

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0268

Modified
Eligible Week 50-18
Not Eligible Week 51-18 through 52-18

PROCEDURAL HISTORY: On January 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant claimed and was not eligible for benefits based on earnings from an educational institution from December 9, 2018 through December 29, 2018 (decision # 141412). Claimant filed a timely request for hearing. On February 15, 2019, ALJ Shoemake conducted a hearing, and on February 22, 2019 issued Order No. 19-UI-125102, concluding that claimant was eligible for benefits from December 9, 2018 through December 29, 2018 (weeks 50-18 through 52-18), but was not eligible for benefits from December 30, 2018 through January 5, 2019 (week 1-19). On March 14, 2019, the Department filed an application for review with the Employment Appeals Board (EAB).

EAB considered the Department's written argument when reaching this decision.

FINDINGS OF FACT: (1) In the Fall 2018 term, claimant worked for Chemeketa Community College as a limited-duration student service specialist.

(2) Effective September 26, 2018, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$624. The base year of claimant's claim was April 1, 2017 through March 31, 2018. All of claimant's base year wages were from Chemeketa.

(3) On September 30, 2018, Chemeketa first laid claimant off work, then rehired her for a temporary position. Effective October 31, 2018, Chemeketa laid claimant off work again. After that date, claimant ceased working for Chemeketa and claimed benefits.

(4) Chemeketa observed a break between the fall and winter terms that began December 8, 2018 and ended January 4, 2019. Claimant earned more than \$624 per week during more than one week during the term preceding that break between terms.

(5) Claimant claimed benefits for the weeks of December 9, 2018 through December 29, 2018 (weeks 50-18 through 52-18). The Department paid claimant benefits for the weeks claimed.¹

(6) Sometime prior to December 14, 2018, claimant applied for a new student services specialist position. On December 14, 2018, Chemeketa offered claimant that job. The job involved many new duties she had never performed in her previous job, but it was the same classification as claimant's previous job, paid the same as claimant's previous job, and was a year-round position. On December 18, 2018, Chemeketa told claimant she had passed her background check and was to begin work on January 2, 2019. On January 2, 2019, claimant began her new job.²

CONCLUSIONS AND REASONS: Claimant is eligible for benefits for the week of December 9, 2018 through December 15, 2018 (week 50-18). Claimant is ineligible for benefits for the weeks of December 16, 2018 through December 29, 2018 (weeks 51-18 through 52-18).

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.³

In sum, the conditions that must be met under ORS 657.221 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 9, 2018 through December 29, 2018, each of which commenced within Chemeketa's recess period of December 8, 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,

¹ We take notice of this fact, which 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 Order No. 19-UI-125102 stated that Chemeketa extended claimant the job offer on January 2, 2019. Order No. 19-UI-125102 at 2. The record actually shows Chemeketa offered claimant the job on December 14, 2018, and told her on December 18th that she had passed her background check and would begin working on January 2, 2019. Audio recording at ~ 16:30-16:40; 18:45-18:50; 25:05.

³ OAR 471-030-0074(2)(b) and (3).

or the earnings are less than the individual's weekly benefit amount. Claimant earned more than her \$624 weekly benefit amount many weeks during the term preceding the term break at issue. She therefore was not "unemployed," and the second condition is met.⁴

The third condition is that there is reasonable assurance of work for claimant during the term following the December 8, 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."⁵ Because the Department paid claimant benefits for the weeks claimed, the Department has the burden of proof as to whether there was reasonable assurance.⁶

Chemeketa last laid claimant off work on October 31, 2018. Between that date, and the date Chemeketa offered claimant a new job on December 14, 2018, claimant did not have reasonable assurance. There is no legal question that claimant had reasonable assurance during the weeks of December 16, 2018 through December 29, 2018 (weeks 51-18 and 52-18). Those two weeks fell after Chemeketa had extended claimant an offer of work. Despite some differences in duties, the offered work was in the same or similar capacity as the position she held prior the term break, and the economic conditions were the same. Claimant therefore had reasonable assurance during those two weeks.

The remaining issue is whether or not claimant had reasonable assurance during the week of December 9, 2018 through December 15, 2018 (week 50-18). From December 9, 2018 through December 13, 2018, claimant did not have reasonable assurance. Her temporary position with Chemeketa had ended over a month earlier, and neither Chemeketa nor any other educational institution had offered her work. Beginning December 14, 2018, however, she did have reasonable assurance because Chemeketa offered her work to begin in the following term. The question is whether the reasonable assurance claimant gained at the time she received the job offer on December 14th applies retroactively to the beginning of that week.

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.⁷ In reversing EAB's decision, the Oregon Court of Appeals explained that ORS 657.221 "uses the present

⁴ For purposes of ORS 657.221, the "unemployed" question does not depend on whether or not claimant had in fact lost her job prior to the term break, but on whether claimant earned more than her weekly benefit amount during any week in the term immediately preceding the term break. Because claimant did, she is not considered "unemployed" for purposes of this case even though the record shows that claimant had been laid off work on October 31, 2018.

⁵ 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 Chemeketa 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 within Chemeketa's control existed in its offer as described herein.

⁶ 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).

⁷ *Nickerson v. Employment Department*, 250 Or. App. 352, 280 P.3d 1014 (2012).

tense: a claimant is disqualified during recess periods in which ‘there is a reasonable assurance’ of employment in the next year.”⁸ 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.”⁹

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 December 14th, the date upon which Chemeketa extended her a new offer of employment. Although the Department determines an individual’s eligibility for benefits on a week-to-week basis, 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 part of the week may be retroactively “declared to be unearned” due to her changed circumstances later in the week, namely, her receipt of a mid-week job offer. In other words, having begun the week without reasonable assurance, claimant cannot later have been determined to have had reasonable assurance for that same period.

The Department had the burden to prove by a preponderance of the evidence that claimant should be deemed ineligible for benefits during week 50-18. 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 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 9, 2018 through December 15, 2018 (week 50-18). The third condition is not met with respect to that week, and claimant is eligible to receive benefits for that week only.¹⁰

In sum, claimant is eligible under ORS 657.221 for benefits for weeks 50-18. She is not eligible for benefits under ORS 657.221 for weeks 51-18 and 52-18.

DECISION: Order No. 19-UI-125102 is modified, as outlined above.

J. S. Cromwell and D. P. Hettle;
S. Alba, 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

⁸ *Nickerson*, 250 Or. App. at 358 (emphasis in original).

⁹ *Id.*

¹⁰ 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.

‘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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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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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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