

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0885

Affirmed
Ineligible

PROCEDURAL HISTORY: On June 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of May 7, 2017 through June 10, 2017 (decision # 115529). Claimant filed a timely request for hearing. On July 17, 2017, ALJ Murdock conducted a hearing, and on July 19, 2017 issued Hearing Decision 17-UI-88382, concluding claimant was not available for work during the weeks of May 7, 2017 through June 17, 2017. On July 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tiffany Home Furnishings employed claimant in project management from sometime in October 2016 until May 8, 2017.

(2) At the time claimant was hired, claimant had custody of her seven year old son every other week. Claimant's son attended school on weekdays from 8:35 a.m. until 3:00 p.m. When school was dismissed, claimant's son attended an aftercare program, from which claimant picked up her son sometime before 5:00 p.m. When the employer's owner offered claimant a job, claimant and the owner discussed claimant's child care needs and agreed upon a work schedule that took those needs into account. Claimant's work schedule was from 9:00 to 9:15 a.m. until approximately 4:00 p.m. since she would be working in the interior design side of the employer's business where the expected hours were flexible. During the weeks when claimant did not have custody of her son, claimant sometimes started work as early as 8:00 a.m. and stayed at work as late as 6:00 p.m.

(3) After claimant had been employed for a few months, claimant told the employer's owner she was interested in working in the staging side of the employer's business. The owner agreed to allow claimant to work in staging on trial basis. The owner told claimant that, due to the logistics of staging and because that work was principally in the field, the usual work hours in the for staging in the industry

were less flexible than those of her current schedule in interior design and were generally from 8:00 a.m. until 4:00 p.m. Claimant began working every other week in staging and then every week in staging.

(4) After claimant started working every week in staging, she continued to working every other week only from approximately 9:15 a.m. until 4:00 p.m. due to her son's child care schedule. On occasion, due to claimant arriving for work as late as 9:15 a.m., the employer needed to pay other members of the staging crew, who had reported for work at 8:00 a.m., for down-time they spent while waiting for claimant's later arrival so they could perform their work in the field. The owner told claimant that the hours she was working every other work did not fit the requirements of staging, were a "problem" and that she would not adjust the hours of the staging crew to meet claimant's needs. Audio at ~42:30. Claimant did not offer to change her work schedule to fit the requirements of a staging position. The employer's owner did not tell claimant that working a schedule of 8:00 a.m. to 4:00 p.m. was a condition of continuing to work for the employer. Sometime around early May 2017, the employer's owner told claimant that she was being let go. On May 8, 2017, claimant separated from employment.

(5) On or about May 8, 2017, claimant filed a claim for unemployment benefits. Claimant claimed benefits for the weeks of May 7, 2017 through June 17, 2017 (weeks 19-16 through 24-16), the weeks at issue.

(6) During the weeks at issue, claimant was seeking work in interior design, staging, project management and coordination and marketing coordination. The days and hours of the week customary for working in interior design were Mondays through Fridays, 8:00 a.m. through 6:00 p.m.

(7) On June 24, 2017, claimant spoke with a Department representative about the hours she was available for work. Claimant told the representative that she was able to work "normal hours" of 9:00 a.m. until 5:00 p.m. in the alternate weeks when she had custody of her son and the hours of 8:00 a.m. until 5:00 p.m. in the other weeks. Audio at ~36:55. Claimant also told the representative that during the alternate weeks when she had custody of her son, her child care arrangements did not allow her to take jobs that started at 8:00 a.m. or required her to work after 5:00 p.m. The summer recess from school for claimant's son started in late June 2017.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of May 7, 2017 through June 17, 2017. Claimant is not eligible to receive benefits during those weeks.

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 during all of the hours and days customary for the work that is being sought, and refrain from imposing conditions that substantially limit the individual's opportunities to return to work at the earliest possible time. *Id.* OAR 471-030-0036(4) provides an exception to finding that an individual who is the parent of child under 13 years of age is unable to work a particular shift due to child care needs is unavailable for work, if, among other things, the work the individual is seeking is performed during other shifts in the individual's labor market and the individual is willing and capable of performing work during those other shifts. However, this exception is inapplicable to claimant's

situation since the work she was seeking during the weeks at issue was performed only during one shift each day, the day shift.

Claimant repeatedly contended in her testimony that she had many options available for child care that would have allowed her to work from 8:00 a.m. to 6:00 p.m. during the weeks at issue and she would have exercised those options if she had been offered a job with those hours. Audio at ~31:11, ~32:22, ~34:00, ~34:46. However, the issue is not whether claimant had hypothetical options to extend the hours of child care for her son and thereby enable her to work all hours during day shifts, but whether she was willing to use those options to do so. The substance of claimant's testimony at hearing suggests that she was not.

At hearing, claimant's testimony about the hours she was willing to work for the employer immediately before the weeks at issue was somewhat evasive. When the ALJ inquired pointedly into whether claimant was able to and would have worked between the hours of 8:00 a.m. and 6:00 p.m. for the employer every week, claimant avoided directly answering the question and stated repeatedly that she worked the hours the employer had hired her to work. Audio at ~35:46, ~45:08, ~46:31, ~47:20, ~49:10. When the ALJ inquired whether the owner told claimant that her starting work at 9:00 to 9:15 a.m. caused problems when she was in staging, rather than admit or deny that it did, claimant also avoided that question and emphasized that she had been working in staging in a "trial position." Audio at ~46:03, ~47:20. While claimant did not dispute and ultimately appeared to acknowledge that she knew beginning work at 9:15 a.m. was an issue with the employer with respect to staging work and her continuing to work in staging, and she testified that staging work was her "passion," it is highly significant that she did not offer to change her son's child care arrangements so she could work the hours that staging work required. Audio at ~46:50, ~47:20, ~49:00. Claimant also deflected many of the ALJ's questions about her availability to work to make the point that the employer's owner did not give her an ultimatum about beginning staging work at 8:00 a.m. every day and did not offer her a permanent staging position on condition that she agree to start that work no later than 8:00 a.m. each day. Audio at ~34:40, ~45:29, ~46:36, ~46:47~47:00, ~48:12, ~48:30. That claimant was willing to jeopardize the trial position in staging that was so desirable to her by not changing her hours of work very strongly implies that she was unwilling at that time to accommodate any work schedule that conflicted with her son's established child care schedule. As well, claimant's contention that the Department representative misconstrued statements she made about the work schedule she had when she was employed by the employer as being statements about the hours she generally was available to work given her son's child care schedule was not persuasive. Audio at ~30:14. It appears that during the June 14, 2017 call, the representative did not focus on claimant's work schedule for the employer, as claimant suggested, but on what claimant would do if she was offered a hypothetical job in interior design that started as early as 8:00 a.m. and continued until 5:00 or 6:00 p.m. Audio at ~24:31, ~36:55. Indeed, it does not make sense that the representative would ask claimant principally about the hours she worked at a job from which she was already separated, when the issue was whether claimant was available to accept new work and the hours she was willing and capable of reporting to that new work.

Given the evasion and avoidance in claimant's testimony, her attempts to deflect responsibility from herself to the employer for not offering her a job in staging or ordering her to begin work at 8:00 a.m. and the likelihood that her statement to the Department representative about the hours she was willing to work was candid and accurately reported, the preponderance of the evidence in the record shows that claimant was not willing or available to work from 8:00 a.m. through 6:00 p.m. during the alternate

weeks at issue in which she had custody of her son. It is highly unlikely that many employers would hire claimant to work in any staging job during the weeks at issue when she was unwilling to work every other week the hours that were customary in the industry, starting at 8:00 a.m. It is also highly unlikely that many employers would hire claimant or anyone else to work a schedule that varied in alternate weeks from the 8:00 a.m. to 6:00 p.m. that was customary in the interior design field. Thus, claimant's unavailability for work every other week during the hours customary for the work she was seeking inevitably reduced her prospects to work during the weeks when she did not limit her schedule. For these reasons, claimant's preferred alternate week work schedule of 9:00 or 9:15 a.m. until sometime before 5:00 p.m. imposed a condition that *substantially* limited her opportunity to return to work at the earliest possible time in the fields in which she was seeking work. Claimant was not available for work during the weeks at issue, and is not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 17-UI-88382 is affirmed.

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

DATE of Service: August 17, 2017

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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