

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1143

Affirmed
Late Request for Hearing Allowed
Ineligible for PUA Weeks 07-20 through 35-21

PROCEDURAL HISTORY: On February 9, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was ineligible to receive PUA benefits effective February 2, 2020. On March 1, 2021, the February 9, 2021, PUA determination became final without claimant having filed a request for hearing. On May 6, 2022, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on May 1, 2023, issued Order No. 23-UI-223598, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by May 15, 2023. On May 15, 2023, claimant filed a timely response to the appellant questionnaire. On June 14, 2023, the Office of Administrative Hearings (OAH) mailed a letter to claimant stating that Order No. 23-UI-223598 was vacated and that a hearing would be scheduled to determine whether claimant had good cause to file her request for hearing late and, if so, the merits of the February 9, 2021, PUA determination. On September 28, 2023, ALJ Mott conducted a hearing, and on September 29, 2023, issued Order No. 23-UI-237247, allowing claimant's late request for hearing and affirming the February 9, 2021 PUA determination on the merits by concluding that claimant was ineligible for PUA benefits for the weeks of February 9, 2020 through September 4, 2021 (weeks 07-20 through 35-21). On October 11, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The rest of this decision addresses claimant's eligibility for PUA benefits.

FINDINGS OF FACT: (1) On October 3, 2020, claimant filed an initial application for PUA benefits. Claimant filed weekly PUA claims for the weeks of February 9, 2020, through September 4, 2021 (weeks 07-20 through 35-21). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue. Claimant did not have sufficient earnings to establish a monetarily valid claim for regular unemployment insurance (regular UI) benefits during the weeks at issue.

(2) Claimant stated in her initial application that she had been self-employed in the field of “recycling” until February 8, 2020, and that the COVID-19 pandemic affected this self-employment.

(3) The Department requested that claimant provide documentary evidence establishing that she was self-employed and demonstrating how that self-employment was affected by the pandemic. Claimant submitted only an affidavit she signed May 13, 2021, stating that she had “been self-employed for the last decade” including “during 2017, 2018, 2019 and also at the onset of the COVID-19 quarantines mandated by the local and federal government commencing March 23rd of 2020.” Transcript at 18. It further stated, “My self-employment business has been substantially affected and destroyed by the pandemic[’s] effect on our economy.” Transcript at 18-19.

(4) Claimant’s reference to “recycling” in her PUA application was made with regard to her efforts in finding or purchasing women’s clothing at Goodwill or, to a lesser extent, other no-cost or low-cost sources; sometimes “customiz[ing]” or “repurposing” the clothing; and selling it at “like swap meets or... [to] friends that [claimant] would have on Facebook.” Transcript at 21. Goodwill closed temporarily during the pandemic in accordance with state orders. Claimant resumed shopping there when they reopened, when restrictions such as “one person per bin” were in effect. Transcript at 26.

(5) Claimant did not register as a business with the Oregon Secretary of State, did not have a business license or pay business taxes, and could not present to the Department any business records or receipts. Claimant was unable to estimate the number or frequency of purchases or sales she made, nor her revenue, expenses, or profits from her “recycling” activities. Claimant did not make enough profit from this activity to be liable to pay income or self-employment taxes, and therefore did not file income tax returns for the years she engaged in this activity.

CONCLUSIONS AND REASONS: Claimant was not eligible for PUA benefits from February 9, 2020, through September 4, 2021 (weeks 07-20 through 35-21).

Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By logical extension of that principle, where benefits have not been paid, claimant has the burden to prove that the Department should have paid benefits. Because the Department did not pay any benefits, claimant had the burden to prove that she should have been paid benefits for weeks at issue.

To be eligible for PUA benefits, an individual must be a “covered individual” as that term is defined by the CARES Act, as amended. 15 U.S.C. § 9021(b). In pertinent part, a “covered individual” is an individual who (1) “is not eligible for regular compensation or extended benefits . . . or pandemic emergency unemployment compensation” and (2) self-certifies that they are either “otherwise able to work and available to work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because” of one of eleven reasons related to the COVID-19 pandemic, or “is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment” and is rendered unemployed because of one of the eleven listed reasons.¹ 15 U.S.C. § 9021(a)(3)(A)(i)-(ii). Regulations

¹ There is a third element of “covered individual” status, added to the Act via the Continued Assistance for Unemployed Workers Act of 2020, enacted on December 27, 2020. The third element requires a claimant to provide documentation substantiating their employment or self-employment within a required timeframe. 15 U.S.C. § 9021(a)(3)(A)(iii); U.S. Dep’t

at 20 C.F.R. part 625, which pertain to the Disaster Unemployment Assistance program, apply to the PUA program, unless otherwise provided or contrary to the Act. 15 U.S.C. § 9021(h).

The COVID-19 related circumstance enumerated by 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj) is that “the individual’s place of employment is closed as a direct result of the COVID-19 public health emergency[.]” Another of the enumerated COVID-19 related circumstances is that “the individual meets any additional criteria established by the [United States] Secretary [of Labor] for unemployment assistance under this section.” 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(kk). A circumstance approved via the Secretary’s item (kk) authority is for “self-employed individuals who experienced a significant diminution of services because of the COVID-19 public health emergency.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 16-20, Change 2 (July 21, 2020) at 2.

The record does not show that claimant met the definition of a “covered individual” entitled to PUA benefits during the weeks at issue. Although claimant met the first element of PUA eligibility because she was not eligible for regular unemployment insurance, extended benefits, or Pandemic Emergency Unemployment Compensation (PEUC) during the weeks at issue, she nevertheless was not a “covered individual” because her circumstances did not satisfy any of the COVID-19 qualifying reasons enumerated under 15 U.S.C. § 9021(a)(3)(A)(ii)(I). The record does not specify which circumstances enumerated in 15 U.S.C. § 9021(a)(3)(A)(ii)(I) claimant believed were applicable to her claim. However, it can be inferred from claimant’s contention that she was self-employed, and her testimony regarding Goodwill’s temporary closure, that only items (jj) and the “diminution of services” provision issued pursuant to item (kk) are potentially at issue.

Preliminarily, claimant has not provided sufficient information regarding her “recycling” activities to conclude that they constituted self-employment. Regulations at 20 C.F.R. part 625, which pertain to the Disaster Unemployment Assistance program, apply to the PUA program, unless otherwise provided or contrary to the Act. 15 U.S.C. § 9021(h). 20 C.F.R. 625.2(o) defines “self-employment” as “services performed as a self-employed individual.” 20 C.F.R. 625.2(n) defines “self-employed individual” as “an individual whose primary reliance for income is on the performance of services in the individual’s own business, or on the individual’s own farm.” While buying and reselling clothing may have generated some income for claimant, claimant’s efforts in that regard lacked any indicia that she did so as a business. Without having obtained any registration or license to conduct business, paid any taxes, or securely retained any financial records or receipts, claimant has not met her burden of showing that she operated a business. At hearing, claimant was not able to provide estimates of her sales volume or profits. The fact that claimant did not engage in this activity at levels that created a liability to pay self-employment tax, which liability accrues with net earnings of \$400 or more in a year,² suggests that she

of Labor, Unemployment Insurance Program Letter No. 16-20, Change 4 (January 8, 2021) (UIPL 16-20, Change 4), at 5 (“Individuals who applied for PUA before January 31, 2021 and receive a payment of PUA on or after December 27, 2020 . . . are required to provide documentation of employment or self-employment[.]”) Because claimant did not meet the second element of “covered individual” status, as discussed below, this decision does not reach the third element of self-employment documentation.

² EAB has taken notice of this fact which is a generally cognizable fact. OAR 471-041-0090(1) (May 13, 2019). A copy of the information is available to the parties at <https://www.irs.gov/businesses/small-businesses-self-employed/self-employment-tax-social-security-and-medicare-taxes#2>. 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

engaged in these activities at a negligible volume, inconsistent with the operation of a business on which one could rely primarily for income. Nonetheless, even if claimant's "recycling" activities could be construed as self-employment, she has not shown she was rendered unemployed because of a COVID-19 related circumstance under items (jj) or (kk).

To the extent claimant's clothing resale activities, which she described as "recycling," could be considered "employment," claimant's place of employment was not Goodwill. The record suggests that once claimant obtained clothing, she would launder it and sometimes "customize" it, presumably in the place she was residing at the time, prior to reselling it to friends or others. Transcript at 21. Claimant testified that her primary source of obtaining clothing for this purpose was Goodwill, which was closed temporarily during the pandemic; claimant did not know how long the closure lasted. Transcript at 25. While Goodwill was involved to that extent in claimant's resale activities, claimant has not established that Goodwill was her "place of employment." If claimant only visited Goodwill sporadically to purchase clothes, as is suggested by profits of less than \$400 per year, it is possible the closure would have had no more than a minimal effect on her activities since the closure may have occurred during a period when she would not otherwise have shopped at Goodwill. As claimant could not provide information as to how frequently she bought clothes from Goodwill or other sources, or the volume of any purchases or sales, claimant has not shown by a preponderance of evidence that uninterrupted access to Goodwill was necessary to conduct her recycling activities. The record therefore does not show that Goodwill was her place of employment. Accordingly, claimant has not shown that the temporary closure of Goodwill constituted closure of her place of employment under item (jj).

Similarly, without establishing a baseline of sales prior to the pandemic, claimant has not shown by a preponderance of evidence that her sales were diminished *during* the pandemic, let alone *because of* the pandemic. Therefore, claimant's inability to provide information regarding her sales or profits both prior to and during the weeks at issue precludes the conclusion that claimant suffered a "significant diminution of services because of the COVID-19 public health emergency" pursuant to item (kk).

Because claimant did not show that her "recycling" activities constituted self-employment, or that she was rendered unemployed by one or more of the enumerated pandemic-related reasons in the CARES Act, claimant did not meet the definition of a "covered individual."

For the above reasons, claimant was not a covered individual under the CARES Act during the weeks at issue, and therefore is not eligible for PUA benefits for those weeks.

DECISION: Order No. 23-UI-237247 is affirmed.

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

DATE of Service: November 21, 2023

mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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