

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1180

Affirmed
Eligible Weeks 24-16 through 38-16

PROCEDURAL HISTORY: On September 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that benefits were not payable to claimant during the recess period between the 2015-16 and 2016-17 academic years (decision # 83506). On September 29, 2016, ALJ M. Davis conducted a hearing, and on October 19, 2016, issued Hearing Decision 16-UI-69467, reversing the administrative decision and concluding that benefits were payable to claimant during the recess period between academic years. On October 21, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits effective the third quarter of 2016. The base year for a claim filed during that quarter was January 1 through December 31, 2015. Claimant claimed benefits for the period August 14 through September 17, 2016 (weeks 33-16 through 37-16).

(2) Claimant's only base year employer was Lane Community College (LCC), an educational institution. LCC employed claimant as a food service specialist in its Renaissance Restaurant and a food service trainee in its Five Spice dining facility and culinary and conference center during the 2015-2016 academic year. The Department determined claimant had a monetarily valid claim for benefits based on her base year wages, and established a weekly benefit amount of \$133. During the 2015-2016 academic year, claimant earned more than her weekly benefit amount during at least one week.

(3) The recess period between the 2015-16 and 2016-17 academic years for LCC began on June 13, 2016 and ended on September 23, 2016. Claimant claimed benefits for the week of August 14 through 20, 2016.

(4) In November 2015, LCC's Five Spice dining facility, where claimant had been working, closed. Although claimant contacted the employer to see if additional work was available, she was offered none. Claimant's work for the employer's Renaissance Restaurant, a facility operated by students in the LCC culinary arts program, was temporary and ended when the LCC spring term did. Audio Recording at

16:26. Claimant worked for the LCC culinary and conference center on an on-call basis; after June 16, 2016, however, she was no longer scheduled to work at the center. When claimant contacted the culinary arts center in early July 2016, she learned that the banquet manager had filled her position. Audio Recording at 26:20.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that unemployment benefits are payable to claimant during the period between the 2015-16 and 2016-17 academic years, June 13 through September 23, 2016 (weeks 24-16 through 38-16).

When a claim for benefits is based on base-year wages from an educational institution or institution of higher learning, either ORS 657.167 or ORS 657.221 will apply and require a reduction of benefits under certain prescribed conditions. OAR 471-030-0074 (January 29, 2007). Under ORS 657.221, as amended by 2016 Oregon legislature in SB 1534, benefits must be reduced under certain conditions for employees who work in a capacity “other than an instructional, research or principal administrative capacity for an educational institution nor institution of higher education.” The provisions of this statute regarding reduction of benefits during a school recess period do not apply, however, if the individual claiming benefits who worked in a capacity other than “an instructional, research or principal administrative capacity” had good cause for voluntarily leaving work for the educational institution. ORS 657.221(5). Because claimant worked for LCC, an educational institution, in a capacity “other than an instructional, research or principal administrative capacity,” we begin our inquiry by determining whether claimant separated from her employment from LCC, and if so, whether the work separation was a discharge or voluntary leaving.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Based on this record, we conclude that claimant was willing to continue to work for the employer, but was not permitted to do so. Her work as a food service trainee in the Five Spice dining facility ended in November 2015, when the facility closed; claimant asked for, but was not offered, any work to replace this job. Her work as a food service specialist in the Renaissance Room was a temporary position, which ended when the LCC spring term did. Although claimant wanted to continue working as on-call food service specialist in the LCC conference and culinary center, she was not scheduled for any work in this center after June 16, 2016, and learned in July 2016 that her supervisor had hired someone to replace her.¹ We therefore conclude that claimant’s work separation was a discharge for unknown reasons.

Because claimant did not voluntarily leave work for LCC, it is necessary to determine whether the provisions of ORS 657.221 apply. OAR 471-030-0074 (January 29, 2007), provides in relevant part:

¹ Although the employer’s witness, an LCC human resources analyst, testified that continuing work was available for claimant in the LCC conference and culinary center (Audio Recording at 19:19), she never disputed claimant’s statement that the banquet manager hired someone to replace claimant. We therefore conclude it more likely than not that the employer was unwilling to allow claimant to continue working.

(1) ORS 657.167 and 657.221 apply only when the individual claiming benefits was not unemployed as defined by ORS 657.100 in the period immediately preceding the holiday, vacation or recess period. . . . Where the week(s) claimed commenced during a customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.

(2) The provisions of ORS 657.167 and 657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

Because claimant claimed benefits for weeks 33-16 through 37-16 (August 14 through September 17, 2016), the relevant period under OAR 471-030-0074 is the University's academic year². Under ORS 657.100, an individual is unemployed in any week in which the individual earns less than her weekly benefit amount. Claimant earned more than her weekly benefit amount of \$133 during at least one week of the 2015-2016 academic year, and is therefore not exempted by OAR 471-030-0074 from the provisions of ORS 657.221.

For ORS 657.221 to apply, three conditions must be met. First, the benefits sought must be for a week that began during a customary vacation period, holiday or summer recess observed by the educational institution for which the individual performed services during the base year. ORS 657.221(3). LCC's summer recess period between the 2015-2016 and 2016-2017 academic years began on June 13, 2016 and ended on September 23, 2016. Because claimant claimed benefits for the period from August 14 through September 17, she met the first condition for ORS 657.221 to apply.

Second, for ORS 657.221 to apply, claimant must have performed services for at least one educational institution during the academic year immediately preceding the recess period. ORS 657.221(3). Claimant met this condition because she worked for LCC during the 2015-2016 academic year. Third, and finally, ORS 657.221 will apply only if claimant had "reasonable assurance" of continuing work in the 2016-2017 academic year. *Id.* Here, the record shows that LCC had no work available for claimant for the 2016-17 academic year. Her job with the Five Spice dining facility ended in November 2015, her job with the Renaissance Room was temporary and ended when the LCC spring term did, and her job with the LCC conference and culinary center ended when she was replaced in July 2016. The record therefore shows that the employer had no work available for claimant during the 2016-17 academic year. Because claimant had no "reasonable assurance" of continuing work with LCC for the 2016-17 academic year, the provisions of ORS 657.221 do not apply to her claim for unemployment benefits during the summer recess period between the 2015-16 and 2016-17 academic years. Benefits are payable to claimant for those weeks that began during the summer recess period – weeks 24-16 through 38-16.

DECISION: Hearing Decision 16-UI-69467 is affirmed.

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

DATE of Service: November 1, 2016

² *Friedlander v. Employment Division*, 66 Or App 546, 676 P2d 314 (1984).

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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