

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0049**

*Affirmed*  
*Ineligible*

**PROCEDURAL HISTORY:** On November 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from September 29, 2019 through November 2, 2019, and until the reason for the denial ended (decision # 124254). Claimant filed a timely request for hearing. On December 10 and December 24, 2019, ALJ Frank conducted a hearing, and on December 31 2019 issued Order No. 19-UI-141935, modifying the Department's decision by concluding that claimant was not available for work and not eligible for benefits from September 29 through December 7, 2019. On January 21, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered claimant's written argument and the hearing record in reaching this decision. In their written argument, claimant requested that EAB consider Exhibit 2, which was not admitted at hearing because the employer's representative stated that it did not receive the documents before the December 24, 2019 hearing. Audio Record at 8:39 to 8:46 (December 24, 2019). Claimant testified that she sent Exhibit 2 to the employer by facsimile before the hearing. Audio Record at 8:46 to 8:58 (December 24, 2019). Because claimant sent the documents to the employer before the hearing, EAB considered the last page of Exhibit 2, which was the only legible portion of that exhibit. EAB did not consider the first three pages of Exhibit 2 because they were not legible, and that portion of Exhibit 2 remains excluded from the record.

**FINDINGS OF FACT:** (1) Ram Restaurant and Brewery employed claimant for 11 years as a restaurant server until after December 12, 2019. It was located within claimant's labor market area.

(2) During 2019, claimant experienced anxiety and posttraumatic stress disorder (PTSD) due to domestic violence. During August 2019, claimant experienced threats from the abuser. Claimant missed work due to court appearances associated with domestic violence and her medical conditions.

(3) Sometime before September 12, 2019, claimant complained to the employer about a manager who told claimant that the employer should have younger people working in the bar. Sometime after claimant

complained about the manager, the employer moved claimant to a different position where claimant would earn less money, and told her it was because she was “unreliable.” Audio Record at 29:05 (December 24, 2019). Claimant believed the employer moved her to a different shift because she complained about the manager.

(4) On September 12, 2019, claimant asked the employer to approve a leave of absence from work so that claimant could seek medical treatment for anxiety and PTSD and begin the process of relocating due to domestic violence. Exhibit 1. Claimant also requested the time off work because she disliked that the employer changed her position. Claimant had complained to her manager about the employer having changed her position, but did not tell the employer she wanted time off work because the employer changed her position. The employer approved a leave of absence from September 12, 2019 through December 12, 2019.

(5) On October 2, 2019, claimant filed an initial claim for unemployment insurance benefits. When claimant filed her initial claim online, she stated that she was still employed by the employer.

(6) Claimant claimed and the Department gave her waiting week credit for the week from September 29 through October 5, 2019 (week 40-19). Claimant claimed and the Department paid her benefits for the weeks from October 6 through October 19, 2019 (weeks 41-19 and 42-19). Claimant claimed and the Department denied benefits for the weeks from October 20, 2019 through December 7, 2019 (weeks 43-19 through 49-19). Weeks 40-19 through 49-19 are the weeks at issue.

(7) During the weeks at issue, claimant sought work as a server. The normal days and hours for a server in claimant’s labor market were all days and all shifts. The employer had continuing work available for claimant as a server, 25 to 35 hours per week, during all the weeks at issue. Claimant had “little to no” contact with the employer during the weeks at issue. Audio Record at 21:12 (December 24, 2019).

**CONCLUSION AND REASONS:** Claimant was not available for work from September 29, 2019 through December 7, 2019 (weeks 40-19 through 49-19).

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, in pertinent part:

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities ; and

(c) Not imposing conditions which substantially reduce the individual’s opportunities to return to work at the earliest possible time \* \* \*.

\* \* \*

(e) However, an individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or

during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work.

\* \* \*

OAR 471-030-0036(3) (December 8, 2019).

The Department gave claimant waiting week credit or paid claimant benefits for weeks 40-19 through 42-19, and denied benefits for weeks 43-19 through 49-19. Thus, the Department had the burden to show that claimant was not available for work during weeks 40-19 through 42-19, and claimant had the burden to prove that the Department should have paid them benefits for weeks 43-19 through 49-19. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (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).

During each of the weeks at issue, the record shows that the employer had 25 to 35 hours of work available for claimant, but that claimant was not willing to accept that work. Claimant was not willing to accept the work because she needed time off work to seek medical care for anxiety and PTSD, and because she disliked her working conditions. In particular, claimant was dissatisfied that the employer had moved her to a less lucrative position. Claimant believed the employer changed her position to retaliate against claimant for complaining about a manager's allegedly discriminatory statement.

To the extent claimant was not willing to accept work from the employer during the weeks at issue because she sought treatment for her medical conditions, claimant was not available for work during those weeks. OAR 471-030-0036 (3)(e) provides that an individual prevented from working full time or during particular shifts due to a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) shall not be deemed unable to work or unavailable for work solely on that basis so long as the individual remains available for some work. Assuming claimant's anxiety and PTSD were long-term "physical impairments" as defined at 29 CFR §1630.2(h), OAR 471-030-0036(3)(e) is not applicable to the issue of claimant's availability for work during the weeks at issue because claimant was not deemed ineligible for benefits because claimant limited her availability to part time work. Nor did claimant limit her availability to "particular shifts" due to her medical conditions.

During all the weeks at issue, claimant sought server work. Although claimant was unwilling to return to work for the employer during the weeks at issue due to the unique situation there, whether an individual is available for work is determined by the individual's willingness and ability to report for all suitable work opportunities in the labor market. The determination whether a work opportunity is suitable for an individual is based on many factors,<sup>1</sup> including risks to the individual's health, safety and morals. ORS 657.190. The record does not show that the employer's work was unsuitable for claimant due to risks to claimant's health, safety and morals, or other factors included in ORS 657.190. Claimant did not accept the work because she felt she was moved to the less lucrative position in retaliation for complaining

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<sup>1</sup> In determining whether any work is suitable for an individual, the [Department] shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190.

about a manager's statement. This record does not support claimant's contention, and does not show that returning to work would pose a risk to her health, safety or morals. To the extent claimant did not accept server work from the employer during the weeks at issue because the employer moved her to a position that paid less, claimant imposed a condition that substantially reduced her opportunities to return to work at the earliest possible time, and therefore was not available for work during the weeks at issue.

**DECISION:** Order No. 19-UI-141935 is affirmed.

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

**DATE of Service: February 20, 2020**

**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](https://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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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