

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0663

Affirmed
Ineligible

PROCEDURAL HISTORY: On April 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of February 28, 2016 through April 16, 2016 (decision # 152509). Claimant filed a timely request for hearing. On May 16, 2016, ALJ Shoemake conducted a hearing, and on May 20, 2015 issued Hearing Decision 16-UI-60027, concluding claimant did not actively seek work during the weeks of February 28, 2016 through March 19, 2016 and April 3, 2016 through April 23, 2016. On June 3, 2016, claimant filed two applications for review with the Employment Appeals Board (EAB), one from him and one purporting to be from his employer Bend River Sash and Door.

FINDINGS OF FACT: (1) Before March 1, 2016, claimant was working full-time as a designer for Bend Sash and Door. On March 1, 2016, the employer informed claimant he was going to be laid off due to lack of work beginning on March 2, 2016. At that time, the employer told claimant his layoff could be “anywhere from two to four weeks.” Audio at ~17:15. The employer did not give claimant a specific date when he could expect to return to full-time work.

(2) On March 2, 2016, claimant filed an initial claim for unemployment insurance benefits. When claimant filed this claim, he stated to the Department that he was going to return to work on April 4, 2016. Claimant claimed benefits for the weeks of February 28, 2016 through March 19, 2016 (weeks 09-16 through 11-16). Each week when claimant claimed those benefits online, an advisory appeared on the screen stating, “If you are on a temporary layoff due to lack of work from your regular employer and you expect to return to work with that employer within four weeks of the time were laid off and you have a specific date to return full-time work, maintaining contact with your regular employer satisfies you work search requirements.” Audio at ~21:15. For weeks 09-16 through 11-16, claimant certified that he was on temporary layoff from his regular employer and did not report any work seeking activities other than keeping in contact with is regular employer.

(3) Sometime during approximately weeks 09-16 through 11-16, a Department representative telephoned claimant about the circumstances surrounding his layoff. When the representative tried to inform claimant of the requirements for claiming a temporary layoff status, he did not understand what

she was saying. Claimant asked to speak to the representative's supervisor, but that did not happen. Sometime around approximately this same time, claimant visited a local WorkSource Oregon office. Claimant told a WorkSource representative that he was on a temporary layoff and expected to return to work within four weeks, and asked about his work search requirements. Audio at ~19:35. The representative told claimant he should continue to file his weekly claims by "checking the box" indicating he was on a temporary layoff, and was exempt from the usual work seeking requirements. Audio at ~19:15.

(4) On March 20, 2016, claimant returned to full-time work for the employer. Claimant worked from March 20, 2016 through April 2, 2016. On April 2, 2016, the employer notified claimant he was laid off again effective April 4, 2016 and the duration of that layoff was "for two or three weeks." Audio at ~18:32. Again, the employer did not give claimant a specific date when he would return to full-time work. After being laid off, claimant claimed benefits for the weeks of April 3, 2016 through April 23, 2016 (weeks 14-16 through 16-16). When he filed his weekly claims online for those weeks, the same advisory appeared on the screen as in the weeks 09-16 through 11-16, and claimant certified he was on a temporary layoff. Claimant did not report any work seeking activities during weeks 14-16 through 16-16 other than maintaining contact with his regular employer.

(5) On April 25, 2016, claimant returned to full-time work and discontinued claiming benefits.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the weeks of February 28, 2016 through March 19, 2016 and April 3, 2016 through April 23, 2016 (weeks 09-16 through 11-16 and weeks 14-16 through 16-16). Claimant was ineligible to receive 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). 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 limited 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). If an individual had, as of the individual's layoff date, been given a date to return to full-time work that is four weeks or less from the date of the layoff, the individual is considered to have actively sought work by remaining in contact with and being capable of accepting and reporting for any suitable work with the individual's regular employer. OAR 471-010-0036(5)(b)(A). An individual does not meet the requirements for the more lenient work search set out in OAR 471-030-0036(5)(b)(A) if the individual was not given, as of the layoff date, a *date* to return to full-time work that is within four weeks or less from the layoff date. OAR 471-030-0036(5)(b)(B) (emphasis added).

It was not disputed that claimant did not perform five work seeking activities during any of the weeks at issue, and he therefore was ineligible for benefits unless he was on a temporary layoff within the meaning of OAR 471-030-0036(5)(b)(A). OAR 471-030-0036(5)(b)(A) and (B) plainly state that an individual who was not given a date when he or she would return to work does not qualify for the more lenient work search requirements applicable to a temporary layoff. Claimant agreed his regular

employer did not give him an exact or specific date when he could expect to return to work, but contended that the employer “guaranteed” he would return to work at some point before four weeks had elapsed from the date he was laid off. Audio at ~17:05, ~17:19, ~18:20. While EAB is sympathetic to claimant’s position, it cannot rewrite the language of the applicable regulation to find that claimant is eligible for benefits. Because claimant did not have a definite and specific return to work date when he was laid off, he may not take advantage of the more lenient work search requirements for a temporary layoff. Because claimant did not fall within any recognized exceptions to OAR 471-030-0036(5)(a) and did not perform five work seeking activities in each of the weeks at issue, he is not eligible to receive benefits during the weeks at issue.

Claimant testified at hearing that sometime during the weeks at issue, a representative from a local WorkSource Oregon office advised him that his layoff qualified as a temporary layoff, and he therefore was entitled to take advantage of the exception to the general work search requirements set out at OAR 471-030-0036(5)(a)(A). Audio at ~19:15. In essence, claimant appeared to be invoking the doctrine of estoppel, contending that based on the statements of the WorkSource representative the Department was precluded from taking the position that his work search was inadequate because he was not on a temporary layoff. Audio at ~19:15. Estoppel against a governmental entity requires finding that an agency or its representative made a false or misleading statement about an existing material fact to an individual and the individual justifiably relied on that inaccurate statement to his detriment. *Employment Division v. Western Graphics Corporation*, 76 Or App 608, 710 P2d 788 (1985). Here, claimant told the representative that he was on a temporary layoff from his regular employer, expected to return to work within less than four weeks and asked how he should report his status when he filed his weekly claims. The factual preface to claimant’s question assumed he qualified to claim he was off work due to a temporary layoff and, as such, the representative’s answer was neither false nor misleading. Notably, claimant did not set out the specific facts surrounding his layoff to the representative and ask whether his eligibility for benefits would be determined under more lenient work search requirements applying to a temporary layoff, or make an explicit inquiry about what the employer needed to have stated in order for his layoff to qualify as a temporary layoff. The alleged statement of the WorkSource Oregon representative, as described by claimant, did not meet the threshold needed to give rise to an estoppel against the Department.

Claimant did not actively seek work during the weeks at issue. Claimant was not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 16-UI-60027 is affirmed.

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

DATE of Service: July 14, 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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