

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0520

Modified
Ineligible Weeks 26-20 through 28-20
Eligible Weeks 29-20 through 20-21

PROCEDURAL HISTORY: On May 7, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective June 28, 2020 (decision # 111109). Claimant filed a timely request for hearing. On June 8, 2021, ALJ Murdock conducted a hearing, and on June 11, 2021 issued Order No. 21-UI-168610, reversing decision # 111109 by concluding that the employer discharged claimant, not for misconduct, and that claimant therefore was not disqualified from receiving benefits based on the work separation. On July 1, 2021, Order No. 21-UI-168610 became final without the employer having filed an application for review with the Employment Appeals Board (EAB).

On May 7, 2021, the Department also served notice of an administrative decision concluding that claimant was not available for work from June 21, 2020 through May 1, 2021 (weeks 26-20 through 17-21), and was therefore ineligible for unemployment insurance benefits for those weeks and until the reason for the denial ended (decision # 112417). Claimant filed a timely request for hearing. On June 8, 2021, ALJ Murdock conducted a hearing, and on June 11, 2021 issued Order No. 21-UI-168609, modifying decision # 112417 by concluding that claimant did not actively seek work during the weeks from June 21, 2020 through May 22, 2021 (weeks 26-20 through 20-21) and was not available for work during the week from June 21, 2020 through June 27, 2020 (week 26-20), and was therefore ineligible for unemployment insurance benefits for those weeks. On June 24, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond Claimant's reasonable control prevented

him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

EVIDENTIARY MATTER: During the June 8, 2021 hearing, claimant sought to admit as evidence a sworn, written declaration prepared by claimant, along with a thread of text messages between claimant and the employer. The ALJ inquired whether the employer had received this potential evidence prior to the hearing, and the employer responded that they had not received the text thread, and they had only received claimant's written declaration earlier that morning. The ALJ stated on the record that she "believe[d] this can be covered in testimony, anyway," but did not otherwise mark the potential evidentiary exhibits or rule on their respective admission into evidence at that time. Audio Record at 7:05. In Order No. 21-UI-168609, the ALJ noted that she marked the documents "as Exhibit 1," but that she did not admit them into evidence because they "were unduly repetitious of testimony" Order No. 21-UI-168609 at 1. The ALJ failed, however, to mark these documents in the record as "Exhibit 1." As a clerical matter, EAB identified the exhibits based on the ALJ's description of them, and marked them as "Exhibit 1."

Notwithstanding the correction of this clerical error, claimant objected in his written argument to the ALJ's decision to not admit claimant's written declaration. Claimant's written argument at 2. Claimant argues, "the declaration was not unduly repetitious and should be included by the EAB" for purposes of EAB's appellate review. Claimant's written argument at 2. However, claimant's written declaration is not material to our decision. Thus, to the extent the ALJ erred in excluding claimant's written declaration, it did not substantially prejudice the of claimant, and therefore did not preclude the ALJ from rendering an on whether claimant is eligible for benefits for the weeks at issue, or EAB from reviewing the ALJ's order on that issue. *See* OAR 471-040-0025(5) (August 1, 2004). EAB did not consider claimant's written declaration when reaching this decision.

FINDINGS OF FACT: (1) The Lucky Labrador Brew Pub employed claimant, last as a bartender, from May 29, 2009 until September 4, 2020.

(2) On March 15, 2020, the employer temporarily closed their business due to the COVID-19 pandemic.

(3) On March 22, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's labor market for his work as a bartender was the greater Portland area, and that in claimant's labor market, the usual days and hours of the week customary for that type of work were all days of the week, from 7:00 a.m. to 2:00 a.m.

(4) On June 7, 2020, claimant texted the employer's manager informing them that he was "available when needed Wednesday through Sunday for four or so . . . shifts a week." Transcript at 18. The manager thanked claimant for his text message.

(5) On Friday, June 19, 2020, the employer reopened for business.

(6) From June 21, 2020 through June 27, 2020 (week 26-20), the employer scheduled claimant to work shifts on Wednesday, June 24, 2020; Thursday, June 25, 2020; Friday, June 26, 2020; and Saturday,

June 27, 2020. Claimant worked his entire shift on both Wednesday, June 24, 2020 and Thursday, June 25, 2020.

(7) During his shift on June 26, 2020, claimant had a conversation with the manager where he asked them, “[H]ow many hours . . . could [I] work before I got kicked off unemployment [?]” Transcript at 11. Claimant was afraid if he worked too many hours during week 26-20 he might lose his unemployment insurance benefits. The manager responded that claimant “should probably go home right away.” Transcript at 11. The manager told claimant they would try to get claimant’s Saturday, June 27, 2020 shift covered by another employee. Claimant chose to leave work before the end of his shift on June 26, 2020 and told the owner about his decision. After the owner told claimant that they needed him to work, claimant responded that he was planning to work on Saturday, June 27, 2020, but if he worked any longer during his June 26, 2020 shift, he would not be able to work on Saturday, June 27, 2020 because he would lose his unemployment benefits. Transcript at 20. The owner turned and walked away from claimant. The owner had no more conversations with claimant for the remainder of the weeks at issue. The employer covered claimant’s June 27, 2020 shift.

(8) From June 28, 2020 through July 4, 2020 (week 27-20), the employer scheduled claimant to work a shift on Wednesday, July 1, 2020. Claimant worked the shift as scheduled.

(9) The employer had scheduled claimant to work one shift on Sunday, July 5, 2020 (week 28-20), but on July 3, 2020, the employer temporarily closed the business due to the COVID-19 pandemic. Claimant did not work the shift due to the July 3, 2020 business closure.

(10) The employer remained closed due to the COVID-19 pandemic from July 3, 2020 through September 2, 2020 (including part of week 27-20, all of weeks 28-20 through 35-20, and part of week 36-20).

(11) On Thursday, September 3, 2020, the employer reopened for business. Claimant texted the manager about returning to work, and the manager told claimant they would let him know when there were hours available to work.

(12) On September 4, 2020, claimant texted the manager stating, “If I’m on schedule this coming week I would like to work two or less shifts per Sunday/Saturday work week. At least for this month Wednesday through Saturday preferred. Flexible. Thanks.” Transcript at 22. The manager responded to claimant’s text by thanking claimant and telling him that they would let him know. After that, the owner told the manager not to schedule claimant for any more shifts due to claimant’s “history” and because the employer “needed people to work . . . more consistently.” Transcript at 22-23. The owner considered September 4, 2020, to be the date the work separation between claimant and the employer had occurred. No one from the employer informed claimant that a work separation had occurred.

(13) From September 6, 2020 through September 12, 2020 (week 37-20), the employer did not schedule claimant to work any shifts. On September 7, 2020, the manager texted claimant that she did not have shifts available for claimant that week and that the owner was “still trying to figure out hours.” Transcript at 29. The manager told claimant that if things changed they would let him know. Claimant thanked the manager in response and stated, “See you eventually.” Transcript at 29. After September 7,

2020, neither claimant, nor the employer, made efforts to contact the other for any of the remaining weeks at issue.

(14) From September 13, 2020 through September 19, 2020 (week 38-20), the employer did not schedule claimant to work any shifts. On or about September 15, 2020, the employer temporarily closed the business due to the threat of nearby forest fires.

(15) From September 20, 2020 through October 3, 2020 (weeks 39-20 through 40-20), there was no contact between claimant and the employer. In late September 2020, the employer reopened for business.

(16) From October 4, 2020 through November 28, 2020 (weeks 41-20 through 48-20), there was no contact between claimant and the employer. On November 23, 2020, the employer closed the business for the winter.

(17) From November 29, 2020 through April 3, 2021 (weeks 49-20 through 13-21), there was no contact between claimant and the employer. On April 1, 2021, the employer reopened for business.

(18) From April 4, 2021 through May 8, 2021 (weeks 14-21 through 18-21), there was no contact between claimant and the employer. It was not until May 4, 2021, when the Department contacted claimant about his unemployment insurance claim, that claimant had “any idea that [he] wasn’t going back to [the employer]” for future work. Transcript at 14. Claimant performed no work search activities during the weeks including June 21, 2020 through May 8, 2020 (weeks 26-20 through 18-21) because he believed he remained employed by the employer. After a second call from the Department on May 6, 2021, claimant began looking for work.

(19) Claimant claimed and received benefits for weeks 26-20 through 17-21, and claimed but did not receive benefits for weeks 18-21 through 20-21. These are the weeks at issue.

CONCLUSIONS AND REASONS: Claimant was available for work and actively seeking work during weeks 29-20 through 20-21 and eligible for benefits for those weeks. Claimant was not available for work during weeks 26-20 through 28-20 and is not eligible for benefits for those weeks.

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), requires, in pertinent part, that they must be 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. OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020).

Generally, 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) (August 2, 2020 through December 26, 2020). With few exceptions, 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.” OAR 471-030-0036(5)(a). “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). However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020). Paragraph (4) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239> [hereinafter OED Temporary COVID-19 Rule], provides the following:

The federal Families First Coronavirus Response Act permits states to temporarily modify their unemployment insurances laws regarding work search requirements on an emergency basis to respond to the spread of COVID-19 (Section 4102(b)). Because of the vital importance to public health and safety of mitigating the spread of COVID-19, social distancing measures must be maintained. Accordingly, effective the week ending March 28, 2020, notwithstanding OAR 471-030-0036, and unless otherwise notified in writing by the Employment Department, a person will be considered actively seeking work for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect.

The OED’s Temporary COVID-19 Rules addressing the requirement that a claimant must “actively seek work” during each week claimed to be eligible for benefits remained in effect through all of the weeks at issue. See “OED Phases Work Search Requirements Back In,” https://unemployment.oregon.gov/uploads/docs/Return-to-Work-PR_FINAL.pdf.

Where the Department has paid benefits, it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have been paid claimant has the burden to prove that the Department should have paid benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 21-UI-168609 concluded that claimant failed to actively seek work during all of the weeks at issue, and that claimant was not entitled to the benefit of the Department’s temporary COVID-19 rules addressing the “actively seeking work” requirement for availability. Order No. 21-UI-168609 at 4. However, the Department’s temporary COVID-19 rules addressing the “actively seeking work” requirement remained applicable during all of the weeks at issue. Inasmuch as the temporary COVID-19 rule provided that an individual is considered “actively seeking work” as long as they were “willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect,” and inasmuch as claimant testified that he was “willing to work,” the preponderance of the evidence supports the conclusion that claimant was actively seeking work during all of the weeks at issue. Transcript at 11.

Order No. 21-UI-168609 also concluded that claimant was not available for work during week 26-20. Order No. 21-UI-168609 at 4. The order reasoned:

[W]hile claimant asserted that his work availability limitations were merely a preference, he actually declined to work all of the available work hours during the week ending June 27, 2020 (week 26-20), in order to ensure he would still receive an unemployment

insurance benefit payment for that week. Therefore, he demonstrated that he was not willing to accept all suitable work that week and, accordingly, was not available for all suitable work that week.

Order No. 21-UI-168609 at 4. Order No. 21-UI-168609 correctly concluded that claimant was unavailable for work during week 26-20 because the preponderance of the evidence demonstrates that claimant was not willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary in his labor market for a bartender.¹ On June 7, 2020 claimant texted the manager to address his work availability for the employer's reopening later that month and stated that he would be available "Wednesday through Sunday for four or so" shifts. Transcript at 18. By limiting his availability to "Wednesday through Sunday," claimant confirmed that he was not willing to work all days of the week, which were customary for a bartender in claimant's labor market area, and he is therefore not entitled to benefits for week 26-20.²

With respect to weeks 27-20 and 28-20, for the same reason, claimant was not available for work. Specifically, the evidence shows that during week 27-20, the employer only scheduled claimant to work on Wednesday, July 1, 2020, and that during week 28-20, the employer only scheduled claimant to work Sunday, July 5, 2020. This scheduling is consistent with claimant's June 7, 2020 text to the manager informing her that his scheduling availability was limited to Wednesday through Sunday. Accordingly, the preponderance of the evidence demonstrates that during weeks 27-20 through 28-20, claimant remained willing to work all days between Monday through Sunday, which were the customary workdays of the week for a bartender in the greater Portland area, and he is therefore not entitled to benefits for week 27-20 and 28-20.

However, with respect to weeks 29-20 through 35-20, the record fails to show that claimant was not available for work. Specifically, during weeks 29-20 through 35-20, the record demonstrates that the employer temporarily closed their business due to the COVID-19 pandemic. In light of the lack of evidence addressing claimant's availability for work after the employer's July 3, 2020 temporary closure, the Department has failed to meet its burden to demonstrate that claimant was unavailable and, therefore, should not have been paid benefits during weeks 29-20 through 35-20.

With respect to week 36-20, after the employer's reopening during week 36-20, claimant texted the manager on September 4, 2020 he "would like" "to work two or less shifts per week for that month, and

¹ The OED Temporary COVID-19 Rules also address the requirement that an individual be "available for work" and specifically state, in pertinent part, "that a person will not be deemed unavailable for work because . . . (d) They normally work less than full-time and are only available for less than full-time work." See Temporary Covid-19 Rules, <https://www.oregon.gov/employ/Documents/Temporary%20Rule-2.pdf>. The record fails to establish, however, whether claimant normally worked less than full-time. Notwithstanding, the OED Temporary COVID-19 Rules addressing the "available for work" requirement are not applicable to claimant because even if the record had established that claimant normally worked less than full time, the OED Temporary COVID-19 Rules do not change the requirement that claimant be willing to work part-time during all of the usual hours and days of the week customary for a bartender in the greater Portland area.

² The record also demonstrates that on June 26, 2020, claimant chose to leave his shift early and chose to have his manager find a coworker to cover his scheduled June 27, 2020 shift, providing further evidentiary support for the conclusion that claimant was not available for work during week 26-20 because he was not willing to work full or part time during all of customary hours and days of the week for a bartender in the greater Portland area.

that he “preferred” Wednesday through Saturday, but was “flexible.” Claimant’s text message suggests that he was providing working day and hour preferences, and not expressing an unwillingness to work the customary hours and days of the week for a bartender in the greater Portland area. Given the lack of any additional evidence addressing claimant’s availability during week 36-20, the preponderance of the evidence fails to show that claimant was not available for work during week 36-20, and he therefore is eligible for benefits for that week.

With respect to weeks 37-20 through 18-21, the record shows that the employer had discharged claimant, but never told claimant that he had been discharged. The record also shows that during those weeks, claimant reasonably believed that he remained gainfully employed, based in part, on the manager’s text on September 7, 2020 (during week 37-20) that the owner was “still trying to figure out hours” and that if things changed, they would let claimant know. Transcript at 29. Because the parties no longer communicated with each other after September 7, 2020, and in light of the events of week 37-20, the preponderance of the evidence supports the conclusion that claimant remained available for work during weeks 37-20 through 18-21, and was, thus, entitled for benefits for these weeks.

With respect to weeks 19-21 and 20-21, claimant testified that after the Department contacted him during week 18-21, he realized that he would not be going back to work for the employer and he started looking for work. In light of the lack of any other evidence in the record bearing on claimant’s availability for work during weeks 19-21 and 20-21, claimant has met his burden of demonstrating by a preponderance of the evidence that he was available for work during those two weeks, and therefore is eligible for benefits for weeks 19-21 and 20-21.

For the above reasons, claimant was available for work and actively seeking work during weeks 29-20 through 20-21, and he is eligible for benefits for these weeks. Claimant was not available for work during weeks 26-20 through 28-20, and is not eligible for benefits for those weeks.

DECISION: Order No. 21-UI-168609 is modified, as outlined above.

S. Alba and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: August 2, 2021

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.