

OKLAHOMA EMPLOYMENT SECURITY COMMISSION

PRECEDENT MANUAL - 2007 EDITION

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FORWARD

The user of this Precedent Manual should apply case law to the interpretation of the Oklahoma Employment Security Act, Title 40, Chapter 1, of the Oklahoma Statutes, only after first reviewing the purpose and objective of the Act. Care should be taken to insure that no application of the Act results in a violation of this purpose and objective.

The Purpose of the Act is contained in Section 1-201 (1):

The purpose of the act is to promote employment security by increasing opportunities for placement through the maintenance of a system of public employment offices and to provide through the accumulation of reserves for the payment of compensation to individuals with respect to their unemployment. The Legislature hereby declares its intention to provide for carrying out the purposes of this act in cooperation with the appropriate agencies of other states and of the federal government, as part of a nationwide employment security program, in order to secure for this state and the citizens thereof the grants and privileges available thereunder.

The Objective of the Act is defined in the declaration of state public policy in Section 1-103 of the Act.

As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during periods of employment, thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

That we are to keep this basic objective in mind while construing the subsequent sections of the Act was made clear in *Tynes v. Uniroyal Tire Co.*, 679 P2d 1310 (Okla App 1984). In that decision the court made it clear that in sections of the Act that operate as a forfeiture of benefits, the section “*should be narrowly construed to allow maximum fulfillment of the Act’s basic purpose*” as set forth in Section 1-103. See also 76 Am. Jur. 2d Unemployment Compensation Sec. 52 (1975) as cited by the court in *Tynes*. All disqualifying sections should be construed in the light most favorable to the unemployed.

ELIGIBILITY / REGISTRATION, BENEFIT YEAR AND REPORTING

Unemployment Insurance benefits are intended to serve as a wage loss insurance against the risk of being involuntarily unemployed. The system does not cover all reasons for unemployment or even all the unemployed at any given time. All states impose certain eligibility requirements that define who is covered and who can receive benefits. Generally, these requirements fall in two categories, monetary and non-monetary eligibility. Several non-monetary requirements designed to determine initial eligibility, provide for fair and efficient administration of the Oklahoma Act, and timely payment of benefits to those deemed unemployed and eligible, are defined in this first section.

Section 1-217. Unemployed

An individual shall be deemed “unemployed” with respect to any week during which he performed no services and with respect to which no wages are payable to him, or with respect to any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount plus One Hundred Dollars (\$100.00); provided that for the purpose of this section only, any vacation leave payments or sick leave payments, which such individual may receive or be entitled to from his employer or former employer, arising by reason of separation from employment, shall be deemed not to be wages as the term wages is used in this section.

Section 1-204. Benefit Year

“Benefit year” with respect to any individual means the one-year period beginning with the first day of the first week with respect to which the individual first files a valid claim for benefits and thereafter the one-year period beginning with the first day of the first week with respect to which the individual next files a valid claim for benefits after the termination of his last preceding benefit year. Any claim for benefits shall be deemed a valid claim for the purpose of this section if the individual has been paid the wages for insured work required under this act.

Section 2-202. Conditions for eligibility

An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he satisfies the provisions of this Part 2.

Section 2-203 Claim

- A.** An unemployed individual must file an initial claim for unemployment benefits by calling an Oklahoma Employment Security Commission claims representative in a Commission Call center, by completing the required forms through the Internet Claims service provided by the Commission, or by completing all forms necessary to process an initial claim in a local office of the Commission or any alternate site designated by the Commission to take unemployment benefit claims. The Commission may obtain additional information regarding an individual's claim through any form of telecommunication, writing, or interview. An unemployed individual must file a claim in writing or by telecommunication for benefits with respect to each week in accordance with such rule as the Commission may prescribe.
- B.** With respect to each week, he or she must provide the Commission with a true and correct statement of all material facts relating to: his or her unemployment; ability to work; availability for work; activities or conditions which could restrict the individual from seeking or accepting full-time employment immediately; applications for or receipt of workers' compensation benefits; employment and earnings; and the reporting of other income from retirement, pension, disability, self-employment, education or training allowances.
- C.** No claim will be allowed or paid unless the claimant resides within a state or foreign country with which the State of Oklahoma has entered into a reciprocal or cooperative arrangement pursuant to Part 7 of Article IV of the Employment Security Act of 1980.

Section 2-204. Registration employment

The unemployed individual must register for work at and thereafter continue to report at an employment office in accordance with such rules as the Commission may prescribe, except that the Commission may, by rule, waive or alter either or both the requirements of this section as to individuals attached to regular jobs and as to such other cases or situations involving mass layoffs or individuals in areas not served by an established employment office, with respect to which it finds that compliance with such requirements would be oppressive, or would be inconsistent with the purpose of this act.

Section 2-205.1 Ability to work and acceptance of employment

(See Section III)

Section 2-206. Waiting Period

The unemployed individual must have been unemployed for a waiting period of one (1) week. No week shall be counted as a week of unemployment for the purpose of this section:

- (1) Unless it occurs within the benefit year which includes the week with respect to which he claims payment of benefits;
- (2) If benefits have been paid with respect thereto;
- (3) Unless the individual was eligible for benefits with respect thereto.

As the provision of the Act indicate, a claimant must be unemployed, file a weekly claim for benefits, register for work with the agency as directed, and serve a one week non-payable waiting period before receiving benefits. Sec. 1-204 provides that a claim is good for one year beginning with the first week of a valid claim. There is no statutory provision for backdating a claim.

Burden of Proof

The burden rests with the claimant to establish initial eligibility for benefits.

CANCELLATION OF REGISTRATION

Case Applications

87 AT 1913

Facts: Claimant became unemployed October 1st because of lack of work. He went to the Commission offices on October 2nd to register for unemployment. He was registered in a group filing procedure with a large number of other applicants. He later learned that if he waited until the next Monday to register, his second quarter earnings would have been included and his benefits would have been \$60 more. He returned to the Commission and was denied. Claimant made a written request for reconsideration, but was denied.

Held: As a result of a lack of explanation and assistance, the claimant filed before the end of the quarter resulting in a lower weekly benefit amount. The Commission's determination should be modified to show Section 1-204 to be the proper Section of the Act and the Determination reversed.

Result: The Commission was ordered to amend the claim to be effective October 5th.

UNEMPLOYED

Abandoned Self-Employment

79 BR 1292

Facts: Claimant was a school teacher and was not rehired in the fall term. She moved to Kansas and placed an ad in the local paper advertising her services for piano lessons and piano tuning. She also worked as a substitute teacher. She was not getting any results from the ad and stopped running it, taking students only as they sought her out. At the time of her filing, she had seven students and reported all her income from lessons and substitute teaching.

Held: Claimant made an attempt to be self-employed in some manner for many months. She gave up her efforts prior to filing for benefits.

Result: Benefits allowed.

Business Open But No Profits

357 BR 76

Facts: Claimant moved to Oklahoma from California and started his own business. He put all his effort into the business and was just starting to show a profit. He filed for benefits arguing that he paid taxes for fourteen years to support the Trust Fund and he was not making any profit or wages.

Held: Claimant, as an employee, never paid money into the Trust Fund. The employer was taxed to support the trust fund. An individual engaged in a business of his own, no matter if it is making a profit or not, is self-employed, not unemployed.

Result: Benefits denied.

37 AT 10918 BR

Facts: Claimant is working full-time in her home in a child-care business that is not making a profit, so she is receiving no wages at this time. She is advertising with a sign in her yard and has made business cards that she carries.

Held: Section 1-217 states that an individual who is engaged in a business of his own, whether or not it is making a profit, is self-employed, not unemployed. Whether the claimant has been paid does not mean that wages were not payable if there had been money to pay them. The claimant is performing a service for which she is entitled to be paid, so she is self-employed, not unemployed.

Result: Benefits disallowed.

On-Call Workers

81 BR 379

Facts: Claimant's job was on an on-call basis when work was available. Claimant negotiated an hourly pay raise with the employer. Before receiving the pay raise, claimant was not called for work. The employer said no work was available at the time, so there was no need to call the claimant.

Held: Claimant was not called because there was no work available. Claimant was laid off for lack of work. On call, but not working, is unemployed.

Results: Benefits allowed.

Operation of Own Business Part-time

97 AT 5908 BR

Facts: Claimant was attempting to establish a medical claims consultant business and was soliciting clients through the mail. She has yet to obtain any clients. Claimant spends six hours a week soliciting. She is looking for regular paid employment and makes at least two work search contacts per week.

Held: Claimant is unemployed. Her business start-up has not limited her work search.

Result: Benefits allowed.

88 AT 8922

Facts: Claimant was laid off from his full-time job and filed for benefits. The Commission found that he was employed and ineligible for benefits because he operated his own business. Claimant said he operated his business as a part-time sideline occupation while holding full-time jobs for six years. Claimant does not have an ad listing his business in the telephone directory. Claimant is seeking full-time work as an employee.

Held: Claimant's business never interfered with his past or present availability for full-time work. Claimant is unemployed.

Result: Benefits allowed.

Seasonal Contracts

84 BR 1544

Facts: Claimants were professional musicians and signed a contract for the symphony season from September to May. They were paid from September through May. During the season they received a monthly salary. In the off-season, they were not paid and not required to perform. Claimants filed for unemployment in the off-season.

Held: Claimants were considered unemployed since their contract was from September to May and since they received no wages and did not perform.

Result: Benefits allowed.

Working for Commission Only

429 BR 75

Facts: Claimant was laid off his job in Oklahoma and moved to Colorado. When he applied for benefits, he was working forty hours a week on a commission basis and had no earnings. After benefits were denied, he reduced his working hours. At his hearing he said he was working only 33-35 hours and had real estate sales in sight in the future.

Held: Reducing one's hours after denial of benefits does not make work less than full-time. Whether or not claimant made any money, he was deemed to be employed and ineligible for benefits.

Result: Benefits denied.

Concurrent Full and Part-Time Employment

01 01886 AT

Facts: The claimant was employed at two places, one full-time and one part-time. She was injured in an auto accident and ceased work at both places. The claimant was released to return to work by her doctor four months later and contacted both employers. She returned for one week to the part-time job. The employer at the full-time job would not allow her to return to work. After learning of this, she quit the part-time job to relocate and attend school, because she could not live on the part-time wages alone.

Held: The claimant became unemployed due to the loss of her full-time job, which rendered the part-time job untenable. When a full-time and part-time job are held concurrently, the loss of the full-time job renders the person unemployed. The full-time employer will be deemed the last employer, even though the claimant may have worked some more days for the part-time employer. In this case, the full-time employer was the moving force resulting in claimant's unemployment and is the separating employer. The reason for separation from the part-time employer is moot.

Result: Determination vacated and remanded to notify the correct separating employer and to adjudicate claimant's eligibility based upon that separation.

Temporary Lockout

03 AT 12098 BR

Facts: The claimant was hired by the employer to work as a companion to an elderly woman. On one particular day the claimant was locked out of the elderly woman's house when she became upset at the claimant. The claimant was allowed back into the elderly woman's house two days later. The employer never discharged the claimant and she was paid for the two days she was unable to enter the house.

Held: The claimant was not unemployed and therefore not eligible under Section 1-217.

Result: Benefits denied.

Wages and Earnings

03 AT 4436 BR

Facts: The claimant was laid off and received a lump sum severance payment equal to 78 weeks of her salary. The employer was contractually required to make this payment. The claimant was given a choice of receiving the severance payment in one check paid in December or two checks, one in December and one a month later. The claimant decided to take the severance payment in two checks to lessen the impact on her income taxes. However, for some unexplained reason the claimant was given her severance payment in three checks, the last one during the third month.

Held: The claimant received a severance payment that met the definition of wages as defined by Section 1-218. OAC Rules 240:10-3-4(b) provides that severance payments deemed to be wages and paid in a lump sum are deductible from unemployment benefits only in the week received. While the claimant's severance payment was paid in a lump sum, it was made in three separate checks and three different weeks. The law did not intend that the claimant be found ineligible for benefits for the full 78 weeks because she opted to receive the lump sum in two checks, while other employees are found ineligible for only one week because they opted to receive it in one check. Appeal Tribunal affirmed.

Result: The claimant is disqualified for benefits only during the weeks in which she received each of the three severance checks.

03 AT 10918 BR

Facts: Claimant is working full-time in her home in a child-care business that is not making a profit, so she is receiving no wages at this time. She is advertising with a sign in her yard and had made business cards that she carries.

Held: Section 1-217 states that an individual who is engaged in a business of his own, whether or not it is making a profit, is self-employed, not unemployed. Whether the claimant has been paid does not mean that wages were not payable if there had been money to pay them. The claimant is performing a service for which she is entitled to be paid, so she is self-employed, not unemployed.

Result: Benefits disallowed.

Cross-reference: Miscellaneous/ Earnings, Wages and Severance

CLAIM

Case Applications

81 AT 5009; 82 BR 932

Facts: Claimant said he went to the local office on August 2 to file a claim for benefits while he was on layoff. He completed some forms. He was told not to mail them if he returned to work the following week. Since he returned to work he destroyed the forms. When he was later laid off, he returned to the office and they were unable to find his claim. Claimant requested that his claim be backdated. The Commission denied. On appeal to the Appeal Tribunal he was also denied because the local office said they had no record of claimant being in the office. Claimant appealed to the Board of Review.

Held: Since neither claimant nor the local office were able to present evidence that the claim was filed, the Board found that claimant failed to establish that he had filed.

Result: Claimant's request to backdate his claim was denied.

BACKDATING OF REGISTRATION

Case Applications

83 AT 2539; 83 BR 702

Facts: Claimant was laid off and filed a claim effective August 8. She returned to work on August 17th and filed her claim for the week ending August 21. She returned to work and was laid off for the entire week ending September 18th. She went into the office and tried to reopen her claim, backdating to September 18th. Her request to backdate was denied by the Commission. Claimant appealed to the Appeal Tribunal. She admitted she had no excuse for not filing her claim in a timely fashion. The Appeal Tribunal denied.

Held: The Board of Review held that the Commission had no authority to backdate claimant's renewed claim to cover the preceding week since she did not file a claim that week.

Result: Benefits denied for one week ending September 18th.

80 AT 6057; 80 BR 1274

Facts: Claimant filed for benefits effective September 16th. He certified that he was laid off because of a lack of work. He also said he was unable to work full-time because he was receiving Social Security benefits. The Commission found him ineligible for benefits because he was not available for full-time work. He appealed but later withdrew. On March 24th of the next year he renewed his claim and said he was available for full-time work. He requested his claim be backdated to November 4th. The Commission denied the request because the claimant had not filed the necessary paperwork for those weeks. The Appeal Tribunal affirmed.

Held: The Board of Review held that since the claimant did not file claims for the weeks in question, he was ineligible for benefits beginning September 16th to March 22nd.

Result: Claim not backdated.

77 AT 9024; 167 BR 78

Facts: Claimant filed for benefits with the effective date of September 25th. He said he was laid off due to lack of work. He reopened his claim on November 14th and attempted to have the claim made effective to the previous week. Claimant said he was laid off November 8th and spent two days at the union office looking for a job. On November 11th claimant went to file his claim, but the office was closed. The Commission denied the claim saying that they had no authority to backdate a claim. The Appeal Tribunal affirmed.

Held: The Board of Review held that claimant had a half-day and then two full days to file his claim but did not. Affirmed.

Result: Benefits denied for week in question.

77 AT 6953; 1368 BR 77

Facts: Claimant filed for benefits August 29, 1976. He did not file claims for several weeks, letting his claim become inactive. He reported to the local office in Huntsville, Alabama on August 22, 1977 and requested permission to file back claims for the weeks of July 30, August 6, August 13, and August 20, 1977. Claimant said he had misplaced the forms. The Commission denied the request to backdate. The Appeal Tribunal held that the claimant should get the week of August 20th since the claim was filed August 22nd.

Held: The Board of Review held that claims cannot be backdated under Oklahoma law. The backdated claims were not filed in a timely manner. The Appeal Tribunal was affirmed.

Result: Request to backdate denied.

FAILURE TO FILE CLAIMS IN ACCORDANCE WITH AGENCY POLICY

Case Applications

90 AT 04563 BR

Facts: Claimant filed for benefits. She was given a medical statement to have her doctor complete and return to the local office. She took the statement to her doctor, but was unable to return it because the doctor had not completed it. The Commission said she failed to file her claim in accordance with policy and denied benefits.

Held: Claimant had no control over the doctor's failure to complete the form. The Appeal Tribunal reversed and allowed benefits. The Commission appealed to the Board of Review which affirmed the Appeal Tribunal.

Result: Benefits allowed.

80 AT 10879; 81 BR 332

Facts: Claimant was laid off for two weeks and went to California for personal reasons. While there he tried to file for the two weeks he was off, but was told by the California employment office to wait until he returned to Oklahoma. When he returned he was not allowed to file a claim for the two weeks.

Held: Claimant received erroneous advice from the California employment office. Reversed.

Result: Benefits allowed.

80 AT 7921; 80 BR 1681

Facts: Claimant was scheduled to report to the local office on June 2nd to file a claim for the week ending May 31st. He attended a family reunion and did not return until late on June 1st. He called the local office on June 2nd and advised that he would not be in. He was advised he could report within a seven-day period from the scheduled date to file a timely appeal. Claimant reported on June 3rd, but did not stay to file his claim. He returned June 4th and filed his claim. Both the Commission and the Appeal Tribunal determined that claimant did not establish good cause for his failure to report and denied benefits.

Held: Claimant had ample opportunity to file his claim within the time period provided. Since he failed to comply with those regulations, benefits were denied.

Result: Benefits denied.

ELIGIBILITY / WAGES

The monetary eligibility provisions of the Act measure a worker's attachment to the work force by looking at employment history and wage earnings. It is that attachment to the work force that establishes the worker's claim to protection from the conditions UI benefits were designed to insure against. Monetary eligibility provisions draw attention to the insurance aspect of UI and the earned right to those benefits as insurance against the hazards created by unemployment.

All states use a one year "base period" to measure employment history and earnings. In Oklahoma the base period is the first four of the last five completed calendar quarters that immediately precede the quarter in which the claim is filed. (Sec. 1-202.) In July 2006 the Act was amended to allow that base period to be extended for those claimants lacking sufficient qualifying wages due to a job-related injury for which the worker received total temporary disability payment through Workers Compensation. (Sec. 1-202.1.) In such cases the base period is "extended" one quarter at a time until eligibility is achieved. Section 1-202.2 of the Act allows for an alternative base period using the most recent four completed calendar quarters. This alternative is only allowed when the UI Trust fund balance is not below the amount required to initiate a conditional factor in the computation of employer tax rates. When it is available, it allows eligibility based on more recent earnings so workers with employment history interrupted by reasons other than injury covered by TTD or with a more irregular employment history are more likely to be eligible.

The wage requirement for UI eligibility in Oklahoma is set out in Sec. 2-207.A. of the Act.

Section 2-207. Wage requirement during base period

A. The unemployed individual, during the individual's base period, shall have been paid wages for insured work of not less than:

- 1.** One Thousand Five Hundred Dollars (\$1,500.00); and
- 2.** One and one-half (1 ½) times the amount of wages during that quarter of the individual's base period in which such wages are highest.

Notwithstanding the preceding provision, an individual with base period wages equal to or more than the highest annual amount of taxable wages that applies to any calendar year in which the claim for unemployment benefits was filed shall be eligible for benefits.

- B.1.** If an individual lacks sufficient base period wages under subsection A of this section to establish a claim for benefits, any wages paid in the individual's alternative base period shall be considered as the individual's base period wages.
- 2.** If the Commission has not received wage information from the individual's employer for the most recent calendar quarter of the alternative base period, the Commission shall accept an affidavit from the individual supported by wage information such as check stubs, deposit slips, or other supporting documentation to determine wages paid.
- 3.** A determination of benefits based on an alternative base period shall be adjusted when the quarterly wage report is received from the employer, if the wage information in the report differs from that reported by the individual.
- 4.** If alternative base period wages are established by affidavit of the individual, the employer to which the wages are attributed will have the right to protest the wages reported. If a protest is made, the employer must provide documentary evidence of wages paid to the individual. The Commission will determine the wages paid based on the preponderance of the evidence presented by each party.
- 5.** Provided, no wages used to establish a claim under an alternative base period shall be subsequently used to establish a second benefit year.
- 6.** Provided, in any calendar year in which the balance in the Unemployment Compensation Fund is below the amount required to initiate conditional factors pursuant to the provisions of Section 3-113 of this title, this subsection shall not apply and no alternative base period shall be available.

Discussion

Adjudication of monetary eligibility requires a careful review of definitions in the Act relating to employer liability, Sec. 1-208; covered employment, Sec. 1-210; wages paid, Sec. 1-219; and taxable wages, Sec.1-223. Clues to which of these other issues might also need to be considered are gathered by reviewing the basis for the claimant's appeal and the basis for the denial of wages printed as a message attached to the determination by the Commission.

Wages earned in Federal service qualify individuals for benefits under the same terms and conditions as other unemployed workers. Active service in the military qualifies as federal service only as defined by the federal statutes. If the ex-service person was discharged or released under honorable conditions and after serving his first full term of active service or before completion of the first term of service and under certain conditions, the service is considered federal service under the law and earnings can then be used to determine monetary eligibility as above. (Title 5 U.S.C. Sec. 8521(A), as amended by Sec. 301(b), Compensation Act of 1991)

Another group of workers otherwise eligible under the same terms and conditions are school employees with an important and sometimes confusing exception described below.

EDUCATIONAL EMPLOYEES BETWEEN AND WITHIN TERMS

Generally, the between and within terms denial provisions of Section 2-209 of the Act apply to professional and non-professional employees of educational institutions, educational service agencies, and certain other entities, like some Headstart Programs, if they have a contract or reasonable assurance of employment in the next term, year, or remainder of the term. These provisions deny benefits “[b]ased on such services...”. Base period wages earned from employment not covered by the between and within terms denial provisions may be used to establish monetary eligibility for benefits.

Section 2-209 is found in Part 2 of Article 2 of the Act under the heading “Eligibility”. Properly administered, the between and within terms denial requires the removal of school wages from the claimant’s monetary determination for the duration of the between terms denial period only. If the claim is not filed in a period between terms, years, or during an established and customary vacation or Holiday recess; Section 2-209 does not apply. If the claim produces a monetary determination showing no school wages; Section 2-209 does not apply even if the claim is in a between or within terms period. Again, the practical result of applying Section 2-209 is to prevent the receipt of benefits “[b]ased on such services...” described in Section 2-209, generally from schools.

If a claim is filed in a period between or within terms and there are school wages, there must be reasonable assurance of work in the next year, term or period before the school wages can be denied. The term “reasonable assurance” is critical here. In part, the justification to deny eligibility to unemployed workers because they are school employees between terms is based on the reasoning that those workers are less harmed by or need less protection from the economic insecurity, hazards and burdens resulting from unemployment described in Section 1-103 of the Act than other people in the same situation. It is their “reasonable assurance” of returning to work that gives them the relief benefits are intended to provide. This exception to equal treatment [26 U.S.C. Sec. 3304(a)(6)(A)] makes it even more important that when the provisions of Section 2-209 are applied, one remembers that unemployment insurance is social insurance and exemption from the remedies described in the Act should be narrowly interpreted. *U.S. v. Silk*, 331 U.S. 704 (1947). Denials should not be based on assumptions, but on substantial and verified evidence.

Reasonable assurance is defined by Commission Rule 10-3-21 to mean a written, verbal, or implied agreement of continued service in the next year, term, or period of instruction. While a written agreement is preferable, an implied agreement can meet the standard, but any implied agreement should be supported by substantial evidence and should be verified. A *bona fide* offer must be made by someone with the authority to make the offer. Any offer made by someone without such authority, or which merely provides for the possibility of continued work is not *bona fide*. Finally, reasonable assurance only exists if the offered work is substantially the same as the previous work.

Even an accepted offer of continued employment, but under terms and conditions substantially less than the previous work would not meet the standard required. An attempt to verify the details of any offer should always be made. Whatever proof is offered should be sufficient enough that a “reasonable” person would count on it.

Once it is determined the between and within terms denial applies, it only means that school wages cannot be used to determine eligibility. A new monetary determination without school wages must be issued. If there are sufficient wages to qualify without the school wages, the claimant is eligible even during the period between or within terms. At the end of that period, the wages must be replaced, since the wages are excluded for the period between or within terms only.

Burden of Proof

The claimant bears the burden to offer proof of missing wages or wages declared not covered. The issue of “federal service” for ex-service members is governed by the Federal determination that characterizes the separation. The characterization of the service and the determination that the service does or does not qualify as federal service is not within the jurisdiction of the Appeal Tribunal.

In cases involving reasonable assurance, the school or educational service agency carries the burden of proof.

2-209 REASONABLE ASSURANCE

Case Law

OESC V. Bd. Of Rev. of OESC, Riverside Indian School, et al. (Ok. Ct App. Div. 2, 5-17-1994) (unpublished)

Facts: The District Court of Caddo County affirmed the Board of Review's award of unemployment benefits to the claimants. The claimants are employees of Riverside Indian School, which prior to 1987 remained open year-round, with employment on a year-round basis. Beginning in 1987, due to funding cuts, the school closed during the summer months and employees were furloughed during that period. In the spring of 1992, the employer mailed a letter to the claimants stating that due to lack of funds the employees would be placed in a non-work status and specifying beginning and ending dates for that status, which ended with the start of the fall semester. In June, the claimants applied for unemployment benefits and were denied by the Commission based upon the decision that the claimants had reasonable assurance they would be reemployed in the fall. The claimants appealed and the Appeal Tribunal reversed and allowed benefits, finding that no reasonable assurance existed. The Board of Review affirmed, as did the District Court.

Held: The ruling of the trial court was not supported by substantial evidence. The letter mailed to the claimants conveyed a reasonable assurance of returning to work after the specified end date of their furlough. The claimant's testimony also indicated that they did, in fact, return to work that fall. Testimony also indicated that the claimants had been furloughed every summer for several years prior to that year and every year they returned to work at the end of the summer. The only evidence presented to support the claimant's contention was that they were non-contract employees and their work was dependent on the availability of funds to pay them. There was no testimony that the funding for Riverside Indian School was in jeopardy or uncertain for that fall. Since all future employment depends on an employer's ability to pay employees, it is an insufficient reason to establish that a lack of reasonable assurance exists. Funding dependency does not support a finding of substantial evidence. The claimant's had reasonable assurance of returning to work for the fall term and are not entitled to benefits.

Result: Reversed. Benefits denied.

Case Applications

06-AT-08520-UCFE-BR

Facts: The claimant was employed as a home living assistant for two consecutive school years. She was laid off when the school year ended. No offer of a job for the next school term was made and she was told only that she could reapply for work when school resumed. She was given no information to indicate she would be rehired. The Appeal Tribunal reversed the Commission's Determination disallowing benefits stating that the claimant did not have a history of returning to work for each new term for several years. She had only returned for one consecutive term, and contrary to the case cited by the Commission, she had been given no verbal or written notice telling her she would return or when. The Appeal Tribunal found that there was no reasonable assurance of returning to work and allowed benefits. The Commission appealed.

Held: The Board of Review distinguished the *Riverside Indian School* case cited by the Commission by the two elements cited by the *Riverside* court. The claimants in that case had reasonable assurance based upon two elements, more specifically: (1) they had a history of returning to work for several years, whereas the claimant has only worked for two school years; and, (2) those claimant had been given a letter advising them that they were being placed in "non-work" status for a specified period with a definite ending date, whereas the claimant in this case had no verbal or written notice that she would be returning to work. She was told only that she could reapply after school started. No reasonable assurance of reemployment existed. The Decision of the Appeal Tribunal was affirmed.

Result: Benefits allowed.

03-AT-11430-BR

Facts: The claimant received a letter from the school district in April advising him that his contract would not be renewed for the following year. He applied for benefits and was allowed. He received benefits for several weeks, but then received a new determination denying benefits effective the end of June because the claimant had reasonable assurance of reemployment during the next school term. He called the school and was advised that a teacher resigned and the claimant could be considered for rehire if another more senior teacher refused the position. The other teacher verbally told the claimant he was not going to take the position because he thought he had another position in another district. However, he had the ability to change his mind any time before the school board met in mid-July.

Held: The claimant did not have reasonable assurance of rehire since another employee had to first turn down the position for the claimant to be rehired. The claimant should have been allowed benefits until the time he was offered a contract in mid-July.

Result: Benefits allowed.

01-AT-6828-UCFE-BR

History: The claimant appealed the Commission's Determination finding she had reasonable assurance of returning to employment for school and disqualifying her for benefits under Section 2-209. The Appeal Tribunal reversed and allowed.

Facts: The claimant testified that whether she is rehired as a temporary clerk for the next term is based on enrollment. The school does not know what the enrollment will be, so they cannot offer her a job for the next year.

Held: Affirmed. The claimant does not have reasonable assurance of a job for the next school term.

Result: Benefits allowed.

ABLE AND AVAILABLE

The most basic requirement of continuing eligibility for unemployment insurance benefits is that the claimant be “able and available” for work. The applicable provision of the Act defining that eligibility requirement is:

Section 2-205.1. The unemployed individual must be able to perform work duties in keeping with his education, training and experience. He must also be available to seek and accept work at any time and may not be engaged in any activity that would normally restrict his seeking or accepting employment in keeping with his education, training and experience.

The fact that an individual is enrolled in school shall not, in and of itself, render an individual ineligible for unemployment benefits. Such individual who is involuntarily unemployed and otherwise eligible for benefits who offers to quit school, adjust class hours or change shifts in order to secure employment shall be entitled to benefits.

Definition

Whether expressly stated or by implication, the entire history of the unemployment insurance system indicates that unemployment benefits are intended to compensate unemployed workers who are able to work. During the inception of the program in 1935 Congress clearly tied the benefits to ability and availability to work by stressing the difference between these benefits from other types of benefits; emphasizing that unemployment benefits are for those involuntarily unemployed, (*S. Rep. 628, 74th Cong. 1st Sess. 1935 Page 11*) and by requiring unemployment benefits to be paid through the public employment system. (*FUTA 26 U.S.C. 3304(a)(1) and SSA 42 U.S.C. 503(a)(2)*)

Eligibility under the Oklahoma statute simply requires that a claimant be able to perform work duties in keeping with his or her work experience, or in keeping with the duties of work that claimant’s education or training would reasonably prepare them for. While the difference between ability and availability may be hard to differentiate, whether a claimant is able to work is basically a determination about a claimant’s physical or mental condition. Since monetary eligibility is based on recent employment and a claimant must have been able to work to have qualifying wages, this issue usually relates to a recent or temporary health restriction. When a claimant is restricted from some duties, but is able to perform others in keeping with their experience, they are able to work. A careful review of a claimant’s entire work history is required followed by a review of all education and training to determine what other types of work the claimant has performed, been trained to perform and is able to do.

Since 1981 the following definition of availability to work offered by the Board of Review has been relied on:

No definite rule can be stated as to what precise facts can constitute availability, and no clear line can be drawn between availability and unavailability, although availability requirements are generally satisfied when an individual is willing, able and ready to accept suitable work, which he does not have a good cause to refuse.

81-BR-855

If no definite rule could be stated in 1981, that task is even more difficult in today's economy. Non-traditional employment, structural changes in the economy caused by a dramatic shift toward a service economy, and a resulting pressure on workers to be life-time learners retraining for the future, all emphasize the Board of Review's observation in 1981 that the precise facts that define availability do not exist. The adjudicator of a claimant's eligibility on this issue must take into account all the facts related to the claimant's availability to work to determine if activities a claimant is involved with or other limitations, whether self imposed for personal reasons or external ones such as a lack of transportation, are reasonable or are so restrictive that the claimant cannot be considered available to seek and accept work. Finally, the adjudicator must determine if the restriction of ability or availability is temporary or indefinite and should explore with the claimant ways to remove restrictions if possible.

The statute specifically directs that school attendance does not make a claimant ineligible provided the claimant is willing to withdraw from school or rearrange class schedules or work shifts in order to secure and be available for work. Further, at Section 2-108, the Act allows those engaged in training approved by the Commission a waiver from the availability for work requirement.

Burden of Proof

Able and available is an eligibility issue. The burden of proof rests with the claimant to establish his or her eligibility for benefits by a preponderance of the substantial evidence presented.

ABLE TO ACCEPT EMPLOYMENT

Copeland v. Oklahoma Employment Security Commission, 172 P2d 420 (Okla. 1946)

History: Board of Review denied claim for benefits; claimant appealed. District Court, Lincoln County, affirmed; claimant appealed. Supreme Court affirmed.

Facts:

1. Claimant resided in Meeker, Oklahoma; he was 63 years old.
2. There was no opportunity for employment in said town or its immediate vicinity. The nearest labor market was in Chandler or Shawnee, approximately 16 miles from Meeker, or Oklahoma City, approximately 45 miles from Meeker.
3. Claimant contacted the labor union in Oklahoma City, and there were jobs available, but he was unable to secure transportation; claimant had no transportation of his own; claimant had never driven an automobile. There was no transportation available to Chandler or Shawnee.
4. There was transportation available to the Douglas plant, but claimant was not qualified to work there because of age requirements.

Further History: The OESC initially paid claimant and then issued a re-determination finding that he was no longer eligible for benefits because he refused a job referral in Norman, Oklahoma, due to transportation problems. The Board of Review and District Court affirmed; the Supreme Court sent the case back to the Board of Review for the taking of additional evidence; the Board of Review found that “viewing all the conditions revealed by the evidence, it is our finding...that claimant was not available for work”. The Board reaffirmed its order denying the claim, and certified the additional findings and its order back to the Supreme Court.

Issue: If a claimant is unable to provide transportation for himself, even through no fault of his own, is he still available for work within the meaning of the Act.

Holding: When the burden is cast upon an employed person to provide himself with transportation to and from available employment, and such person is unable to provide such transportation for himself, even through no fault of his own, he is not available for work within the meaning of the Oklahoma Employment Security Act.

Note: Read case for discussion of burden of proof, judicial review, duty to furnish transportation, and taking notice of the needs of claimant.

Pregnancy

Case Applications

83 BRD 15727 (Illinois)

Facts: Claimant was no longer able to physically perform her regular job duties in a factory because of her pregnancy. She was placed on medical leave, whereupon she began searching for office work.

Held: Given the medical restriction on the claimant's ability to perform factory work, the work search was reasonable. She was able to work, available to work, and actively seeking work during the period under review.

Result: Benefits allowed.

Medical/Health Restrictions

Case Applications

81-BR UCFE 1558

Facts: Claimant had a serious health problem, which was not job-related. He was under the care of several doctors, which affected his work attendance. The claimant was given several opportunities to present statements from his doctors to establish whether he was able to return to work in his occupational classification. He did not submit any doctors' forms.

Held: There was no medical evidence that claimant was physically able to work.

Result: Benefits denied.

03-AT-10393-BR

Facts: The claimant had shoulder surgery. When she was released to return to work, she had a ten-pound lifting restriction. Part of her duties before surgery was to unload trucks and do stocking. The claimant was unable to return to that position with the ten-pound weight restriction, so she was transferred to a cashier's position. After working in that position for two months, she developed shoulder problems because she was required to lift some items over ten pounds as part of that job. There were no other positions available, so the claimant quit. She still has a ten-pound weight restriction. She is seeking work as a cashier or a hostess. The claimant was denied and the Appeal Tribunal affirmed the Commission.

Held: The claimant could perform the duties of a cashier or hostess at a gas station, restaurant or other places that don't require lifting items over ten pounds. She is able and available for work.

Result: Reversed and benefits allowed.

Work-related Injury

Case Applications

90 AT 5532-BR

Facts: Claimant was a paramedic. She injured a wrist and was off work for a short time. She returned, then, took off to have surgery on her wrist. She returned to work but was laid off. She began drawing unemployment benefits but then had to have additional surgery on the wrist, which required it to be in a cast for ten weeks. Claimant worked as a “street” paramedic, but continued to search for related work without lifting. The Commission required claimant to get a doctor’s statement. The doctor said the claimant was not able to perform her usual duties.

Held: The claimant could perform other jobs such as a dispatcher, chauffeur, etc., that do not require heavy lifting.

Result: Benefits allowed.

AVAILABLE TO ACCEPT EMPLOYMENT

Approved Training

Case Applications

76 AT UCX 250; 1189 BR 77

Facts: Claimant filed for benefits after being discharged from the military. He moved to Tennessee and began going to school. The Commission held he was not eligible for benefits because he was attending school full-time and was therefore not available for work. The Appeal Tribunal affirmed and denied benefits.

Held: The school to which claimant was going was approved training in Tennessee, and further, the claimant was under the impression that vo-tech training was approved training. While not all, vocational training is approved training, in this instance the vo-tech training was approved.

Result: Benefits allowed.

Cross-reference: Section 2-108 re Relief from Search for Work, Section VI.

AVAILABILITY

Child Care

Case Applications

702 BR 75

Facts: Claimant listed several prospective employers in an effort to find employment within fifteen miles of her home. She had two boys, ten and thirteen, living at home and would not accept employment requiring her to be at work before 8 a.m., but could work anytime after that, including evenings.

Held: Claimant did not place unreasonable restrictions as to her location of employment, beginning wages or working hours.

Result: Benefits allowed.

Farming

Case Applications

79 BR 13455

Facts: Claimant was a sheet metal worker and was laid off due to lack of work and the employer's decision to cut down operating systems. The claimant filed for benefits. Claimant said he was hired full-time and family interests did not interfere with his desire to work full-time. He farmed on weekends only. He worked for his employer for seven years and was allowed to take off ten days each summer for wheat harvest.

Held: Claimant's part-time farming activities did not make him self-employed. Claimant was available for work.

Result: Benefits allowed.

Cross-reference: Section 1-217, Unemployed.

III-30-(B)

Restrictions, Miscellaneous

Case Applications

92-AT 04724

Facts: Claimant was laid off for lack of work from his part-time job. When he applied for benefits he placed a monetary limitation on his availability for full-time employment. He was found ineligible for benefits. He appealed. He stated he was receiving disability and must not earn in excess of \$500 or his disability would be affected.

Held: Claimant worked part-time for many years within the limits of his disability. Benefits cannot be denied because he is disabled and desirous of maintaining a cap on salary to remain within the salary limit set forth by the Social Security Administration.

Result: Benefits allowed.

1046 AT 60; 118 BR 60

Facts: Claimant had been asked by an employer to work full-time. She stated she was unable to work full-time due to an eye condition. Claimant made no contacts or applications for employment.

Held: Claimant was unavailable or unable to work.

Result: Benefits denied for as long as the condition exists.

Students

Case Applications

89 AT 9533 BR

Facts: Claimant enrolled in slot machine school Monday through Friday from 7:30 a.m. to 12:30 p.m. He was actively seeking employment and stated he could change his school hours to 5:30 to 10:30 p.m., if employment was found. The commission denied benefits, because he was attending school during working hours. The Appeal Tribunal held that since the school allowed the claimant to change to evening hours, if necessary, claimant was not restricting himself. Benefits were allowed. The Commission appealed to the Board of Review.

Held: The Board of Review affirmed.

Result: Benefits allowed.

89 AT 960

Facts: The claimant applied for benefits after she was laid off due to lack of work. She had been taking classes during the day. The commission denied benefits because the claimant was attending classes during the workday. Claimant appealed. Claimant stated that she was looking for a job at any hour, and if it interfered with her classes she would take evening classes. The Appeal Tribunal denied benefits.

Held: Any student who was involuntarily unemployed and who offered to quit school, adjust class hours or switch shifts to secure employment is entitled to benefits. Remanded to the Appeal Tribunal. The Appeal Tribunal found claimant's school attendance did not stop her from seeking work, but again denied benefits because the claimant was attending class during the day. The Board of Review reversed stating that benefits cannot be denied if the student is willing to change their classes for work.

Result: Benefits allowed.

89 AT 112 BR

Facts: The Commission denied benefits to claimant because he was enrolled in two three-hour classes each week, one of which began at 4:30 p.m. Claimant appealed stating that he could rely on others' notes for the first thirty minutes of that class. The classes were toward a master's degree which was career-related. The Appeal Tribunal reversed to allow benefits. Thirty minutes was not a barrier to finding work.

Held: The Board of Review affirmed the Appeal Tribunal.

Result: Benefits allowed.

98-AT-8007-BR

History: The claimant appealed the Commission's Determination finding the claimant unavailable for work and denying benefits under Section 2-205A. The Appeal Tribunal reversed and allowed.

Facts: The claimant was employed for five years when he voluntarily quit to enter Officer Candidate School. He attends school during hours he would normally be working. He testified he would be willing to quit school to accept a full-time job.

Held: Reversed. The Board of Review did not believe the claimant's assertion he would quit school to obtain work, because he quit full-time work to go to school. He could have kept his job.

Result: Benefits denied.

00-AT-3566-BR

Facts: The claimant completed a Statement/School Attendance form at the local office stating he would not be willing to withdraw from or rearrange his classes to accept full-time employment. He had worked temporary and part-time jobs. He has been registered with a temporary staffing agency for temporary jobs during that review year. He has worked as an assembly worker and currently works as a part-time security guard from 11 p.m. to 7 a.m. He stated he is willing to work from 5 p.m. to 1:30 a.m. on weekdays and at any time on weekends. He was not working when he filed for benefits. He has been able and available during hours he is not attending school and has accepted some part-time jobs. The Appeal Tribunal disqualified the claimant for the time period in which the claimant said he was not willing to change his school schedule.

Held: Claimant's work restrictions did not and do not prevent him from accepting full-time employment in field for which he had experience.

Result: Reversed and benefits allowed.

01-AT-6427-BR

History: In June the claimant appealed the Commission's Determination finding the claimant was enrolled in school activities and disqualified for benefits under Section 2-205A. The Appeal Tribunal affirmed.

Facts: The claimant is enrolled in school for the fall semester, which begins in mid August. She is willing to accept work, but if hired, would quit when school begins. She is enrolled in classes from 9 a.m. to 5 p.m. on Monday, Wednesday, and Friday, and from 8 a.m. to 5 p.m. on Tuesday and Thursday. She is not willing to change school hours to accept full-time employment. The Appeal Tribunal held that although the claimant is not presently attending classes, she would quit work to attend school and is not, therefore, available for work.

Held: Reversed. The claimant was available for work at the time she filed her claim and will continue to be available until she begins classes. At that time, if the claimant has not obtained employment or if she had obtained employment and resigns to attend school, then a new determination should be issued. Future unavailability will not disqualify an individual, if at the time of the claim the individual is available for work.

Result: Benefits allowed.

01-AT-6956-BR

History: In July, the claimant appealed the Commission's Determination finding the claimant was enrolled in school activities and was disqualified for benefits under Section 2-205A. The Appeal Tribunal reversed and allowed.

Facts: The claimant is not presently in school, but will attend school beginning the end of August. The claimant is found to be currently available for work.

Held: When the claimant filed his claim for benefits, he was available for full-time work. The fact that he is enrolled in college has no effect on his availability for employment at this time. If or when he begins attending college, the Commission may issue a new determination. Benefits may not be denied for current weeks based on speculation about events, which may or may not occur in the future. Affirmed.

Result: Benefits allowed.

ABLE AND AVAILABLE

Temporary Job Does Not Prohibit Availability

97-AT-06218

Facts: The claimant received a full release from her physician and immediately informed the Commission she was available for full-time employment. She also told the Commission she had a part-time job on Saturdays. The claimant had training and experience as a health care worker and was available for two of three shifts generally available in that filed. The claimant said she was willing to quit her part-time job to obtain full-time employment.

Held: The claimant was able and available to seek and accept work immediately. Part-time temporary work does not prevent the claimant from being able and available.

Result: Claimant allowed.

Transportation

Case Law

Copeland v. OESC, 172 P2d 420 (Okla 1946)

Facts: Claimant was disallowed benefits after he refused a job and later a referral which were too far from his home. He did not own nor had he ever driven a car. This made him unable to accept work outside his town.

Held: When an individual is unable to provide transportation to work even through no fault of his own, he is not available for work and not eligible for benefits.

Result: Benefits denied.

171 BR 76

Facts: Claimant's truck broke down for one week and she was unable to search for work.

Held: Claimant was not available for work that week and not eligible for benefits.

Result: Benefits denied.

Cross-reference: See Refusal of Referral.

Wages

Case Applications

3817 AT 75; 552 BR 75

Facts: When claimant filed for benefits and registered for work, she said she would not consider less than \$600 per month since she had a child to support. She had seven years experience in this line of work, but was earning \$550 per month in her last job. She said she would rather have part-time work since she was planning to go to school in September, but that she would accept full-time work until then. The Commission denied because the claimant was not available to work because of the wage restriction. The Appeal Tribunal affirmed. Claimant informed the Board of Review that she would accept \$600 per month. Claimant did not appear at the hearing.

Held: There is no evidence that claimant made a sincere and reasonable effort to find full-time work during her five month unemployed period. Claimant chose not to appear to substantiate her contentions that she has been in the bona fide active labor market without any undue restrictions as to salary or working hours.

Result: Benefits denied until the claimant could prove she has returned to the active labor market.