

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0463

Affirmed
Ineligible

PROCEDURAL HISTORY: On March 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively search for work during the weeks of January 31, 2016 through February 20, 2016 (decision # 103441). Claimant filed a timely request for hearing. On April 18, 2016, ALJ Menegat conducted a hearing, and on April 19, 2016 issued Hearing Decision 16-UI-57268, affirming the Department's decision. On April 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sometime before January 22, 2016, the owner of Upscale Automotive Sprinter Store told claimant that it no longer had work for him. The owner told claimant he "may bring [him] back either in May or June [2016]," five or six months after he was let go. Audio at ~10:58

(2) On January 22, 2016, claimant filed an initial claim for benefits online. Before the Department's online claim system allowed claimant to finalize this filing, he needed to confirm he understood a Department advisory that stated he needed to actively search for work each week he claimed benefits, which was defined as completing five work seeking activities in that week of which at least two were required to be direct employer contacts. Audio at ~8:45. On February 1, 2016, claimant called the Department and reopened his claimant starting the week of January 24, 2016. On February 1, 2016, the Department mailed its Publication 195 Eligibility Notice to claimant which repeated the online work search advisement and further stated that if he expected to return to work for his employer, but the return to work date was more than four weeks after he was laid off, or he did not have a "definite return to work date scheduled," he needed to begin "actively seeking work immediately." Audio at ~9:54. Claimant claimed and was paid benefits during the weeks of January 31, 2016 through February 20, 2016 (weeks 05-15 through 07-16), the weeks at issue.

(3) During the weeks at issue, claimant did not list any work seeking activities other than contacting Upscale Automotive when he claimed benefits. Sometime before February 26, 2016, a Department representative called claimant to inquire about his failure to include any other work seeking activities when he claimed benefits. Claimant told the representative that another representative had told him that,

because he had been laid off rather than discharged from employment, he was not required to complete any work seeking activities during the first four weeks he claimed benefits. Claimant also told the representative that, despite what the other representative had said to him, he had actively sought work during all of the weeks at issue. The representative told claimant he needed to submit those work searches to the Department to verify he had sought work. On February 26, 2016, the representative sent to claimant a form that allowed him to list his work searches during weeks 05-15 through 07-15. Claimant returned the form to the Department listing only work search activities for week 08-16. Audio ~12:08.

CONCLUSIONS AND REASONS: Claimant did not actively search for work during weeks 05-16 through 07-16. Claimant is ineligible 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). With exceptions, 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). An exception to the general requirement of "actively seeking work" exists if an individual was laid off and, as of the date of the layoff, given a return to work date of four weeks or less from the date of the layoff. OAR 471-030-0036(5)(b)(A)-(B). For such individuals, the individual is considered to have actively sought work if he remains in contact with his employer and is capable of accepting and reporting for any suitable work with the employer during the first four weeks after the layoff. OAR 471-030-0036(5)(b)(A). This exception does not apply if an individual was on temporary layoff of more than four weeks, and such individuals must immediately seek work consistent with the general work seeking requirements of OAR 471-030-0036(5)(a).

It was not disputed at hearing that claimant was not on a temporary layoff of four weeks or less and did not fall within an exception to the general work seeking requirements of OAR 471-030-0036(5)(a). Claimant's justification for his failure to seek work according to those requirements was that a Department representative advised him he did not need to actively seek work during the first four weeks he claimed benefits because he was "laid off," rather than having been discharged. Audio at ~ 20:43. However, the Department's witness at hearing testified that Department representatives are required to make notes in a claimant's claim records about the substance of each contact with a claimant and the advice that was given .and no records exist of the type of contact claimant contended, and the representative who took claimant's claim denied having given such advice to claimant. Audio at ~27:58, ~28:38. Assuming such advice was given to claimant by a Department representative, claimant would have been expected to contact the Department about the discrepancy between this advice and the Department's formal written advisements about work seeking requirements, and he did not testify that he did so. Claimant's failure to follow up with the Department in the face of such starkly contradictory advice seriously undercuts that his assertion that he ever received the advice that he did not need to actively seek work during the first four weeks he received benefits.

Even if we accept that claimant was advised he need to comply with general work search requirements, the doctrine of estoppel would not apply to preclude the Department from enforcing the general work seeking requirements of OAR 471-030-0036(5)(a) against him based on the alleged statements of one of its representatives. Estoppel against a governmental entity requires a finding that an agency or its representative made a false or misleading statement of an existing material fact to an individual, and the individual justifiably relied on that false or misleading statement to his detriment. *Employment Division v. Western Graphics Corporation*, 76 Or App 608, 710 P2d 788 (1985). Given the conflict between what claimant testified the representative told him and the Department's formal advisements that he read or received, claimant's decision to rely on the representative and not to inquire further into the applicability of the general work seeking requirements to his claim was not justified. As well, claimant testified that despite the representative's advice he actively sought work during the weeks at issue, which completely negates that he relied on it to his detriment on that alleged advice. Audio at ~20:08, ~22:12. Based on these facts, the doctrine of estoppel does not apply to prevent the Department from enforcing OAR 471-030-0036(5)(a) against claimant.

With respect to claimant's contention that he actively sought work during the weeks at issue, he contended, first, that the cell phone on which he entered those searches during his weekly online claim reports somehow did not record them in the Department's records. Audio at ~ 20:14. It would be a highly unusual occurrence if, as claimant's testimony suggests, his cell phone allowed him to make a weekly claim and to answer all of the claim questions other than those about his work searches. It would also be highly unusual if, as claimant contended, he faxed in work searches to a Department representative shortly after February 26, 2016 and, after the purported malfunction of his cell phone, that fax listing his work searches was lost and somehow not delivered to the representative. Audio at ~27:33. Finally, we find it unlikely that claimant was unable to recall any of his supposed work seeking activities during the weeks at issue and did not keep any records of them, particularly when he was on notice as early as February 26, 2016, that the Department was inquiring into the legitimacy of his work seeking activities. On this record, it appears most likely that claimant did not engage in the required work search activities during the weeks at issue.

The preponderance of the evidence show claimant did not actively seek work during weeks 05-16 through 07-16. Claimant is not eligible to receive benefits during those weeks.

DECISION: Hearing Decision 16-UI-57628 is affirmed.

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

DATE of Service: May 27, 2016

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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