

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0128

Reversed & Remanded

PROCEDURAL HISTORY: On November 21, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work from June 25 through July 22, 2023 (weeks 26-23 through 29-23) and from July 30 through August 5, 2023 (week 31-23),¹ and was not eligible for benefits for those weeks (decision # 105035). Claimant filed a timely request for hearing. On January 5, 2024, ALJ Goodrich conducted a hearing, and on January 18, 2024, issued Order No. 24-UI-245682, affirming decision # 105035. On February 5, 2024, 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 her 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.

FINDINGS OF FACT: (1) Prior to mid-June 2023, claimant worked as a substitute teacher, and as a part-time as a server for the employer, a bar and restaurant. Claimant's substitute teaching work ended in mid-June 2023. Before it ended, the substitute teaching work was full-time, Monday through Friday. Claimant's server work for the employer began in mid-February 2023, when claimant was already working full-time as a substitute teacher. Claimant worked as a server Fridays and Saturdays, ten to twelve hours a week.

(2) From mid-June 2023 through August 5, 2023, following the end of the substitute teaching job, claimant continued to work part-time as a server for the employer. Claimant was open to working more hours for the employer. Claimant had a conversation with the manager who scheduled shifts for the employer, and based on that conversation, "it didn't seem" to claimant "that there were a lot more hours

¹ The "Outcome" section of decision # 105035 stated claimant was denied benefits for weeks 26-23 through 28-23 and week 31-23, whereas the "Findings" section of the decision stated claimant claimed benefits for weeks 26-23 through 29-23, and week 31-23, and was not available for work for those weeks. The omission of week 29-23 from the "Outcome" section is presumed to be a clerical error.

available to work,” and claimant “didn’t feel like full-time work was even available.” Audio Record at 1:05:42. On a few occasions during this period, claimant picked up the shifts of coworkers who had called out due to illness, and on those occasions worked on days other than Fridays and Saturdays.

(3) On June 25, 2023, claimant filed an initial claim for unemployment insurance benefits.

(4) Claimant requested not to be scheduled to work for the employer on Monday June 26 through Thursday June 29, 2023. Claimant claimed benefits for the week of June 25 through July 1, 2023 (week 26-23).

(5) Claimant also requested not to be scheduled to work for the employer on Saturday July 8 through Tuesday July 11, 2023. Claimant claimed benefits for the week of July 2 through 8, 2023 (week 27-23), and the week of July 9 through 15, 2023 (week 28-23). Claimant also claimed benefits for the week of July 16 through 22, 2023 (week 29-23) and the week of July 30 through August 5, 2023 (week 31-23).

(6) All told, claimant claimed benefits for weeks 26-23 through 29-23 and for week 31-23. These are the weeks at issue. The Department paid claimant benefits for these weeks.

(7) On August 5, 2023, claimant quit working for the employer to accept a job with the local school district that was scheduled to begin on August 28, 2023.

(8) Claimant’s labor market area was the Klamath Falls, Bonanza, Chemult, and Chiloquin, Oregon area. Restaurant server work was customarily performed in claimant’s labor market area all days,² from 7:00 a.m. to 10:00 p.m. Substitute teacher work was customarily performed in claimant’s labor market area 7:00 a.m. to 4:00 p.m., Monday through Friday.

CONCLUSIONS AND REASONS: Order No. 24-UI-245682 is set aside, and this matter remanded for further proceedings consistent with this order.

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), 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; and

² The order under review erroneously stated that server work in claimant’s labor market area was customarily performed Monday through Friday. Order No. 24-UI-245682 at 2. The record shows it was customarily performed all days, from 7:00 a.m. to 10:00 p.m. Audio Record at 53:09.

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and

(d) Physically present in the normal labor market area as defined by [OAR 471-030-0036(6) (March 25, 2022), every day of the week * * *.

OAR 471-030-0036(3) (March 25, 2022). Because the Department paid claimant benefits, it had the burden to prove that benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The order under review concluded that claimant was not available for work during the weeks at issue because she was not willing to work full-time as a server for the employer during those weeks. Order No. 24-UI-245682 at 3-4. However, the record does not support this conclusion. In particular, the order reasoned that claimant was not willing to work full-time hours for the employer because, when asked by the ALJ if she had been open to working full-time for the employer during the weeks at issue if full-time hours were available, claimant responded "I was open to working more, yes." Audio Record at 1:07:51. Because claimant's testimony was framed in terms of being willing to work *more* but not specifically in terms of being willing to work *full-time*, the order under review regarded this testimony as an implicit concession that claimant was not willing to work full-time and therefore was not available for work. Order No. 24-UI-245682 at 3-4.

This testimony is not sufficient to show that claimant was unwilling to work full-time hours for the employer if full-time hours were available. It is not unusual that claimant would frame her answer in terms of *more* work, rather than *full-time* work given that claimant did not think full-time work was available. Claimant's answer was framed in terms of her impression, based on the conversation with a manager, that working full-time for the employer during the weeks at issue was not an option. Further, claimant's impression about the availability of full-time work was not directly rebutted by the employer. At hearing, when asked about claimant's testimony regarding the availability of full-time work based on her conversation with the manager, the employer's witness testified, "I'm not privy or aware of what, uh, conversation she may have had" and then stated, equivocally, "there really kind of usually is some kind of opportunity. We'll usually ask people, um, you know, if they're available to work more." Audio Record at 1:10:01

Remand is required to develop the record sufficient to determine whether claimant was available for work during the weeks at issue. On remand, the ALJ should directly ask if claimant was willing to work full-time hours for the employer during the weeks at issue had they been available, and clarify whether claimant's willingness to work *more* meant she was willing to work *full-time*. The ALJ should ask questions to develop more detail about the conversation claimant had with the manager, such as when it occurred and what precisely claimant and the manager discussed relating to additional hours. The ALJ also should inquire whether claimant's request for time off for Monday June 26 through Thursday June 29, 2023, was granted, and, if it was, clarify whether that meant that claimant's work schedule after mid-June 2023 had expanded beyond merely Fridays and Saturdays.

The ALJ should also ask questions to assess, given the June 26 through 29 time off request, how claimant could be available for work for week 26-23 if she had requested the majority of that week off work. Likewise, the ALJ should inquire whether claimant's time off request for Saturday July 8 through

Tuesday July 11, 2023, was granted, and ask questions to assess how this time off request affected claimant's availability for work for the weeks impacted, weeks 27-23 and 28-23. To the extent claimant testifies on remand that she was willing to work full-time hours for the employer during the weeks at issue, the ALJ should ask claimant to explain how, if at all, the issues that led her to leave work on August 5, 2023 to accept a job offer for the local school district that was scheduled to begin August 28, 2023 instead of continuing to work as a server until closer in time to August 28, 2023—such as the late hours, issues with minors using fake ID's, and coworkers not taking their jobs seriously—factored into claimant's willingness to work full-time during the weeks at issue. *See* Audio Record at 38:20.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of claimant's availability for work during the weeks at issue, Order No. 24-UI-245682 is set aside, and this matter is remanded.

DECISION: Order No. 24-UI-245682 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: March 8, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-245682 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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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