

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1496

Affirmed
Ineligible

PROCEDURAL HISTORY: On November 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the week of October 22, 2017 through October 28, 2017 (decision # 132914). Claimant filed a timely request for hearing. On December 14, 2017, ALJ Clink conducted a hearing, and on December 18, 2017 issued Hearing Decision 17-UI-99204, affirming the Department's decision. On December 26, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On April 13, 2017, claimant filed an initial claim for unemployment benefits. Claimant's claim was determined valid with a weekly benefit amount of \$590.

(2) Claimant was union carpenter. The labor market in which claimant's union assigned claimant to work was Eugene, Springfield and Corvallis, Oregon, The customary days and hours for work as a union carpenter were Mondays through Saturdays, 6:00 a.m. until 6:00 p.m. Sometime before September 2017, T. Gerding Construction hired claimant as a carpenter and claimant discontinued claiming benefits.

(3) Sometime before September 7, 2017, the Lane County Circuit Court sentenced claimant to work ten days on the sheriff's work crew for a probation violation. Claimant was not incarcerated to serve this sentence but was placed on a furlough release to the sheriff's work crew. Claimant was scheduled to report for work on the work crew on September 16, 17 and 24, 2017, October 01, 08, 15, 22 and 29, 2017 and November 6 and 12, 2017. Claimant reported for work as scheduled from September 16 through October 22, 2017.

(4) On Monday, October 23, 2017, T. Gerding Construction informed claimant he was laid off as of that afternoon. At that time, claimant was informed that he should remain in contact with T. Gerding Construction because work might become available later in that week.

(5) On Tuesday, October 24, 2017 at around 7:30 a.m., claimant reported to the correctional center out of which work crews were assigned for work. Claimant wanted to accelerate the completion of his

sentence by working days he was not initially scheduled for work on the sheriff's work crew and, since T. Gerding had not contacted him about work on the evening of October 23 or before the customary 7:00 a.m. start of his shift on October 24, 2017, claimant decided to try to work on the work crew that day. On that day, the sheriff's work crew assigned claimant to the road crew. Claimant worked on the road crew from 7:30 a.m. until 3:30 p.m. Not having been contacted by T. Gerding either the evening before or by 7:00 a.m. on the following day, claimant also reported for the work crew on Wednesday and Thursday, October 25 and 26, 2017. On both of these days, claimant was assigned to work on the road crew and worked from 7:30 a.m. until 3:30 p.m.

(6) On October 24, 25 and 26, 2017, while working on the road crew, claimant was not allowed to have his cell phone with him. Also on those days, once having started work on the road crew, claimant was not allowed to leave until the scheduled shift on the road crew ended at 3:30 p.m.

(7) On October 26, 2017, claimant restarted his claim for unemployment insurance benefits. Claimant claimed, but was not paid benefits for the week of October 22 through 28, 2017 (week 43-17), the week at issue.

CONCLUSIONS AND REASONS: Claimant was not available to work during the week of October 22 through 28, 2017.

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 days and hours customary for the work being sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* Although an individual who is incarcerated during any of days or hours customary for the work the individual is seeking is considered not available for work, an individual who is sentenced to an alternative sentencing facility will not be considered unavailable for work solely because of the non-traditional custody arrangement. OAR 471-030-0036(3)(f)(B) (February 23, 2014) and OAR 471-030-0036(3)(f)(B)(ii).

Claimant decided to report for work on the road crew on Tuesday, October 22 through Thursday October 26, 2017 from 7:30 a.m. through 3:30 p.m., which were on days and during hours that were customary for his work as union carpenter. While claimant was working on the road crew, he was not free to leave the crew to work as a union carpenter. As such, working on the road crew prevented claimant from reporting for work as a carpenter during all of the days and hours customary for work as a carpenter. While claimant argued at hearing that neither his regular employer nor his union contacted him for carpenter work or other work on October 22 through October 26, 2017, OAR 471-030-0036(3) does not give EAB the discretion to exempt claimant from the requirement that, to be considered available for work, he must be willing and *capable of reporting for work* during all of the days and hours customary for the type of work being sought.

Claimant also argued at hearing that since he was in an alternative sentencing program, OAR 471-030-0038(3)(f)(B)(ii) establishes that he was available for work. However, the plain language of that

provision states only that a claimant may not be considered unavailable *solely* due to being subject to a non-traditional custody arrangement. It does not state that participation in an alternative, non-traditional custody arrangement means that an individual is available for work even when, due to the requirements of the alternative sentencing program or non-traditional custody arrangement, the individual is not capable of reporting for work during all of the days and hours customary for the work being sought. On this record and for these reasons, claimant was not available to work during week 43-17 and is not eligible to receive benefits during that week.

DECISION: Hearing Decision 17-UI-99204 is affirmed.

DATE of Service: February 2, 2018

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

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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