

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0249

Reversed
Eligible Weeks 02-20 and 03-20

PROCEDURAL HISTORY: On February 3, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks including January 5 through January 18, 2020 and was ineligible for benefits for those weeks (decision # 103217). Claimant filed a timely request for hearing. On March 4, 2020, ALJ Monroe conducted a hearing, and on March 6, 2020, issued Order No. 20-UI-145802, affirming the Department's decision. On March 25, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) From 2019 through January 3, 2020, claimant worked part-time as a restaurant server during the week and on weekends.

(2) In 2019, claimant took classes and a practicum to obtain a certification to work as a doula. Claimant's classes and practicum ended on December 5, 2019. Thereafter, claimant opened an account on "DoulaMatch.com" to obtain work as a certified doula. Transcript at 22.

(3) From 2019 through January 24, 2020, claimant also worked part-time as a direct support professional (DSP) for the employer, Rise, Inc., which served clients with intellectual and developmental disabilities. A DSP for the employer worked one-on-one with an employer client. Before the employer assigned a DSP to a client, the employer arranged a meeting between the DSP and the client to ensure that they were compatible. If the DSP and the client later became incompatible, the employer ended the DSP's assignment to the client.

(4) Claimant limited her work availability with the employer to Monday, Tuesday and Friday mornings and evenings so that her employment would not interfere with her work as a restaurant server and her doula practicum. For approximately the last six months of claimant's employment with the employer, claimant worked with a client on Monday, Tuesday and Friday mornings from 8:30 a.m. to 10:30 a.m. In September, October, and November of 2019, claimant requested additional DSP work from the

employer, but only received one additional opportunity to work with an employer client. However, after working for only one week with that client, the client's family decided that the client and claimant were not compatible and the assignment ended. After that assignment ended, the employer did not offer claimant any other work opportunities.

(5) On January 13, 2020, claimant filed an initial claim for unemployment insurance benefits by telephone. When claimant spoke to a Department representative about filing her claim, the representative told claimant to report her hours of work for current employers but did not tell claimant that she was required to "contact any current Employer [for] all hours of availability." Transcript at 27. Claimant claimed but did not receive benefits for the weeks including January 5 through January 18, 2020 (weeks 02-20 and 03-20). These are the weeks at issue.

(6) During the weeks at issue, claimant sought only restaurant server work. Exhibit 2; Transcript at 5. Claimant's labor market was the Portland metropolitan area. In claimant's labor market, the customary days and hours for work as a restaurant server were all days and all shifts.

(7) After claimant lost her job as a restaurant server and her doula practicum ended, claimant did not notify the employer of those facts, update her hours of availability, or request additional work hours from the employer. The employer had potential opportunities for additional work as a DSP available, but did not offer them to claimant because claimant had not updated her hours of availability. However, claimant would have accepted any additional DSP work the employer offered or assigned her during the weeks at issue.

CONCLUSIONS AND REASONS: Claimant 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 imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time * * *.

* * *

OAR 471-030-0036(3) (December 8, 2019). Where, as here, claimant was not paid benefits for the weeks claimed, claimant has the burden to establish that she was eligible for benefits for those weeks. *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).

Order No. 20-UI-145802 concluded that claimant was not available for work during the weeks at issue. The order reasoned that although claimant was not actively seeking work as a DSP during those weeks, she remained working in that capacity and that by not updating her availability or seeking additional hours after her server position and practicum ended, claimant “imposed a condition that substantially limited her opportunities to work.” Order No. 20-UI-145802 at 2-3. However, the record does not support the order’s conclusion and reasoning.

Claimant asserted, and the Department did not dispute, that the only work claimant sought during the weeks at issue was restaurant server work, and that when she filed her initial claim after losing her job as a restaurant server, the Department did not advise claimant that she was required to seek additional hours with the employer. Moreover, although claimant’s unwillingness to notify the employer that she was available for extra hours may have “impose[d] a condition” that might have affected her ability to work more hours for the employer, the record as a whole failed to show that that condition “substantially” interfered with her obtaining more work hours under OAR 471-030-0036(3)(c). Rather, the preponderance of the evidence shows that even if claimant had updated her schedule availability, getting additional hours with the employer during the weeks at issue would have been a mere possibility, rather than a probability, as demonstrated by her unsuccessful request for extra hours during September, October and November 2019. Moreover, whether the employer would have given claimant extra hours was contingent upon whether the employer had additional work available, and whether the employer deemed claimant compatible with any potential client.

For all of these reasons, under OAR 471-030-0036(3)(c), it is not more likely than not that claimant’s failure to update her availability with the employer “substantially” reduced her work opportunities during the weeks at issue. Claimant therefore was not unavailable for work during weeks 02-20 and 03-20 because of her failure to update her availability with the employer, and was not ineligible for benefits for those weeks based on her availability for work.

DECISION: Order No. 20-UI-145802 is set aside, as outlined above.

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

DATE of Service: April 28, 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. 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 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 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 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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