

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0807

Affirmed
Ineligible Weeks 24-19 through 29-19

PROCEDURAL HISTORY: On June 28, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from June 9 through June 22, 2019 (decision # 151557). Claimant filed a timely request for hearing. On July 24, 2019, ALJ Frank conducted a hearing, and on August 1, 2019, issued Order No. 19-UI-134338, concluding claimant was not available for work during the weeks including June 9 through July 20, 2019. On August 21, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Providence Health employed claimant as a nurse mid-wife until May 6, 2019, when it laid her off work due to a lack of work. Claimant had worked for the employer approximately 32 hours per week. Claimant's husband worked for a separate employer Monday through Thursday from 5:00 a.m. to 5:00 p.m., although his work hours were flexible. Claimant had a seven year-old son and a four year-old daughter for whom day-care was necessary when neither claimant nor her husband were available to care for them. When claimant separated from her employment on May 6, 2019, she was pregnant with a due date of November 20, 2019.

(2) On June 10, 2019, claimant filed an initial claim for unemployment insurance benefits. When completing her initial application for benefits, claimant reported that she could not begin full-time work immediately due to "pregnancy" and "child care" concerns. Audio Record at 14:00 to 15:00.

(3) Claimant claimed but was not paid benefits or given waiting week credit for any of the weeks from June 9 through July 20, 2019 (weeks 24-19 through 29-19), the weeks at issue.¹

(4) During the weeks at issue, claimant sought work as a nurse and nurse mid-wife. Claimant's labor market area was Beaverton, Hillsboro, Tigard, NW Portland and SW Portland. In claimant's labor market, the customary days and hours for nursing work were all days and all shifts. Nurses typically worked in 12-hour shifts from 7:00 a.m. to 7:00 p.m. or 7:00 p.m. to 7:00 a.m.

(5) On June 24, 2019, a Department representative interviewed claimant about her ability to work, availability for work and search for work during the weeks claimed. Claimant told the representative that she "would work full time if [the employer] were flexible" but was only "looking for part-time and temporary work" which was the only work she had applied for. Audio Record at 14:00 to 14:30 and 16:40 to 17:05. When specifically asked about her availability for work, claimant responded, "I am available to work swing, night and day on the weekends" and on "Monday through Thursday I could do an eight hour [day] shift." Audio Record at 15:50 to 16:25. When asked if she would accept an offer of full time day shift work on Monday through Thursday when her husband worked, claimant responded, "I don't think I could accept it if it was everyday [because] I don't think it would make sense to pay child care for all those days." Audio Record at 16:40 to 17:05.

CONCLUSIONS AND REASONS: Claimant failed to establish that she was available for work during the weeks at issue.

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). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

(a) Willing to work full time, part time, and accept temporary work opportunities, *during all of the usual hours and days of the week customary for the work being sought*, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(c) Not impos[e] conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; ***

OAR 471-030-0036(3) (April 1, 2018) (italics added for emphasis).

¹ EAB has taken notice of this fact, which is contained in Employment Department records. Any party that objects to our taking notice of this information 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.

Where the Department seeks to deny benefits it has already paid, the Department has the burden to show that claimant was not eligible to receive those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principle, where the Department has denied benefits for weeks claimed without paying them, claimant has the burden to show that she was eligible for benefits for those weeks. In this case, the Department denied claimant benefits for each of the weeks claimed. Therefore, claimant has the burden to establish that she was available for work during each of those weeks.

Claimant failed to meet her burden. When claimant filed her initial claim on June 10, 2019, she reported that she could not begin full-time work immediately due to “pregnancy” and “child care” concerns. When she was interviewed by a Department representative shortly thereafter, she asserted that she “would work full time if [the employer] were flexible” but admitted she was only “looking for part-time and temporary work” which was the only work she had applied for. When specifically asked by that representative about her availability for work, claimant limited her availability to swing, day and night shifts on weekends and an eight-hour day shift on Monday through Thursday. When asked by that representative if she would accept offer of full time day shift work on Monday through Thursday, while her husband worked, claimant responded “I don’t think I could accept it if it was everyday [because] I don’t think it would make sense to pay child care for all those days.”

At hearing, claimant did not dispute that she made those statements to the representative on June 24, 2019 but explained that she did not fully understand the questions asked and that the representative only asked her questions that were leading. Audio Record at 26:00 to 28:00. She also asserted that she had been available for work at all times during each of the weeks at issue. Audio Record at 29:00 to 30:00. However, viewed objectively, the record as a whole shows that the answers claimant previously gave to the Department were more probative regarding her *willingness* to work full time, part time, and accept temporary work opportunities, during *all* of the usual hours and days of the week customary for the work she sought during the weeks at issue. Even if her pregnancy did not limit her ability to work during all of the days and hours customary for nursing work and she had access to child care during all of those hours, her statements to the Department that she was seeking only part-time and temporary work demonstrated that she was not willing to work full time during the weeks at issue. More likely than not, claimant’s pregnancy and child care concerns imposed conditions that substantially limited her opportunities to return to work at the earliest possible time.

Claimant failed to establish that she was available for work during the weeks at issue. Therefore, she is ineligible for benefits for the weeks of June 9 through July 20, 2019 (weeks 24-19 through 29-19).

DECISION: Order No. 19-UI-134338 is affirmed.

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

DATE of Service: September 27, 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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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 desisyong ito.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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 الإستئناف 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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