

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0406

Affirmed
Ineligible

PROCEDURAL HISTORY: On February 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of December 21, 2014 through January 24, 2015 (decision # 92317). Claimant filed a timely request for hearing. On March 19, 2015, ALJ Wyatt conducted a hearing, and on March 26, 2015 issued Hearing Decision 15-UI-35788, affirming the Department's decision. On April 8, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) On December 18, 2014, Benson Trucking employed claimant full-time as a dump truck driver. On that day, the truck that claimant usually drove for Benson was significantly damaged in a highway accident and became inoperable.

(2) On December 19, 2014, Benson's owner told claimant that he was laid off as a driver until the owner determined whether to repair the damaged truck or to purchase a new truck. The owner allowed claimant to continue working for Benson as a helper in its shop one day each week, on Saturdays. Claimant started this part-time work on Saturday, December 20, 2014.

(3) Sometime before December 21, 2014, claimant filed an initial claim for unemployment benefits. When claimant made his application for benefits, he stated that he was temporarily laid off from work and would return to work on January 5, 2015. Claimant claimed benefits during the weeks of December 21, 2014 through January 24, 2015 (weeks 52-14 through 03-15), the weeks at issue.

(4) During the weeks at issue, when claimant made his weekly claims, the only work search activities he listed were contacts with Benson.

(5) On January 5, 2015, Benson's owner was still uncertain whether he would replace the damaged truck. On Saturday, January 17, 2015, the owner told claimant that he could return to full-time work on

January 21, 2015, driving a log truck. Sometime before January 17, 2015, the owner had abandoned the possibility of repairing or replacing of the damaged dump truck. Claimant resumed working full time for Benson on January 21, 2015, but was injured that day.

(6) On February 3, 2015, a Department representative made a telephone call to claimant to discuss, among other things, his work search activities during the weeks at issue. In that call, claimant told the representative that, when he was laid off, Benson's owner told him he had a return to work date of January 5, 2015, which was when Benson's damaged truck would be repaired. Claimant said that he thought he was exempt from the general work search requirements because his return to work date was within four weeks of the December 20, 2014 date of his layoff. On February 3, 2015, the same Department representative called Benson's owner to learn if claimant had been given a return to work date when he was laid off. The owner told the representative that he had not given claimant any definite date to return to work as a truck driver, and he "had no intentions" of fixing the damaged truck or buying a truck to replace it. Audio at ~9:50, ~34:32.

CONCLUSIONS AND REASONS: Claimant did not actively look for work during the weeks of December 21, 2014 through January 24, 2015. Claimant is not eligible to receive benefits during those weeks.

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 purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). If no exceptions apply, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* "Direct contact" means "making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer." OAR 471-030-0036(5)(a)(B). For an individual who is temporarily laid off for four weeks or less by the individual's regular employer and, as of the layoff date, had been given a date to return to work, the individual is actively seeking work by remaining in contact with the employer and need not engage in any other work seeking activities during the first four weeks of the layoff. OAR 471-030-0036(5)(b)(A).

Assuming Benson's owner laid claimant off on December 20, 2014, rather than maintaining the employment relationship and merely reducing claimant to part-time employment, claimant was exempt from the general work seeking requirements set out in OAR 471-030-0032(5)(a) only if he fell within one of the specified exceptions to that regulation. The only exception potentially applicable to claimant's situation is that for a temporary layoff of four weeks or less in which he must have been given a return to work date as of the date he was laid off. OAR 471-030-0036(5)(b)(A). Although claimant initially appeared to contend that the owner of Benson Trucking gave him a definite date of January 5, 2015 to return to full-time work when was laid off, the Department representative presented evidence that contradicted claimant's testimony, and stated that the owner had told him that he gave claimant no date to return to work and did not intend to repair the truck that claimant had been employed to drive. Audio at ~10:39. When claimant was asked at hearing why he thought that was going to return on January 5, 2015, his response detailed the owner's uncertainty about how to handle replacing the damaged truck rather than stating in substance that he thought he was going to return on January 5, 2015 because the owner had supplied that date to him. Audio at ~33:50. When pressed during his testimony

about whether the owner gave him a definite date to return to full-time work, claimant stated that he selected the date of January 5, 2015 based on an “assumption that I would be returning [to work] in a very short period of time” and “that’s my return to work date as I stayed within the four weeks [for the temporary layoff exception].” Audio at ~35:50. Claimant’s testimony fell far short of establishing that it was the owner who gave him the return date, and appears to indicate that it was he who came up with a return date that was within the four weeks needed to establish an exemption from the work seeking requirement due to a temporary layoff. Finally, claimant’s testimony about the owner’s continuing indecision over replacing the truck, which was the basis for claimant’s surmise about when he was going to return to full-time work, was that the owner did not know what he was going to do about the truck on December 20, 2014 (when claimant was laid off), on January 5, 2015 (the return to work date that claimant initially alleged) and on January 16, 2015 (one day before the owner gave claimant a certain return to work date of January 21, 2015). Audio at ~21:06, ~22:23, ~34:32, ~36:40. It is not plausible under such uncertain circumstances that Benson’s owner would have committed to claimant on December 20, 2014 that he would have full time work for him on January 5, 2015, when he had not yet decided if there was even going to be a truck for claimant to drive. On these facts, it is more likely than not that claimant was given a return to work date well after the December 20, 2014 date of his alleged layoff. There is insufficient evidence in this record to demonstrate that claimant was exempt from the work seeking requirements of OAR 471-030-0036(5)(b)(A).

If claimant was not laid off on December 20, 2014 and his part-time work for Benson Trucking is considered to have been a continuation of the employment relationship at significantly reduced weekly hours, he might still qualify to receive unemployment insurance benefits based on a diminution in earnings. *See* ORS 657.100(1); ORS 657.155(6). However, if claimant was considered “unemployed” during the weeks at issue due to his reduced earnings as Benson’s part-time employee, there is no application exception to the requirement that, to receive benefits in any week, he needed to engage in the work seeking activities specified in OAR 471-030-0036(5)(a). In his written argument, claimant asserted that under ORS 657.155(1)(a) and OAR 471-030-0060 (December 25, 2005) he was exempt from seeking work as a prerequisite to receiving benefits. While ORS 657.155(1)(a) states that the Department may waive the eligibility requirements of registering for work and reporting to an employment office, and OAR 471-030-0060 waives those particular requirements for “partially unemployed individuals,” neither waives the work seeking requirements of OAR 471-030-0036(5)(b)(A) for a “partially unemployed” individual to maintain benefit eligibility. OAR 471-030-0032(4). Because the Department sought to disqualify claimant based on his failure to actively seek work and not based on his failure to register for work or report to an employment office, claimant’s argument is not persuasive.

Claimant did not dispute that he failed to engage in five work seeking activities per week during the weeks at issue, and that his only direct employer contact during the weeks at issue was to Benson Trucking. Audio at ~6:45. On this record, claimant did not actively seek work during the weeks of December 21, 2014 through January 24, 2015. Claimant was not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 15-UI-35788 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating

DATE of Service: June 2, 2015

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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