

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0331

Modified
Eligible ~ Weeks 07-20 and 08-20
Ineligible ~ Week 09-20

PROCEDURAL HISTORY: On March 20, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from February 9, 2020 through February 29, 2020 and was ineligible for benefits for those that period (decision # 63441). Claimant filed a timely request for hearing. On April 22, 2020, ALJ Monroe conducted a hearing, and on April 24, 2020 issued Order No. 20-UI-148763, affirming the Department's decision. On April 28, 2020, claimant filed a timely application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Buckaroo Deli employed claimant as a customer service representative in 2020. On January 17, 2020, claimant's employer laid her off work due to a decline in business, but told claimant that it anticipated her return to work by early March, 2020.

(2) On January 27, 2020, claimant filed an initial claim for unemployment insurance benefits. When claimant filed her initial claim, she reported that she last worked on January 17, 2020, was temporarily laid off work, and would return to work on February 8, 2020.

(3) Claimant claimed and was paid benefits for the weeks from February 9 through 22, 2020 (weeks 07-20 and 08-20). She also claimed but was not paid benefits for the week of February 23 through February 29, 2020 (week 09-20). These are the weeks at issue.

(4) On February 12, 2020, claimant contacted the Department to discuss her claim, and reported that she had no return to work date at that time. A Department representative told claimant that it did not consider her temporarily unemployed, and that she was required to perform five work-seeking activities each week with at least two of them being direct employer contacts.

(5) During week 07-20, claimant contacted her employer and inquired about returning to work. During that week, she also contacted O'Reilly Auto Parts and inquired about a work opportunity there. During

that week, claimant also performed at least three additional work-seeking activities including reviewing job postings online on Indeed.

(6) During week 08-20, claimant contacted her employer and inquired about returning to work. During that week, she also contacted Walgreens and inquired about a work opportunity there. During that week, claimant also performed at least three additional work-seeking activities including reviewing job postings online on Indeed.

(7) During week 09-20, claimant contacted her employer and inquired about returning to work. During that week, she also contacted Winco and inquired about a work opportunity there. During that week, claimant also performed one additional work-seeking activity reviewing a job posting online on Indeed.

CONCLUSIONS AND REASONS: Claimant actively sought work during weeks 07-20 and 08-20 and is eligible for benefits for those weeks. Claimant did not actively seek work during week 09-20 and is not eligible for benefits for that week.

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 purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (December 8, 2019). With few exceptions, none of which apply here, individuals are “required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual.” *Id.* “Direct contact” means “making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer.” OAR 471-030-0036(5)(a)(B).

In a case involving eligibility for benefits, the allocation of the burden of proof depends upon whether benefits were paid to claimant for the week at issue. *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).

Although Order No. 20-UI-148763 found that claimant performed at least two direct employer contacts during each of the weeks at issue, and also conducted additional work seeking activities during those weeks including reviewing job postings on Indeed, the order concluded that claimant did not actively seek work during each of the weeks at issue, reasoning:

Claimant reported one direct contact with [alternate] potential employers in each weekly claim for benefits for the period at issue. At hearing, claimant testified that she likely performed additional activities seeking employment with alternate employers during the period at issue, and I have no reason to disbelieve her testimony on this matter. However, claimant was unable to testify with certainty about which activities she performed or provide definite dates on which she may have performed them, sufficient to establish that [she] was “actively seeking work” within the meaning of OAR 471-030-0036(5)(a).

Order No. 20-UI-148763 at 1 and 3. However, the Department, rather than claimant, had the burden to establish that claimant did not actively seek work during weeks 07-20 and 08-20 because the Department paid claimant benefits for those weeks. The record supports that claimant was credible in reporting a direct contact with an alternate employer during each week at issue, in addition to contacting her regular employer during each of those weeks to inquire about a possible return to work. Audio Record at 14:15 to 15:00; 28:45 to 29:30. The record also supports the order's conclusion that claimant's testimony that she performed additional activities seeking employment with alternate employers during the weeks at issue was credible. For example, claimant could not have determined which alternate employers to contact for work during a given week without performing other work-seeking activities first, such as reviewing job postings on Indeed or elsewhere. Accordingly, it reasonably may be inferred that in addition to her two direct employer contacts, claimant performed at least three additional work-seeking activities during weeks 07-20 and 08-20. For these reasons, the evidence is no more than evenly balanced that claimant failed to actively seek work under OAR 471-030-0036(5)(a) during weeks 07-20 and 08-20. Where the evidence is no more than evenly balanced, the party with the burden of proof, here the Department, has failed to meet its burden. Accordingly, claimant actively sought work during week 07-20 and week 08-20.

Conversely, claimant, rather than the Department, had the burden to establish that she actively sought work during week 09-20 because the Department did not pay claimant benefits for that week. The record supports the order's conclusion that "claimant was unable to testify with certainty about which activities she performed or provide definite dates on which she may have performed them [during that week] sufficient to establish that [she] was 'actively seeking work' within the meaning of OAR 471-030-0036(5)(a)." Although, as claimant testified, she may have had that information "in [her] phone," she was unable to produce it when asked by the ALJ during the hearing. Audio Record at 22:00 to 23:15. Accordingly, the record supports the order's conclusion that claimant failed to establish that she was actively seeking work during week 09-20.

In sum, claimant was actively seeking work during weeks 07-20 and 08-20, and is eligible for benefits for those weeks. However, claimant did not actively seek work during week 09-20, and is not eligible for benefits for that week.

DECISION: Order No. 20-UI-148763 is modified, as outlined above.

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

DATE of Service: May 26, 2020

NOTE: This decision reverses, in part, an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់រដ្ឋទេ ប៉ុន្តែវាជាភារកិច្ចរបស់អ្នកប្រើប្រាស់។ បើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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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