

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0837

Affirmed
Ineligible

PROCEDURAL HISTORY: On May 17, 2016, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant did not actively seek work from April 17, 2016 to April 23, 2016 (decision # 115047) and the second concluding claimant did not actively seek work from May 1, 2016 to May 7, 2016 (decision # 122137). Claimant filed a timely request for hearing. On June 30, 2016, ALJ Murdock conducted a consolidated hearing, and on July 6, 2016, issued Hearing Decision 16-UI-63216, affirming decision # 115047, and Hearing Decision 16-UI-63218, affirming decision # 122137. On July 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-63216 and 16-UI-63218. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0836 and 2016-EAB-0837).

FINDINGS OF FACT: (1) On September 30, 2015, claimant filed an initial claim for unemployment insurance benefits. When claimant filed the initial claim for benefits, the Department sent him a job search advisory. The advisory informed claimant that he was required to do five job-seeking activities every week.

(2) Claimant had a shoulder injury that affected his use of his left arm. Claimant had approximately 60% mobility in his arm. He was referred to a surgeon, who put him on restricted duty until after his shoulder injury was surgically repaired.

(3) Around that time, claimant was working at a temporary assignment through ManPower, a temporary or employee leasing agency. Claimant's job duties required him to do repetitive motions with his left hand, but he was restricted from lifting his hand over his head, or lifting anything more than five pounds. Neither ManPower nor its client had work claimant could perform within this restrictions. On

April 20, 2016, claimant quit his job with ManPower.¹ On April 21, 2016, he contacted the Department to reopen his September 30th unemployment insurance claim.²

(4) Claimant subsequently filed a weekly claim for benefits for the week of April 17, 2016 to April 23, 2016. During that week, claimant sought work by contacting ManPower about two jobs and contacting Providence about a possible job.

(5) Claimant filed a weekly claim for benefits for the week of May 1, 2016 to May 7, 2016. Claimant did not seek work that week.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant did not actively seek work from April 17, 2016 to April 23, 2016 and May 1, 2016 to May 7, 2016.

To be eligible to receive benefits, unemployed individuals must 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, including conducting “at least five work seeking activities per week,” including direct contact with two employers “who might hire the individual.” OAR 471-030-0036(5)(a) (February 23, 2014).

There is no dispute that claimant did not conduct five work seeking activities in either of the weeks at issue. Therefore, unless claimant was excused from conducting five work seeking activities, he is not eligible for benefits for those weeks.

Some individuals are excused from conducting five work seeking activities per week, including individuals “on temporary layoff of four weeks or less” who have “been given a date to return to full-time work” that is within four calendar weeks of the layoff date. OAR 471-030-0036(5)(b). However, claimant testified that he “resigned for medical.” Transcript at 18. It was claimant’s decision to leave his job. He did not allege or show that the employer laid him off from his regular job, much less that the anticipated break in employment was four weeks or less or that the employer had designated the date upon which he would be scheduled to return to work at the time the break in employment occurred.

¹ We take notice of this fact, which is contained in Employment Department records, specifically, within Office of Administrative Hearings (OAH) case number 2016-UI-50572, Hearing Decision 16-UI-63222, which allowed claimant benefits based upon his April 20, 2016 voluntary leaving from ManPower. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

² Claimant alleged the conversation took place on April 19th or 20th, but Department records establish that the conversation occurred on April 20th. We take notice of these facts, which are contained in the Department’s electronic records showing the date claimant reopened his claim and claim comments indicating the date claimant conversed with a female Department employee about his separation from ManPower. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

Claimant was not on a temporary layoff from work, and is not excused from conducting five work seeking activities on that basis.³

Claimant argued that he should nevertheless be allowed benefits for the weeks at issue because his failure to seek work was the result of erroneous advice he received from a Department employee. Claimant's argument is, essentially, that the Department should be prohibited from denying him benefits based on the doctrine of equitable estoppel, under which claimant could be paid benefits even though he was not otherwise eligible for them if his ineligibility was the result of his justifiable and detrimental reliance upon erroneous advice from the Department. *See accord Employment Div. v. Western Graphics Corp.*, 76 Or.App 608, 710 P.2d 788 (1985); *Pilgrim Turkey Packers, Inc. v Dept. of Revenue*, 261 Or. 305, 493 P.2d 1372 (1983). Generally speaking, in order for estoppel to apply, the agency must have made a false or misleading statement of a material fact upon which claimant justifiably and detrimentally relied. *Id.*

In this case, claimant testified that he called the Department's toll free phone number and spoke with a Department employee on April 19th or April 20th "for more than an hour" to explain his situation "before going with that route of resigning due to medical reasons." Transcript at 17-18. Claimant testified "she said what I need to do was file unemployment but mark it as I was let go by my Employer, even though it was resigned for medical . . . at a time I did my paperwork I would put it in as laid off by employer and then once the employer was either able to make the accommodations . . . or find a new position . . . then I would just do that and go back to work employed." Transcript at 18. Claimant also stated that the employee "told me that as long as – because my Employer was asking me to step away from my position since they weren't able to meet my accommodations, that all I had to do is stay in contact with my Employer because – with ManPower. As long as I was staying in contact with them every week I would still be qualified." Transcript at 23.

To the extent claimant alleged that he relied on the Department's advice to quit his job or reopen his claim for benefits, estoppel does not apply. Claimant quit his job on April 20th, but he did not speak with a Department employee or reopen his claim until the next day, April 21st.⁴ Therefore, it is more likely than not that claimant's decisions to leave his job and reopen his claim for benefits were not based upon advice from a Department employee, and the doctrine of estoppel does not apply to the consequences his decision to reopen his claim.

We also conclude that estoppel does not apply with respect to claimant's decision not to conduct five work seeking activities because it is implausible that the Department employee gave claimant the false or misleading information as alleged. Estoppel only applies if claimant's reliance on the Department's alleged advice was justifiable, and, for several reasons, we conclude claimant was not justified in relying upon it. First, OAR 471-030-0036(5) specifically limits the "layoff" exception at issue to individuals who are laid off for a specific period of time with an actual return to work date. The situation claimant described was one in which he admittedly resigned from work for an indefinite period depending on his surgery date, recovery period and medical release, which was clearly different from the type of "layoff"

³ On this record, the other exceptions to the work seeking activity requirement, including for certain union members and individuals working part time for their regular employers during the first week of an initial or additional claim, do not apply to claimant's circumstances. *See* OAR 471-030-0036(5)(d)-(e).

⁴ According to the previously noticed Department records.

described in the administrative rule. Second, claimant's testimony clearly demonstrates that his position is that a Department employee advised him to lie when claiming benefits by "mark[ing] it as I was let go . . . even though it was resigned for medical." Not only do we find it implausible that a Department employee would advise a claimant to lie about his circumstances when claiming benefits, we also conclude an individual may not reasonably or justifiably rely on advice to lie when claiming benefits. Third, for purposes of unemployment insurance benefits cases, an individual who works for a temporary or employee leasing agency is deemed to have voluntarily quit a job with the agency as of the date the individual quit his work assignment with the agency's client. *See* OAR 471-030-0038(1)(a). Although an individual might be temporarily laid off from a work assignment with a temporary agency's client, there is no provision in Oregon laws and rules allowing an individual separated from his work assignment with a temporary agency's client to be considered "employed," and thereby exempt from seeking work while claiming benefits, as long as he remained in contact with the temporary agency. Claimant would, rather, be considered unemployed after leaving a work assignment, and required to seek work as a condition of receiving benefits. Therefore, to the extent a Department employee might have given claimant that advice, which we consider implausible, the advice was so patently inconsistent with the principles set forth in Department's laws and rules that we must conclude claimant may not have justifiably or reasonably relied upon it. Finally, it is notable that the Department mailed claimant a work search advisory when he filed his initial claim for benefits instructing him to conduct five work seeking activities each week, which contradicted the advice he was allegedly given. For the foregoing reasons, considered individually or as a whole, we conclude that claimant's alleged reliance upon advice from a Department employee that he was not required to seek work when claiming benefits was not justifiable, and, therefore, that the Department is not estopped from denying claimant benefits under the circumstances.

For the reasons explained, claimant did not actively seek work by conducting five work seeking activities during the two weeks at issue. Claimant is, therefore, not eligible for benefits during either week.

DECISION: Hearing Decisions 16-UI-63216 and 16-UI-63218 are affirmed.

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

DATE of Service: August 12, 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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