

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0102

Affirmed
Eligible Weeks 42-21 through 45-21

PROCEDURAL HISTORY: On November 16, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was available for work from October 17, 2021 through November 13, 2021 (weeks 42-21 through 45-21) and therefore was eligible to receive unemployment insurance benefits for those weeks (decision # 103500). The employer filed a timely request for hearing. On January 7, 2022, ALJ Demarest conducted a hearing, and on January 10, 2022 issued Order No. 22-UI-183617, affirming decision # 103500. On January 12, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The employer employed claimant as a patient access representative.

(2) Prior to September 22, 2021, the employer, in compliance with a state mandate, required that all of their employees either get vaccinated against COVID-19 or receive a religious or medical exemption by October 18, 2021. Claimant requested a religious exemption.

(3) On September 22, 2021, the employer granted claimant a religious exemption. The accommodation the employer offered claimant in connection with her exemption request was to take an unpaid leave of absence beginning on October 18, 2021. Claimant accepted the accommodation and began unpaid leave at that time. Had claimant been vaccinated against COVID-19, the employer had work available for claimant after October 18, 2021. Claimant was willing to work for the employer after October 18, 2021, but she did not get vaccinated against COVID-19.

(4) Claimant claimed benefits for the weeks from October 17, 2021 through November 13, 2021 (weeks 42-21 through 45-21), the weeks at issue. Claimant certified on each of her weekly claims that she was willing to accept the work she was seeking, and the Department determined that claimant's weekly work searches were "adequate," and found no other issues with regard to whether claimant was able,

available, and actively seeking work during each of the weeks at issue. Transcript at 6. The Department gave claimant waiting week credit or paid her benefits for all the weeks at issue.¹

CONCLUSIONS AND REASONS: Claimant was available for work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual shall be considered available for work if, at a minimum, the individual is:

* * *

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

Temporary OAR 471-030-0036(3) (September 26, 2021 through March 24, 2022). Because the Department paid benefits or provided waiting week credit during the weeks at issue, it is the Department's or the employer's burden to demonstrate that claimant should not have received those benefits for the weeks at issue. See *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, the Department took the position that during the weeks at issue claimant's weekly certifications on her claims for benefits were "adequate," and that the Department otherwise found no issues with respect to her availability during each week she claimed. The employer's contention at hearing that claimant was not available for work during the weeks at issue because of her unwillingness to get the COVID-19 vaccine, and because her position with the employer as a patient access representative could only be performed while physically in the workplace and was not appropriate for remote work. Transcript at 9. Thus, it can be inferred that the employer viewed claimant as not available because she was not capable of reporting for the suitable work opportunity *they* provided. However, claimant's incapability of reporting for work with the employer as a patient access representative, and the employer's inability to otherwise allow claimant to perform this work remotely, does not establish that claimant was not capable of accepting and reporting for *other* suitable work opportunities within the labor market in which she was seeking work.

The record shows that during the weeks at issue claimant certified that she met the applicable requirements for availability, including that she was "willing to accept the work [she] was looking for." Transcript at 16. Furthermore, it stands to reason that another employer might have had the ability to offer claimant suitable work as a patient access representative (or something similar), and that another employer might have had the ability to allow claimant to perform that work remotely, or provide some other accommodation that would have allowed claimant to report for the work opportunity. On this record, it is not necessary to speculate as to what those other opportunities might have been. The Department determined that claimant's weekly certifications as to her availability were "adequate" and presented no issues, and the employer offered no evidence to suggest that claimant would not have been

¹ EAB has taken notice of these facts, which are contained in Employment Department Records. OAR 471-041-0090(1) (May 13, 2019). 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

capable of accepting and reporting for *other* suitable work opportunities within the labor market in which she was seeking work. As such, the employer did not meet their burden to show that claimant was not available for work during the weeks at issue.

Finally, it is noted that the language of Temporary OAR 471-030-0036(3)(b) is broad and covers a scenario such as the one presented here, where an individual is capable of accepting some, but not all, suitable work opportunities. Interpreting Temporary OAR 471-030-0036(3)(b) in this less restrictive fashion is warranted because the previous administrative rule that Temporary OAR 471-030-0036(3) replaced contained several restrictive textual elements that do not now appear in Temporary OAR 471-030-0036(3). Specifically, former OAR 471-030-0036(3)(b) included the modifier “any” before “suitable work opportunities,” which does not appear in the language of the existing rule. *Compare* OAR 471-030-0036(3) (effective August 2, 2020 through December 26, 2020) (“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[.]” (emphasis added)).² It is logical to conclude that the Department removed this modifier deliberately and with the intent to establish a less restrictive standard. This conclusion is bolstered by language contained in the Department filing statement accompanying Temporary OAR 471-030-0036(3), which explains that the justification for the rule amendment was to provide “more clear guidance . . . regarding the availability of UI benefits and *expands the availability of benefits to people still impacted by COVID-19.*” See Temporary Administrative Order ED 4-2021, “Justification for Temporary Filing,” available at, <http://records.sos.state.or.us/ORSOSWebDrawer/Recordhtml/8581188>. (emphasis added).

For these reasons, the employer failed to meet their burden to establish that claimant was not available for work during the weeks at issue. Claimant therefore is eligible to receive benefits for those weeks.

DECISION: Order No. 22-UI-183617 is affirmed.

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

DATE of Service: February 24, 2022

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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² Additionally, OAR 471-030-0036 (effective August 2, 2020 through December 26, 2020) also contained a provision, at subpart (3)(c), that required an individual to be “[n]ot imposing conditions which substantially reduce the individual’s opportunities to return to work at the earliest possible time[.]” This provision does not appear in Temporary OAR 471-030-0036(3).

You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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