

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0096

Affirmed
Ineligible

PROCEDURAL HISTORY: On October 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from October 11 through 24, 2015 (decision # 162946). Claimant filed a timely request for hearing. On January 14, 2016, ALJ Lewis conducted a hearing, and on January 20, 2016 issued Hearing Decision 16-UI-51324, concluding that claimant was not available for work from October 11 through December 12, 2015. On January 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. In her argument, claimant asks EAB to consider a document she asserts was "offered" but not received into evidence, a copy of her academic transcript, which she further asserts shows she withdrew from a class to work a part-time job during the weeks at issue. However, the record shows that although claimant provided the document to the ALJ prior to the hearing, she did not offer it into evidence at the hearing. *See* Audio Record; Hearing Decision 16-UI-51324 at 1. The information contained in the document also is redundant, given claimant's credible and undisputed testimony that she withdrew from a class to work a part-time job during the weeks at issue. *See* Audio Record at 20:45. EAB therefore did not consider the document when reaching this decision.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from October 11 through December 12, 2015 (weeks 41-15 through 49-15), the weeks at issue. The Department did not pay claimant benefits for those weeks.¹

(2) During the weeks at issue, claimant sought retail sales work. The usual hours and days customary for retail sales work were 8:00 a.m. to 10:00 p.m., all days of the week. Much of the retail sales work in claimant's labor market paid at or near Oregon minimum wage.

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

(3) Claimant also attended school during the weeks at issue from 5:45 p.m. to 7:15 p.m. on Mondays, 9:15 a.m. to 10:05 a.m. on Tuesdays and Thursdays, 11:45 a.m. to 7:15 p.m. on Wednesdays, and 10:15 a.m. to 3:45 p.m. on Fridays. On November 11, 2015, claimant withdrew from a class for part-time retail sales work that paid \$11 per hour, plus sales commissions. However, claimant was unwilling to withdraw from classes for work that did not pay significantly more than Oregon minimum wage.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant was not 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) (February 23, 2014). Among those requirements are that the individual be willing to work during all of the usual hours and days of the week customary for the work being sought, and not imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.* Where, as here, the Department does not pay a 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 the weeks at issue, claimant attended school during some of the customary hours and days for the retail sales work she sought. In written argument, as at hearing, claimant asserts that her withdrawal from a class for part-time retail sales work shows that she was available for work. However, claimant testified that she withdrew from the class because the work paid more than Oregon minimum wage, plus sales commissions. Audio Record at 23:00-24:00. Claimant admitted that she was unwilling to withdraw from classes for much of the retail sales work in her labor market because it did not pay significantly more than minimum wage. Audio Record at 23:45-24:45. Claimant therefore was imposing a condition on her willingness to work during all of the customary hours and days for the work she sought that limited her opportunities to work. She therefore was not available for work during the weeks at issue, and is ineligible for benefits for those weeks.

DECISION: Hearing Decision 16-UI-51324 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: February 11, 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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