

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0677

Affirmed - Afirmado
Ineligible – No Elegible

PROCEDURAL HISTORY: On April 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from March 6 through April 23, 2016 (decision # 151506). Claimant filed a timely request for hearing. On May 27, 2106, ALJ Monroe conducted a hearing, and on June 2, 2016 issued Hearing Decision 16-UI-60884, concluding claimant was not available for work from March 6 through May 21, 2016. On June 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant claimed benefits from March 6 through May 21, 2016 (weeks 10-16 through 20-16), the weeks at issue. The Department paid claimant benefits for March 6 through April 23, 2016, but did not pay benefits for April 24 through May 21, 2016.

(2) During the weeks at issue, claimant sought work as a farm worker and laborer. Claimant's labor market area was Salem and Keizer, Oregon. The customary days and hours for a farm worker and laborer work were all days of the week, day shift. The median pay for farm workers and laborers in claimant's labor market was \$9.38 per hour during the weeks at issue.

(3) On March 9, 2016, the Department called claimant regarding several nursery and labor jobs and told claimant the jobs paid between \$9.25 (Oregon minimum wage for claimant's labor market) and \$12.50 per hour, depending on experience. Claimant was driving during the telephone conversation, and did not hear the representative state that some of the jobs paid as much as \$12.50 per hour. Claimant responded to the Department representative that she was unwilling to accept work that paid \$9.25 per hour, and that she was looking for work that paid at least \$14.00 per hour.

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.* For the weeks that the Department paid benefits, from March 6 through April 23, 2016, the Department has the burden to establish by a preponderance of the evidence that claimant was not eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). For the weeks that the Department denied benefits, from April 24 through May 21, 2016, claimant has the burden to show by a preponderance of the evidence that she was eligible for those benefits. *Id.*

Claimant's testimony was inconsistent during the hearing regarding whether she was willing to accept work that paid \$9.25 per hour during the weeks at issue. However, she testified repeatedly that she told the Department representative when he called her on March 9, 2016 that she would not accept jobs paying minimum wage, and that she was looking for work that paid \$14.00 or more per hour. *See* Transcript at 11-12, 13, 18. Claimant also testified that she told the representative on March 9 that she would not accept the jobs he told her about because she did not hear him say that the jobs might pay as much as \$12.50 per hour, and "if he had said 12.50 I would have take [sic] that price." Transcript at 12. Thus, the preponderance of the evidence shows claimant might have accepted work that paid less than \$14.00 per hour, but was unwilling to take work that paid \$9.25 per hour.

ORS 657.195(1)(b) (2007) provides that unemployment benefits will not be denied to an individual for refusing to accept new work if the remuneration is "substantially less favorable" to the individual than the prevailing rate of pay for similar work in the individual's labor market. OAR 471-030-0037 (August 3, 2011) defines a "substantially less favorable" rate of pay to mean a rate of pay that is at least ten percent lower than the median rate of pay for similar work in the labor market. Thus, where, as here, the Department has determined the median rate of pay is \$9.38 per hour for farm work and labor in claimant's labor market, a rate of pay is not substantially less favorable than \$9.38 per hour unless it falls below \$8.44 per hour, and, it must be at least the Oregon minimum wage of \$9.25 per hour.

Because the preponderance of the evidence shows claimant was unwilling to accept work for \$9.25 per hour during the weeks at issue, we conclude claimant imposed a condition on her willingness to work that limited her opportunities to return to work at the earliest possible time. 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-60884 is affirmed. *Decisión de la Audiencia 16-UI-60884 queda confirmada.*

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

DATE of Service: July 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.