

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0270

Modified
Benefits Allowed in Part, Denied in Part

PROCEDURAL HISTORY: On January 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available from August 2, 2015 to January 9, 2016 (decision # 85834). Claimant filed a timely request for hearing. On February 12, 2016, ALJ S. Lee conducted a hearing, and on February 19, 2016 issued Hearing Decision 16-UI-53378, concluding claimant was not available from August 2, 2015 to February 6, 2016. On March 9, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) In approximately 2009, claimant began working for Ross Dress for Less as a part-time stockroom person. Beginning August 2014, claimant limited his availability for work to four hours each Friday to accommodate another job. Claimant typically worked for Ross on two or three Fridays each month because Ross did not always have enough work for him on Fridays.

(2) In July 2015, claimant's other job ended. On August 3, 2015, claimant filed an initial claim for unemployment insurance benefits. A week later, claimant notified Ross that his other job had ended. He did not ask to increase his hours at Ross, and Ross did not ask if he wanted more hours or offer to increase his hours. Had claimant asked to increase his hours the employer had additional work available to him on other days of the week.

(3) On December 24, 2015, claimant spoke with a Department employee who asked claimant why he had not tried to increase his hours at Ross after his other job ended. After speaking with the Department employee, claimant spoke with his supervisor and the stock manager at Ross and notified them both that he was available for more work at Ross.

(4) Claimant filed weekly claims for benefits from August 2, 2015 to February 6, 2016 (weeks 31-15 to 5-16). The Department paid claimant benefits through January 9, 2016, and did not pay him thereafter.

(5) During the weeks at issue, claimant sought work in retail, among other things. The days and hours customary for retail work included all days, day and evening shift.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work from August 2, 2015 to December 26, 2015. Claimant was, however, available for work from December 27, 2015 through February 6, 2016.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). To be considered "available for work", the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market during the days and hours customary for the types of work sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. OAR 471-030-0036(3) (February 23, 2014).

As a preliminary matter, claimant argued that the ALJ erred in stating that claimants "may not restrict their hours in any manner during the customary days and hours the work they are seeking is performed" and "cannot place any restriction on their availability." Hearing Decision 16-UI-53378 at 4. Written argument at 2. We agree with claimant that the ALJ erred. OAR 471-030-0036(3) provides that an individual may limit their availability for work for any number of reasons, including imposing limitations if the work is unsuitable, is outside the customary hours and days for the types of work sought, for child care, because of an impairment, for limited travel outside the labor market, or if the conditions limiting availability are not "substantial."

We agree with the ALJ that claimant was not available for work from August 2, 2015 to December 26, 2015 because he placed a substantial limitation on his availability. Although claimant argued that he "thought he had made it clear that he was looking for more hours" from Ross when he spoke with his supervisor about his unemployment insurance claim in August 2015, claimant testified about that conversation that he "did not tell her [that he wanted more work], but I expected her to know that I am available more time for work because I stopped doing the other job." *Compare* Written argument at 1; Transcript at 14. The record fails to show that claimant communicated his availability to Ross, much less that he "thought he made it clear" that he could work more hours despite not having mentioned as much to his supervisor. The employer testified, and reported to the Department, that Ross had additional hours available to claimant had claimant informed Ross that he no longer wanted to limit his work schedule to four hours on Friday. Transcript at 7, 18. Because claimant did not inform Ross of his availability, claimant limited his opportunities to return to work at the earliest possible time.

Claimant argued that even if we conclude that claimant limited his opportunities to return to work at the earliest possible time, the record fails to show that the limitation was "substantial." Written argument at 2. In support, claimant argued that his coworkers worked part-time, and Ross did not always need claimant to work his Friday shifts. Transcript at 6, 15, 19. However, the fact that Ross did not have full time work for claimant, or that the employer's Friday workload did not always necessitate that claimant work, or work four hours, does not mean that the employer did not have work available for claimant on other days. The employer reported to the Department, and its witness testified unequivocally that the employer did have additional work available for claimant on other days during the weeks at issue. Transcript at 7, 18. Moreover, even if Ross had, for instance, only one or two hours of additional work for claimant each week, that would still be a 25% to 50% increase over his hours during the weeks at

issue, which, in context, we would consider "substantial." We therefore conclude that claimant's failure to notify the employer between August 2, 2015 and December 26, 2015 that he could work more than just four hours on Fridays was a condition that substantially reduced claimant's opportunities to return to work at the earliest possible time.

The ALJ also concluded, however, that claimant was not available for work between December 27, 2015 and February 6, 2016. The ALJ concluded that claimant "admitted that he did not change his availability or specifically tell the employer that he was able and willing to work additional hours, he merely assumed that his conversation with the manager . . . would lead her to schedule him for more hours if they were available." Hearing Decision 16-UI-53378 at 3. We agree that claimant made that admission with respect to his August 2015 conversation with his supervisor. *See* Transcript at 14. However, the ALJ did not consider claimant's testimony that, after speaking with the Department employee about his availability on December 24, 2015, he told both a manager and the stock manager that he was available to work more than just Fridays for four hours. Transcript at 14-15. Although the employer's witness testified that claimant did not change his availability throughout any of the weeks at issue, she is not one of the individuals with whom claimant spoke in December 2015, and did not claim or show that those individuals denied claimant spoke with them. Transcript at 18. The Department's witness averred that the employer had reported in January 2016 that claimant had not yet changed his availability with Ross, but, likewise, did not explain the source of the employer's report or specifically refute claimant's assertion that he told two managers he had changed his availability. Transcript at 7. In the absence of evidence tending to disprove claimant's claim that he spoke with his managers about his availability, we find claimant's testimony that he spoke with them credible.

The record is silent as to the date of claimant's conversations with the two managers, just that it occurred after his conversation with the Department employee. The conversation with the Department employee occurred on Thursday, December 24, 2015. The following Friday, December 25, 2015, was a national holiday, so it is implausible that claimant would have worked or had the opportunity to speak with the two managers that day. We infer from context that it is more likely than not that claimant's conversation with his two managers would have occurred the week following his conversation with the Department employee. We conclude, therefore, that it is more likely than not that claimant expanded his availability for work with Ross beginning the week of December 27, 2015.

Based on the employer's witness's testimony at the hearing, and the employer's January 11, 2016 report to the Department that claimant had not expanded his availability, it is clear that the employer was not aware of claimant's expanded availability beginning the week of December 27, 2015. The employer's witness also reported that claimant did not use the employer's computer system to properly expand his availability with the employer. Transcript at 18. That does not, however, determine the outcome of this decision. Despite the fact that claimant's attempt to notify the employer of his expanded availability for work was, ultimately, ineffectual, by having the conversations with two managers claimant demonstrated that he was subjectively willing to work, capable of accepting and reporting for work, and had removed the self-imposed conditions that had, previously, substantially reduced his opportunities to return to work. We therefore conclude that claimant was available for work beginning December 27, 2015 through February 6, 2016.

DECISION: Hearing Decision 16-UI-53378 is modified, as outlined above.

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

DATE of Service: April 4, 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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