

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1223

Modified
Late Request for Hearing Allowed
Eligible Weeks 26-23 through 35-23 and 39-23 through 41-23

PROCEDURAL HISTORY: On July 31, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work during the weeks of June 25, 2023 through July 22, 2023 (weeks 26-23 through 29-23) and therefore was ineligible for unemployment insurance benefits for those weeks and until the reason for the denial had ended (decision # 81420). On August 21, 2023, decision # 81420 became final without claimant having filed a request for hearing. On September 8, 2023, claimant filed a late request for hearing on decision # 81420. On October 17, 2023, ALJ Goodrich conducted a hearing, and on October 23, 2023 issued Order No. 23-UI-239251, allowing claimant's late request for hearing and modifying¹ decision # 81420 by concluding that claimant was not available for work, and therefore ineligible for benefits, for the weeks of June 25, 2023 through September 2, 2023 (weeks 26-23 through 35-23) and September 24, 2023 through October 14, 2023 (weeks 39-23 through 41-23). On November 1, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's late request for hearing is **adopted**. The remainder of this decision addresses claimant's availability for work.

FINDINGS OF FACT: (1) On June 16, 2023, claimant was discharged from her position as a freight clerk. Before her discharge, claimant worked for that employer for approximately 16 years.

(2) On June 26, 2023, claimant filed an initial claim for benefits. Claimant subsequently claimed benefits for weeks 26-23 through 35-23 and 39-23 through 41-23. These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

¹ Although Order No. 23-UI-239251 stated that it affirmed decision # 81420, it modified that decision by changing the period of weeks for which claimant was denied benefits. Order No. 23-UI-239251 at 6.

(3) The Department determined that claimant was seeking work as a freight clerk, customer service representative, or foodservice worker; that claimant’s labor market was the Portland, Oregon area; and that these types of work were customarily performed in claimant’s labor market from 6 a.m. to 10 p.m., every day of the week.

(4) During the weeks at issue, claimant had been attempting to find her son a spot in a daycare. Although she added her son to the waitlists of four daycares, none had yet accepted him during the weeks at issue. Nevertheless, claimant had a family friend who could often watch claimant’s son if necessary.

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

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

(b) 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[.]

* * *

OAR 471-030-0036(3) (March 25, 2022).

However, notwithstanding the provisions of OAR 471-030-0036(3), an individual with a circumstance which restricts their availability such as, but not limited to, lack of childcare, caring for an immediate family member or another person in their household, lack of transportation, or attendance in school or training to improve their job skills or long-term employment opportunities, will not be deemed unavailable for work if:

(a) The work the individual is seeking or is otherwise willing to seek is customarily performed during other days and hours in the individual’s normal labor market area as defined by OAR 471-030-0036(6); and

(b) The individual is willing and capable of working full time during other days and hours for which they could reasonably expect employers to schedule them.

OAR 471-030-0036(4) (March 25, 2022).

The question of whether claimant was available for work during the weeks at issue arose because of concerns that she would not have childcare available for her two-year-old son if she was offered a job of the sort she was seeking. The order under review concluded that claimant was not available for work during the weeks at issue because although claimant “had access to a close friend of the family who

could provide childcare from time-to-time... she did not have reliable childcare for her son,” as she had suggested at hearing that the availability of childcare was “‘iffy’ at best.” Order No. 23-UI-239251 at 6. The record does not support this conclusion.

At hearing, claimant indeed described the availability of childcare for her son as “‘iffy,” testifying:

Childcare is very iffy. Sometimes you get it. Sometimes you don’t. I could – I could say I’ll be here for whatever. I could be there, but then something’s going to happen. So I don’t – I can’t control what happens with my son or, you know, the situation. I can’t control it. Things just happen.

So, yeah, I can say, yeah, I can work that week. I have childcare or whatever. And then I get there and it’s like, okay. Something happened. You know, uh, where I lost the childcare. Because that’s literally the case most of the time.

Transcript at 34–35. Claimant appeared here to be referring to her family friend who could watch her son if necessary while claimant worked. On that point, claimant also testified:

... I said yeah, that they can watch him. But it’s not always permanent. I can’t just have them watch my son all the time. They have kids of their own, too. So I’m just basically trying to figure it out until I get an actual job and he’s in school.

Transcript at 37.

Based on this evidence, claimant had childcare available for her son at least some of the time during the weeks at issue. The order under review suggested this was insufficient to meet the available-for-work requirements under OAR 471-030-0036 because while “claimant *subjectively* intended to be capable of reporting to work despite her need to provide childcare to her son during the weeks at issue, claimant did not *objectively* show that she did, in fact, have childcare in place so that she would have been capable of reporting to work if work was offered.” Order No. 23-UI-239251 at 6. OAR 471-030-0036 does not impose a blanket requirement that an individual “objectively show” that they have childcare “in place” during all of the days and hours during which the work they are seeking is customarily performed in their labor market.

In fact, the only mention of childcare in the rule is found under subparagraph (4), which excepts persons with circumstances restricting their availability, such as a lack of childcare, from being found unavailable for work if they meet two additional requirements under that subparagraph: that the work they are seeking or otherwise willing to seek is customarily performed during other days and hours in their normal labor market area; and that they are willing and capable of working full time during other days and hours for which they could reasonably expect employers to schedule them.

The Department found that the work claimant was seeking was performed 16 hours per day (6 a.m. to 10 p.m.), every day of the week. The Department’s witness amended this finding, testifying that, in claimant’s labor market, some of the work she was seeking “would probably go [until] 1:00 to 2:00 in the morning[.]” Transcript at 26. Claimant’s testimony, above, suggests that her sporadic lack of childcare may restrict her availability for work on occasion. Given how much of the time the work

claimant was seeking is performed in her labor market, however, it is likely that any speculative and sporadic lack of childcare would not have rendered her consistently unavailable during *all* of the hours and days she was required to be available. Claimant's testimony above also supports the inference that she was willing to work other days and hours for which she could reasonably expect employers to schedule her. Therefore, the preponderance of the evidence shows that claimant met the requirements of OAR 471-030-0036(3) and (4) during the weeks at issue, was available for work during those weeks under those portions of the rule, and was therefore eligible for benefits.

DECISION: Order No. 23-UI-239251 is modified, as outlined above.

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

DATE of Service: December 18, 2023

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.

NOTE: This decision reverses 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.

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

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