

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0803

Affirmed
Ineligible

PROCEDURAL HISTORY: On May 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of February 15 through 21, 2015 (week 07-15), March 8 through April 11, 2015 (weeks 10-15 through 14-15), and weeks April 19 through May 9, 2015 (weeks 16-15 through 18-15) (decision # 105625). On May 26, 2015, the Department served notice of a second administrative decision, concluding claimant did not actively seek work during the week of May 10 through May 16, 2015 (week 19-15) (decision # 135926). Claimant filed timely requests for hearing. On June 23, 2015, ALJ R. Davis conducted a consolidated hearing, and on June 26, 2015, issued Hearing Decision 15-UI-34415, affirming decision # 105625, and Hearing Decision 15-UI-34413, affirming decision # 135926. On June 6, 2015, claimant filed applications for review of Hearing Decisions 15-UI-34415 and 15-UI-34413 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-34415 and 15-UI-34413. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0803 and 2015-EAB-0804).

EAB considered the entire hearing records and claimant's written arguments.

FINDINGS OF FACT: (1) Claimant filed an initial claim for unemployment benefits on February 9, 2015.

(2) Claimant was employed by Barrett Business Services, Inc. (BBSI), a staffing agency, during the weeks at issue. Claimant had worked for Treetop for six years through BBSI performing seasonal work as a lab technician. In early February 2015, the employer put claimant on a temporary layoff, and instructed her to call the employer each week to see if work was available for the following week.

(3) Claimant claimed and was paid benefits for the weeks of February 15 through February 21, 2015 (week 07-15), March 8 through April 11, 2015 (weeks 10-15 through 14-15), April 19 through May 9,

2015 (weeks 16-15 through 18-15), and May 10 through May 16, 2015 (week 19-15). These are the weeks at issue.

(4) BBSI gave claimant intermittent work with Treetop during February through May 2015, but did not, on any layoff date, give claimant a date to return to work.

(5) During each week at issue, claimant contacted either BBSI or Treetop to ask for work. She did not engage in other work seeking activities during those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that claimant did not actively seek work during weeks 07-15, 10-15 through 14-15, 16-15 through 18-15, and 19-15, and is ineligible for benefits for 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). 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). OAR 471-030-0036(5)(a) states that the minimum requirements for an individual to be considered “actively seeking work” are five work-seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. However, OAR 471-030-0036(5)(b) provides, in pertinent part:

(b) For an individual on temporary layoff of four weeks or less with the individual’s regular employer:

(A) If the individual had, as of the layoff date, been given a date to return to full-time work * * *, such individual is actively seeking work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the temporary layoff occurred. The individual no longer meets the requirements of this subsection if four calendar weeks have passed following the week in which the temporary layoff occurred, therefore the individual must seek work consistent with [OAR 471-030-0036(5)(a)].

(B) The individual does not meet the requirements of [OAR 471-030-0036(5)(b)] if the individual had not, as of the layoff date, been given a date to return to full-time work or work for which remuneration is paid or payable that equals or exceeds the individual’s weekly benefit amount.

The Department seeks to retroactively deny benefits for the weeks at issue because claimant did not actively seek work during the weeks at issue. Where, as here, the Department pays a claimant benefits for weeks claimed, the Department has the burden to establish by a preponderance of evidence that the claimant is not entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department met its burden.

It is undisputed that claimant’s only work search activity during each week at issue was to seek work with her regular employer, BBSI. In her argument, claimant asserts that she was actively seeking work

by seeking work with BBSI because she was on a temporary layoff and did not have a layoff period of more than four consecutive weeks. Claimant's Written Argument. However, claimant did not qualify for the work search requirements permitted for an individual on a temporary layoff because the record does not show her regular employer, *as of the layoff date*, gave claimant a date to return to work. Emphasis added. The issue is not, as claimant asserts in her argument, whether claimant was on temporary layoff for four weeks or less, but whether the employer gave her a return-to-work date at the beginning of any temporary layoff period. Here, because claimant did not know if she would work until she called BBSI each week, claimant failed to show BBSI gave her a return-to-work date as of a layoff date. Claimant failed to engage in at least five work search activities for each of the weeks at issue. Accordingly, claimant did not actively seek work during each of those weeks. Claimant is therefore ineligible for benefits for the weeks at issue.

DECISION: Hearing Decisions 15-UI-40791 and 15-UI-40843 are affirmed.

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

DATE of Service: August 13, 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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