

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0655

Affirmed
Ineligible Weeks 9-16, 11-16 through 13-16, 15-16

PROCEDURAL HISTORY: On April 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 95538) concluding claimant was not available for work from February 28 through March 5, 2016, and from March 13 through April 2, 2016 (weeks 9-16, 11-16 through 13-16). Claimant filed a timely request for hearing. On May 4, 2016, ALJ Seideman conducted a hearing at which the employer failed to appear, and on May 6, 2016 issued Hearing Decision 16-UI-59056, concluding claimant was not available for work weeks 9-16, 11-16 through 13-16, and from April 10 through April 16, 2016 (week 15-16). On May 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On February 28, 2016, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed and was denied benefits for weeks 9-16, 11-16 through 13-16, and 15-16, the weeks at issue.

(2) Intel Corporation employed claimant as program manager and had work available for claimant during all the weeks at issue. Claimant had an anxiety disorder and migraines during the weeks at issue, but was able to perform some work. The employer also had an interactive work reassignment program for employees who required accommodations due to medical conditions. The employer did not guarantee it would have a position available for a participant who completed that program.

(3) Claimant was not willing to return to her current position at Intel or participate in the employer's work reassignment program during the weeks at issue because she believed that there was a possibility the employer would discharge her with no work separation package if she returned to work.

(4) During week 9-16, claimant did online work searches and contacted two potential employers.

(5) During week 11-16, claimant engaged in networking with colleagues, contacted small business owners regarding job openings, and contacted two potential employers.

(6) During week 12-16, claimant engaged in networking with small business owners, did online work searches, and contacted two potential employers.

(7) During week 13-16, claimant did online work searches, a work search at the Department, updated her references and resume, and contacted two potential employers.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that claimant was not available for work during the weeks at issue, and we conclude claimant was not actively seeking work during week 15-16.

Availability for Work. To be eligible to receive benefits, unemployed individuals must be able to work and available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). Where, as here, the Department does not pay claimant benefits, claimant has the burden to establish by a preponderance of evidence that she was eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

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 refrain from imposing conditions that substantially reduce the individual’s opportunities to return to work at the earliest possible time. *Id.* An individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(3)(e).

Claimant was not willing to return to her position with the employer or participate in its reassignment program during all the weeks at issue because she believed the employer might discharge her without a separation package if she returned to work with the employer. In refusing to return to her current position with the employer or to participate in the reassignment program due to the possibility that it might result in her discharge, claimant imposed a condition that substantially limited her opportunities to return to work at the earliest possible time. Whether or not claimant’s migraines and anxiety disorder were permanent or long-term physical or mental impairments as defined by 29 CFR 1630.2(h), claimant was unavailable for work because she refused to work due to a risk that she might be discharged without a compensation plan, and not because her health conditions prevented her from working full time or during particular shifts. For these reasons, claimant was not available for work during the weeks at issue.

Actively Seeking Work. To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). With few exceptions, none of which apply here, individuals are “required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual.” *Id.* Work seeking activities include but are not limited to registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume,

reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer. OAR 471-030-0036(5)(a)(A). “Direct contact” means “making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer.” OAR 471-030-0036(5)(a)(B).

Claimant was required to conduct at least five work seeking activities per week. The record shows claimant conducted at least five work seeking activities during weeks 9-16, and 11-16 through 11-13. The Notice of Hearing advises parties that claimant’s work search evidence may be required at hearing and to be prepared with work search evidence for all weeks at issue. Claimant testified at hearing that she had no record of her work search for week 15-16. Audio Record at 23:54 to 23:59. Because the record fails to show that claimant conducted five work seeking activities during week 15-16, claimant is ineligible for benefits for week 15-16.

In sum, claimant was not available for work during weeks 9-16, 11-16 through 13-16, and 15-16, and was not actively seeking work during week 15-16. She therefore is ineligible for benefits for those weeks.

DECISION: Hearing Decision 16-UI-59056 is affirmed.

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

DATE of Service: July 1, 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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