

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0966

Affirmed
Ineligible

PROCEDURAL HISTORY: On June 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from October 26, 2014 through June 13, 2015 (decision # 81019). Claimant filed a timely request for hearing. On July 28, 2015, ALJ S. Lee conducted a hearing, and on July 30, 2015 issued Hearing Decision 15-UI-42354, concluding that claimant did not actively seek work from October 26 through December 6, 2014, April 19 through May 2, 2015, and May 17 through June 13, 2015. On August 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks of October 26 through November 15, 2014 (weeks 44-14 through 46-14), November 23 through December 6, 2014 (weeks 48-14 and 49-14), April 19 through May 2, 2015 (weeks 16-15 and 17-15), and May 17 through June 13, 2015 (weeks 20-15 through 23-15), the weeks at issue. The Department initially paid claimant benefits for those weeks.

(2) Claimant worked for her regular employer as a licensed tax consultant. When claimant ran out of work to perform, she was not given a date to return to work by a supervisor. She instead was told that if her regular employer needed her to work, then it would have her return, but otherwise did not have any work for claimant.

(3) Claimant worked full time for her regular employer during the week of October 19 through 25, 2014 (week 43-13), but did not have any more work to perform after Friday, October 24, 2014. Claimant was not given claimant a date to return to work. However, she had "a pretty good idea based on deadlines" for the employer's existing customers that she would return to full time work "sometime towards the end of November" 2015, and she "expected" and "hope[d]" to do so. Transcript at 19.

(4) From October 26 through November 15, 2014 (weeks 44-14 through 46-14), claimant remained in contact with and was capable of accepting and reporting for work with her regular employer. She did

not conduct other work seeking activities during those weeks. Claimant's regular employer did not have work for her to perform during week 44-14, but had had part time work for her to perform during weeks 45-14 and 46-14. Claimant worked for her regular employer part time during weeks 45-14 and 46-14.

(5) Claimant returned to full time work on November 17, 2015. She worked full time for her regular employer during the week of November 16 through 22, 2014 (week 47-14), but did not have any more work to perform after November 21, 2014. Claimant's regular employer did not give her a date to return to work.

(6) From November 23 through December 6, 2014 (weeks 48-14 and 49-14), claimant remained in contact with and was capable of accepting and reporting for work with her regular employer. She did not conduct other work seeking activities during those weeks. Claimant's regular employer had part time work for her to perform during weeks 48-14 and 49-14. Claimant worked for her regular employer part time during those weeks.

(7) Claimant worked full time for her regular employer during the week of April 12 through 18, 2015 (week 15-15), but did not have any more work to perform after April 17, 2015. Claimant's regular employer did not give her a date to return to work. Claimant expected to return to full time work on May 4, 2015.

(8) From April 19 through May 2, 2015 (weeks 16-15 and 17-15), claimant remained in contact with and was capable of accepting and reporting for work with her regular employer. She did not conduct other work seeking activities during those weeks. Claimant's regular employer had part time work for her to perform during weeks 16-15 and 17-15. Claimant worked for her regular employer part time during those weeks.

(9) Claimant returned to full time work on May 4, 2015. She worked full time for her regular employer during the week of May 10 through 16, 2015 (week 19-15), but did not have any more work to perform after May 15, 2015. Claimant's regular employer did not give her a date to return to work. Claimant expected to return to full time work on June 10, 2015.

(10) From May 17 through June 13, 2015 (weeks 20-15 through 23-15), claimant remained in contact with and was capable of accepting and reporting for work with her regular employer. She did not conduct other work seeking activities during those weeks. Claimant's regular employer had part time work for her to perform during weeks 20-15 through 23-15. Claimant worked for her regular employer part time during those weeks. Claimant did not return to full time work until June 15, 2015

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant did not actively seek work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). Where, as here, the Department initially paid a claimant benefits, the Department has the burden to establish by a preponderance of evidence that the claimant is not eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

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). Individuals typically 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.* However, for an individual on temporary layoff of four weeks or less with the individual’s regular employer, if the individual had, 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, 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. OAR 471-030-0036(5)(b)(A). The individual does not meet the requirements of OAR 471-030-0036(5)(b)(A) 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. OAR 471-030-0036(5)(b)(B).

In the present case, it is undisputed that claimant did not conduct any work seeking activities during the weeks at issue other than remaining in contact with and being capable of accepting and reporting for any suitable work with her regular employer. The issue is whether claimant met the requirements OAR 471-030-0036(5)(b). At hearing, the Department argued that claimant did not meet the requirements of OAR 471-030-0036(5)(b)(A) because she worked part time for her regular employer during the weeks at issue, and therefore was not “on temporary layoff” during those weeks. Transcript at 6-15, 27-35. Claimant argued that she met the requirements of OAR 471-030-0036(5)(b)(A) during the weeks at issue because she was on temporary layoff with her regular employer as of October 24, 2014, November 21, 2014, April 17, 2015 and May 15, 2015. Transcript at 17-27, 31-37. In Hearing Decision 15-UI-42354, the ALJ deferred to the Department’s interpretation of OAR 471-030-0036(5)(b)(A), concluding that claimant was not on temporary layoff with her regular employer during the weeks at issue, and therefore did not actively seek work during those weeks.¹ In written argument, claimant continues to assert that she was temporary layoff with her regular employer, and therefore met the requirements of OAR 471-030-0036(5)(b)(A).

However, even assuming, *arguendo*, that claimant was “on temporary layoff” with her regular employer as of October 24, 2014, November 21, 2014, April 17, 2015 and May 15, 2015, we nevertheless conclude that claimant did not meet the requirements of OAR 471-030-0036(5)(b)(A) because, as of the layoff dates, she was not given dates to return to work. At hearing, claimant asserted otherwise. Transcript at 19-26. However, claimant initially conceded that when she ran out of work to perform, she was not given a date to return to work by a supervisor. Transcript at 18. According to claimant, she instead was told that if her regular employer needed her to work, then it would have her return, but otherwise did not have any work for claimant. *Id.* With respect to her October 24, 2014 layoff, claimant first asserted only that she had “a pretty good idea based on deadlines” for the employer’s existing customers that she would return to full time work “sometime towards the end of November” 2015, and that she “expected” and “hope[d]” to do so. Transcript at 19. Only later did claimant assert, equivocally, that she “probably” had a specific return date of November 17, 2015, “was expected” to return to work on May 4, 2015 after her April 17, 2015 layoff, and “was scheduled” to return to work on June 10, 2015 after her May 15, 2015 layoff.

¹ Hearing Decision 15-UI-42354 at 4.

We find claimant's initial testimony that she generally was not given dates to return to work when laid off, and was not given a return date when laid off on October 24, 2015, more credible than her subsequent, equivocal, and self-serving assertions that she was given dates to return to work. We therefore find in accordance with claimant's initial testimony that, as of the layoff dates, she had not been given dates to return work. Claimant therefore did not meet the requirements of OAR 471-030-0036(5)(b)(A), and did not actively seek work, during the weeks at issue. She is ineligible for benefits for those weeks.

DECISION: Hearing Decision 15-UI-42354 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 16, 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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