resort. Claimant sometimes worked at the food stand.

(3) Sometime before July 5, 2015, claimant restarted her claim for unemployment benefits because Sodexo laid her off for the summer during the school recess period. During the layoff, claimant sought work in stocking, as a cashier and in the areas of food service and catering. Claimant's labor market was Redmond and Bend, Oregon. Claimant claimed benefits for the period of July 4, 2015 through September 19, 2015 (weeks 27-15 through 37-15), the weeks at issue.

(4) Before July 5, 2015, claimant worked as a cook two evenings each week for the employer, on Tuesdays and Wednesdays. Although the employer assigned a kitchen aide to assist its day cooks it did not schedule kitchen aides for its evening cooks. Claimant complained to the employer's dietary manager that she thought the number of residents she cooked for each evening required the employer to provide the services of a kitchen aide to her. The dietary manager arranged to have one of two kitchen aides available to assist claimant if she needed them. The dietary manager told claimant that she could call either one if she needed help on particular evenings when she cooked.

(5) On July 6, 2015, claimant left a completed employee availability form for the employer's dietary manager. On the form, claimant stated that she was available for work only on an on-call basis "effective immediately." Transcript at 32. The dietary manager told claimant that she could not start working only on-call until after her scheduled shifts on Tuesday and Wednesday, July 14 and 15, 2015. If claimant had not asked to work on-call only, the employer would have continued to have her work a schedule of at least two shifts per week through the summer of 2015. The employer allowed claimant to change to on-call status.

(6) On July 14 and 15, 2015, claimant did not work her scheduled shifts. Claimant called the employer to notify it that she was sick.

(7) On July 21, 2015, the dietary manager sent claimant a text message asking her if she was able to work on July 22, 2015 from 3:00 p.m. until 8:00 p.m. The work was as a cook and it paid \$12.36 per hour. The median rate of pay for cooks in claimant's labor market was \$11.02 per hour. Claimant sent a text message to the dietary manager in which she stated, "I'm already working" and turned down the offered shift on July 22, 2015. Transcript at 17.

(8) On the morning of July 29, 2015, sometime before 9:00 a.m., the dietary manager sent a text message to claimant asking her to work that afternoon from 3:00 p.m. until 8:00 p.m. Claimant turned down the offered shift, stating that she was working elsewhere that evening.

CONCLUSIONS AND REASONS: Claimant was not available to work during the week of July 12, 2015 through July 18, 2015 and the weeks of July 5, 2015 through September 19, 2015. Claimant refused without good cause to accept suitable work on July 21 and July 29, 2015. Claimant is ineligible to receive benefits during the weeks of July 5, 2015 through September 19, 2015, and disqualified from receiving benefits because of her job refusals.

Availability. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week benefits are 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 all full time, part time and temporary work opportunities throughout the labor market during each week for which benefits are claimed, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.*

Claimant readily agreed that she called in sick and did not work on July 14 and 15, 2015, which were days within claim week 28-15 (the week of July 12, 2015 through July 18, 2015). Transcript at 28, 33, 35. OAR 471-030-0036(3)(f)(A) provides, among other things, that an individual who misses an opportunity to work due to illness is not available for work. Because she was not able to work due to illness on those two days, claimant was not willing or capable of reporting to all work opportunities in her labor market, including those two opportunities that the employer offered her *during that week*. There is no good cause exception to the requirement that an individual must be “available” during each day of a week for which benefits are claimed to maintain eligibility to receive benefits for that week. Accordingly, claimant’s illness, although it lasted only for two days, rendered her not available to work on those days and not eligible to receive benefits for the entire claim week in which those days fell, which was claim week 28-15.

Claimant also agreed that, at her request dated July 5, 2015, she changed from regularly working a two day per week schedule for the employer to working only on an on-call basis. Claimant stated she made this change because the employer did not schedule kitchen aides to assist her when she worked in the evenings. Transcript at 36, 43. However, claimant did not dispute either that the dietary arranged for two kitchen aides to be available to assist her, or that those aides came to assist whenever she called them. Transcript at 42. That the employer might not have formally scheduled those aides to work with claimant was unlikely to have significantly inconvenienced claimant in performing her work as a cook since despite non-scheduling they were available to assist claimant, as needed. The employer’s alleged actions or inactions in connection with kitchen aides reasonably should not have caused claimant to seek the change to on-call status, only. Claimant did not dispute that if she had not requested to change to an on-call basis only the employer would have regularly scheduled her for two days of work each week, and she did not offer a legitimate reason for so limiting her availability to work to on-call only. Absent evidence to the contrary, by limiting her availability to on-call, claimant imposed a condition that unreasonably limited her opportunities to work. Since claimant sought to limit her availability starting on July 6, 2015, it follows that claimant was not available during the weeks of July 5, 2015 through September 19, 2015.

Job Refusals. ORS 657.176(2)(e) states that an individual is disqualified from benefits if the individual refused without good cause to accept suitable work when offered. "Good cause" "is such that a reasonable and prudent person, exercising ordinary common sense, would refuse to apply for available suitable work when referred by the employment office or accept suitable work when offered by the employer." OAR 471-030-0038(6). ORS 657.190 sets out the factors for determining if work is suitable for an otherwise eligible individual and ORS 657.195(1)(b) provides that work is not suitable for an individual if the remuneration for it is substantially less favorable than the remuneration prevailing for such work in the locality. OAR 471-030-0037(1) (August 1, 2014) states that a rate of pay for offered work is “substantially less favorable” when the rate of pay is at least ten percent lower than the average rate of pay in the locality, as determined by the Department.

The work the employer offered to claimant on July 21 and July 29, 2015 was as a cook, which she was already performing for it and was one of the types of work she was seeking. The rate of pay for the work the employer offered was \$12.36 per hour or 12 percent greater than the average rate of pay for cook's work in claimant's labor market. The work the employer offered was suitable work.

While claimant never specified what work she was otherwise doing that prevented her from accepting the suitable work the employer offered to her on July 21 and July 29, 2015, she stated that she might have been performing volunteer work, without compensation, for Sodaxo or, perhaps, her and her husband's food stand at Eagle Crest. Transcript at 17, 18, 19. The desire to perform uncompensated volunteer work is not good cause to refuse a suitable offer for paying work. By refusing the employer's work offers for July 21 and July 29, 2015, claimant refused a suitable job offer without good cause.

DECISION: Hearing Decisions 16-UI-50548, 16-UI-50556, 16-UI-50555 and 16-UI-50545 are affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 3, 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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