

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0241

Modified
Eligible Week 51-18 and 52-18
Not Eligible Week 1-19

PROCEDURAL HISTORY: On January 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not eligible for benefits during the period of December 9, 2018 through January 5, 2019, the period between two academic terms observed by her employer (decision # 62150). Claimant filed a timely request for hearing. On February 12, 2019, ALJ Shoemake conducted a hearing, and on February 20, 2019 issued Order No. 19-UI-124899, concluding claimant was eligible for benefits from December 9, 2018 through December 29, 2018, but was not eligible for benefits from December 30, 2018 to January 5, 2019. On March 7, 2019, claimant filed an application for review of Order No. 19-UI-124899 with the Employment Appeals Board (EAB). On March 8, 2019, ALJ Shoemake issued amended Order No. 19-UI-126074, concluding claimant was eligible for benefits from December 9, 2018 through December 22, 2018, but was not eligible for benefits from December 23, 2018 through January 5, 2019. Because Amended Order No. 19-UI-126074 did not cancel Order No. 19-UI-124899 or resolve the issues decided by that order, claimant's March 7th application for review was construed to apply to the amended order.

FINDINGS OF FACT: (1) Until December 3, 2018, claimant worked for OHSU as a contract coordinator. At all relevant times, OHSU was an educational institution that had both educational and non-educational programs. At all relevant times, claimant did not work for any of the employer's educational programs. On December 3, 2018, OHSU terminated claimant's employment.

(2) On December 4, 2018, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$624. The base year of claimant's claim was July 1, 2017 to June 30, 2018. All of claimant's base year wages were from OHSU.

(3) OHSU's educational programs observed a break between the fall and winter terms that began December 14, 2018 and ended January 4, 2019. Claimant's previous position with the employer was year-round and did not observe term breaks. She earned over \$1,000 per week each week during the term preceding the term break at issue.

(4) Claimant filed weekly claims for unemployment insurance benefits from December 16, 2018 through January 5, 2019. The Department paid benefits to claimant for the weeks of December 16, 2018 through December 29, 2018 (weeks 51-18 and 52-18); the Department did not pay benefits to claimant for the week of December 30, 2018 to January 5, 2019 (week 1-19).¹

(5) After claimant's employment was terminated on December 3, 2018, claimant applied for another position with OHSU as an external candidate. Between December 3, 2018 and December 28, 2018, claimant attended three interviews with OHSU. "Several weeks" after being laid off, claimant first received an offer of employment as a senior contract specialist. Audio recording at ~ 18:10-19:00.² Claimant did not do much negotiating with OHSU after receiving the job offer because she was "eager to find employment" after her separation. Audio recording at ~ 18:55-19:05. On December 28, 2018, claimant accepted OHSU's offer of employment.

(6) The senior contract specialist position OHSU offered to claimant differed in some ways from claimant's previous job. It was in a different area of OHSU's organization and was not represented by a union. The new job paid more than her previous job, however, and the work she was to perform in that position bore many similarities to the work she had previously done.

CONCLUSIONS AND REASONS: Benefits based upon wages from an educational institution are payable for weeks 51-18 and 52-18, and are not payable for week 1-19.

Claimant's principal argument in this case, as set forth at the hearing and in her written argument, was:

Oregon School Recess Laws do not apply to the job I served in for the past 3 years . . . I am not a teacher. I do not, nor am I required to have a teaching license. I am not part of a teacher union, nor have I ever worked as an educator. I have never worked for a seasonal employer with 'recesses' or 'breaks.' I have always, while employed, worked year round . . . this was an hourly job with no deferred compensation option because we work year round.

* * *

OHSU is the only academic health center in Oregon. It not only educates doctors . . . and other healthcare professionals but also CARES FOR PATIENTS and conducts extensive research and clinical trials. OHSU employs roughly 16,500 people and has about 5,000 students --- it is fair to presume **most of those 16,500 employees are not educators working seasonally and therefore are not governed by the recess laws.** * * * None of these facilities that I supported provide recess periods to their support staff. * * * My denials are based upon the unsupported assumption that any institution classified as a public university must not operate year round.³

¹ We take notice of the weeks the Department did and did not pay benefits to claimant, which is information that is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

² Neither party was able to specify the precise date upon which OHSU offered claimant a new position orally or in writing.

³ Claimant's written argument at 1-2 (emphasis in original).

* * *

The record supports claimant's arguments to a certain extent. Claimant did not work for OHSU as a teacher, did not work for OHSU in any of its educational programs, worked year-round, and was not entitled through her position to observe OHSU's educational program term breaks. Notwithstanding those factors, however, claimant is still subject to the between and within terms denials set forth in Oregon's school recess laws.

First, the denial of benefits to claimant was not based upon an unsupported assumption that OHSU "must not operate year round." There is in fact no dispute that OHSU operates year round, or that claimant's job was year-round. However, ORS 657.221(3) requires that benefits based upon wages paid by an educational institution "shall be denied . . . for any week that commences during" the term break, so long as certain conditions are met. OAR 471-030-0074 states that ORS 657.221 applies "regardless of whether or not the individual performed services . . . in a year-round position." For those reasons, claimant is incorrect that she was erroneously denied benefits because of an unsupported assumption about OHSU's year-round operations.

Second, while claimant might draw a factual distinction between OHSU's educational and non-educational programs, and her work in a non-educational capacity, that *factual* distinction is not legally significant and is not recognized by Oregon law. Oregon law defines an "educational institution" as a public or non-profit accredited institution that, among many other things, offers students a course of study under guidance of an instructor or teacher, and provides a program of post-graduate or post-doctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation.⁴ Even if that institution also does other non-educational things, it is still an "educational institution" for purposes of unemployment insurance law if it also meets the legal definition of an "educational institution." In other words, there are no laws under which an institution may be classified as both an educational institution and a non-educational employer; it is either one or the other.⁵ Likewise, the law does not include any provisions under which a claimant who worked for an educational institution in a non-educational capacity may be exempted from the provisions of ORS 657.221. In fact, ORS 657.221 was specifically adopted to apply school recess law to employees of educational institutions who work in "other than an instructional, research or principal administrative capacity." For those reasons, ORS 657.221 applies to claimant's claim for benefits, and she is subject to a between term denial of benefits if the conditions set forth in ORS 657.221 are met.

ORS 657.221(1)(a) prohibits benefits based upon services for an educational institution performed by a non-educational employee from being paid "for any week of unemployment that commences during a period between two" terms "if the individual performs such services in the first academic term" and "there is a reasonable assurance that the individual will perform any such services in the second" term. That law applies when the individual claiming benefits "was not unemployed," as defined at ORS 657.100, during the academic term prior to the term break, regardless whether claimant's position observed between-term recess periods.⁶ In sum, the

⁴ See ORS 657.010(6) and (9).

⁵ See generally ORS chapter 657.

⁶ OAR 471-030-0074(2)(b) and (3).

conditions that must be met for the between-terms school recess denial to apply to claimant are these: (1) the weeks claimed must commence during a period between two academic terms; (2) claimant must not have been “unemployed” during the term prior to the recess period at issue; and (3) there is reasonable assurance of work during the term following the recess period at issue. Each condition will be discussed in turn.

The first condition is that the weeks claimant claimed commenced during a period between two academic years. Claimant claimed the weeks of December 15, 2018 through January 5, 2019, each of which commenced within OHSU’s recess period of December 14, 2018 through January 4, 2019. The first condition is therefore met.

The second condition is that claimant must not have been “unemployed” during the term prior to the term break at issue. ORS 657.100 provides that an individual is “unemployed” if there are no earnings, or the earnings are less than the individual’s weekly benefit amount. Claimant earned over \$1,000 each week during the term preceding the term break at issue, which exceeded her \$624 weekly benefit amount. She therefore was not “unemployed,” and the second condition is met.

The third condition is that there is reasonable assurance of work for claimant during the term following the December 14, 2018 to January 4, 2019 term break. An offer of employment, in the same or similar capacity as the service performed prior to the recess period, with economic conditions that are not considerably less than those existing prior to the recess period, “must be present *before* determining whether an individual has reasonable assurance.”⁷

OHSU terminated claimant’s employment on December 3, 2018. Between December 3rd, when claimant’s employment ended, and the date upon which OHSU offered claimant a new job in a different position sometime later in December 2018, there was not reasonable assurance. The factual question presented by this case is when did OHSU offer claimant the new job. Because the Department paid claimant benefits for weeks 51-18 and 52-18, the Department has the burden of proof as to whether there was reasonable assurance during those weeks; because the Department denied benefits to claimant for week 1-19, claimant has the burden to prove there was not reasonable assurance during that week.⁸

The Department’s adjudicator noted in Department records that at some point prior to claimant receiving an offer letter, there was some manner of verbal agreement between claimant and OHSU as to claimant’s employment after the term break at issue.⁹ Neither the adjudicator’s notes nor the Department’s witness could “say for sure” what the date of any such verbal offer or agreement was. *Id.* Nor could claimant identify the date upon which OHSU extended her a verbal or written offer of employment after the term break at issue, only that the initial offer was extended to her “several weeks”

⁷ See OAR 471-030-0075(1) (emphasis added). There is no evidence in this case of a contract of employment; the terms of OAR 471-030-0075(2) therefore are not at issue. Nor is OAR 471-030-0075(4) at issue, since claimant did not voluntarily leave her position with OHSU at any relevant time. There is also no legally significant dispute in this case as to the provisions of OAR 471-030-0075(3)(a) and (b), since the record does not reflect that any contingencies existed in OHSU’s offer as described herein.

⁸ See *accord Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (holding that where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principal, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

⁹ Audio recording at ~11:45-12:30.

after December 3rd.¹⁰ The only definitive date related to OHSU's offer of employment to claimant was that claimant accepted the offer of employment on December 28, 2018. Therefore, it appears likely that the offer was extended to claimant sometime between December 24, 2018 (three weeks after December 3rd) and December 28, 2018 when claimant accepted the offer. Based upon the fact that December 24th and December 25th are a customary holiday, it is more likely than not that OHSU did not extend the offer on those dates. December 28th was a Saturday, making it more likely than not that OHSU did not extend the offer on that date. Given that claimant accepted the offer on December 28th, and was so "eager to find employment" by the time she received the initial offer that she did not negotiate much before accepting the offer, and in the absence of more definitive evidence of an earlier offer, it is more likely than not that OHSU offered claimant employment on either December 26th or December 27th.

The Department therefore did not prove that it was more likely than not that claimant had the offer of new work during the week of December 15, 2018 through December 21, 2018 (week 51-18). Claimant did not have reasonable assurance during week 51-18. The third condition is not met with respect to that week, and she is eligible to receive benefits.

Order No. 19-UI-124899 initially concluded that claimant was also eligible for benefits for the week of December 22, 2018 through December 28, 2018 (week 52-18). Amended Order No. 19-UI-126074, however, concluded without explanation that because claimant had reasonable assurance on December 28, 2018 she was not actually eligible to receive benefits during that entire week.¹¹ That conclusion is not, however, supported by the applicable law.

In *Nickerson v. Employment Department*, EAB found that Nickerson retroactively had reasonable assurance of employment after a school recess period because his layoff was canceled after-the-fact.¹² In reversing EAB's decision, the Oregon Court of Appeals explained that ORS 657.221 "uses the present tense: a claimant is disqualified during recess periods in which 'there is a reasonable assurance' of employment in the next year."¹³ The Court also pointed out that there is no provision in the law "allowing the department to deny benefits that, having been earned (in the sense of having been qualified for), are later declared to be unearned due to changed circumstances."¹⁴

Applying *Nickerson* to the facts developed in this case, claimant more likely than not was qualified for benefits based upon her earnings from an educational institution up until approximately December 26th, the first likely date upon which OHSU extended her a new offer of employment. Although the Department determines an individual's eligibility for benefits on a week-to-week basis, and there is no law under which the Department may find an individual both eligible and ineligible for benefits within a single week, there is, as the *Nickerson* court determined, also no law under which benefits "earned (in the sense of having been qualified for)" during the first half of the week may be retroactively "declared to be unearned" due to her changed circumstances, namely, her receipt of a mid-week job offer. The Department had the burden to prove by a preponderance of the evidence that claimant should be deemed ineligible for benefits during week 52-18. Since claimant may not under *Nickerson* be denied benefits for the portion of the week she was eligible for benefits, and in the absence of compelling evidence or a

¹⁰ Audio recording at ~ 18:10-19:00.

¹¹ See Amended Order No. 19-UI-126074 at 3.

¹² *Nickerson v. Employment Department*, 250 Or. App. 352, 280 P.3d 1014 (2012).

¹³ *Nickerson*, 250 Or. App. at 358 (emphasis in original).

¹⁴ *Id.*

source of law dictating that claimant be deemed ineligible for benefits for the entire week because of her mid-week change of circumstances, claimant did not have reasonable assurance during the week of December 22, 2018 through December 28, 2018 (week 52-18). The third condition is not met with respect to that week, and claimant is eligible to receive benefits for that week.¹⁵

Finally, the record suggests it is more likely than not that claimant did in fact have reasonable assurance during the final week at issue, December 29, 2018 through January 5, 2019 (week 1-19). Claimant had the burden of proof as to that week, and did not dispute the Department's evidence that she had received an offer of work prior to December 29th, the date week 1-19 commenced. Although the work involved a different position within OHSU's organization, and there were some differences as to the nature of the benefits and the work, the record lacks evidence of the kind of legally significant differences described in OAR 471-030-0075(1)(b) and (c). The record therefore shows that it is more likely than not that there was reasonable assurance during the week of December 29, 2018 through January 5, 2019 (week 1-19). Because there was reasonable assurance, the third condition was met with respect to week 1-19, and claimant is not eligible to receive benefits for that week.

In sum, claimant is eligible under ORS 657.221 for benefits for weeks 51-18 and 52-18. She is not eligible for benefits under ORS 657.221 for week 1-19.

DECISION: Order No. 19-UI-124899 is modified, as outlined above.

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

DATE of Service: April 12, 2019

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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¹⁵ The fact that, like *Nickerson*, claimant might "receive what some might characterize as a windfall" because of this determination does not alter the outcome of this decision; the Court of Appeals has interpreted the relevant statute so as not to provide for retroactive application of the reasonable assurance principal, and the Court's "rules of interpretation do not contain an anti-windfall exception." *Id.* at 359.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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