

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0190

Affirmed
Ineligible

PROCEDURAL HISTORY: On January 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of November 29, 2015 through December 20, 2016 (decision # 80840). Claimant filed a timely request for hearing. On February 11, 2016, ALJ Wymer conducted a hearing, and on February 11, 2016 issued Hearing Decision 16-UI-52852, concluding claimant was not available for work during the weeks of November 29, 2015 through January 2, 2015 and the weeks of January 10, 2016 through February 6, 2016. On February 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant had two children: one who was 3 years old and one who was 1 year old. The children did not attend preschool and claimant was responsible to care for them all day. Claimant and her children lived in Echo, Oregon with claimant's mother. The children's father lived in Molalla, Oregon. Claimant's mother worked in Pendleton, Oregon as an in-home care provider on Tuesdays through Fridays.

(2) From April 4, 2015 until November 2, 2015, claimant worked Tuesdays, Wednesdays and Thursdays at a pizza shop from 10:30 or 11:00 a.m. until 4:00 or 4:30 p.m. Claimant's friend provided care for claimant's children when she worked. Claimant's friend had three of her own children to care for: one was 4, one was 2 and one was 5 months old.

(3) On November 17, 2015, claimant filed an initial claim for unemployment insurance benefits. The claim was determined valid. Claimant claimed, but was not paid, benefits for the weeks of November 29, 2015 through January 2, 2016 and January 10, 2015 through February 6, 2016 (weeks 48-15 through 52-15 and 02-16 through 05-16), the weeks at issue.

(4) Claimant's labor market was Echo, Stanfield, Hermiston, Boardman and Umatilla, Oregon. During the weeks at issue, claimant sought work as a cashier, waitress and hostess. In claimant's labor market, the work claimant sought was performed all days of week, day and swing shifts. Day shift hours were 8:00 a.m. through 5:00 p.m. and swing shift hours were 5:00 p.m. through 11:00 p.m. Audio at ~14:00.

(5) On November 17, 2015, when claimant filed her initial claim for benefits, she completed a questionnaire for the Department. In response to a question about whether she was willing to work full-time and part-time, claimant answered, "No, part-time only due to child care." Audio at 14:24. In response to a question about whether there were any reasons she could not work full-time, claimant answered, "Part-time only due to childcare." Audio at ~14:34.

(6) On December 1, 2015, claimant visited a WorkSource Oregon office to obtain information about her unemployment insurance claim. A representative who spoke with claimant recorded that claimant had "childcare issues" and that claimant had stated she "does not have childcare at this time." Audio at ~16:39, ~17:02.

(7) On December 24, 2015, claimant had a telephone conversation with a Department representative. Claimant told the representative that she was "totally open" for full-time work despite childcare needs. Audio at ~14:50, ~17:42. Claimant told the representative that her friend, who had previously provided care for children when claimant worked at the pizza shop, was willing to care for the children on Tuesdays through Thursdays and her mother would provide care for her children "on the weekends." Audio at ~15:59, ~16:09.

CONCLUSIONS AND REASONS: Claimant was not available during the weeks of November 29, 2015 through January 2, 2016 (weeks 48-15 through 52-15) and January 10 through February 6, 2016 (weeks 2-16 through 5-16).

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 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.* An individual who is a parent of a child or children under the age of 13 and who is unable to work a particular shift due to child care needs, is considered available for work if the work the individual seeks is performed during other shifts in the labor market and the individual is willing and capable of working during those other shifts. OAR 471-030-0052(4). Where, as here, claimant was not paid benefits during the weeks at issue, claimant carries the burden to show by a preponderance of the evidence that she was entitled to receive benefits or that she was available for work. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, claimant did not contend that childcare needs prevented her from regularly working during a particular shift. Accordingly, the availability exception for individuals who cannot work one shift because of childcare responsibilities does not apply to claimant's situation.

Claimant stated that child care issues prevented her from taking other than part-time work when she completed Department paperwork on November 17, 2015 and indicated to a Work Source Oregon representative on December 1, 2015 that she had childcare issues and did not have childcare at that time. At hearing, however, she contended that her mother and friend could care for her children seven days a week, from 8 a.m. until 11:00 p.m. that she was required to be willing and capable of reporting for work in her labor market to establish she was available for work. However, claimant's contention is not plausible. First, it is unlikely that claimant's friend, who had three very young children of her own, would be willing to care for claimant's two additional young children anytime from 8:00 a.m. through 11:00 p.m. and it is particularly unlikely that she would be willing to provide that childcare for two more young children until as late as 11:00 p.m. It is more likely that claimant's friend was willing to care for claimant's children the same hours and days she had cared for the children when claimant worked in the pizza shop: from 10:30 or 1:00 a.m. until 4:00 or 4:30 p.m., Tuesdays through Thursdays. Second, it is also implausible that claimant's mother could provide childcare for claimant's children on Fridays through Mondays, the days the claimant did not expect her friend to provide that care. When claimant was specifically questioned about her mother's work schedule, she stated that her mother worked in Pendleton every Friday. Audio at ~34:24. It therefore does not appear likely that claimant's mother was available to provide childcare on Fridays. Aside from her mother and her friend, claimant was unable to identify any other person who lived in the proximity of Echo and was able and willing to provide childcare for her children on a regular basis.

The preponderance of the reliable evidence in this case shows that claimant did not demonstrate she had childcare arrangements covering day shifts and swing shifts on Fridays and swing shifts on Tuesdays through Thursdays. To demonstrate that she was available for the work she sought in her labor market, claimant needed to show that childcare needs would not prevent her from working on all days per week, during both day shifts and swing shifts. Consequently, claimant did not meet her burden to establish she was available for work during all of the weeks at issue.

Claimant did not show she was available for work during the weeks of November 29, 2015 through January 2, 2016 and January 10, 2016 through February 6, 2016. Claimant is ineligible to receive unemployment benefits during those weeks.

DECISION: Hearing Decision 16-UI-52852 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: March 9, 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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