

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0950

Affirmed
Ineligible

PROCEDURAL HISTORY: On June 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work, available for work, or actively seeking work during the weeks of May 1, 2016 through June 11, 2016 (decision # 110255). Claimant filed a timely request for hearing. On July 21, 2016, ALJ Vincent conducted a hearing, and on July 28, 2016 issued Hearing Decision 16-UI-64637 affirming the Department's decision. On August 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) As of sometime before May 2, 2016, claimant broke her hand and was temporarily unable to work for Care Center (Linda Vista), Inc. in her usual position as a certified nursing assistant (CNA). The employer authorized claimant to take an eight week leave of absence while her hand healed.

(2) On May 2, 2016, claimant filed an initial claim for unemployment insurance benefits by telephone. Although claimant was unable to work for the employer as a CNA, she was able to perform less physically demanding work. When claimant filed her claim, she was notified that she was required to perform five work seeking activities each week she claimed benefits. On May 3, 2016, the Department sent claimant a letter advising her that she needed to register for work and again advising her of the work seeking requirements. On May 27, 2016, claimant attended a welcome process meeting where she was also advised of the work seeking requirements. Claimant claimed benefits for the weeks of May 1, 2016 through June 11, 2016 (weeks 18-16 through 23-16), the weeks at issue.

(3) For all of the weeks at issue except for week 21-16, the only work seeking activity that claimant reported was contacting her regular employer. For week 21-16, claimant contacted Skylark, a care facility, in addition to contacting her regular employer.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the period of May 1, 2016 through June 11, 2016.

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 certain specified 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.* Individuals who have been laid off and, as of the layoff, were given a return to work date that is no more than four weeks after the layoff date are considered to be actively seeking work by remaining in contact with their regular employer and being capable of accepting and reporting for any suitable work with that employer. OAR 471-030-0036(5)(b).

Claimant did not dispute that she did not fulfill the work seeking requirements specified at OAR 471-030-0036(5)(a) and did not perform five work seeking activities each week. Claimant contended she did not do so because a representative at a local WorkSource Oregon office, whom she could not identify, told her she did not need to look for work other than maintain contact with her regular employer since she was “still employed and had a job” waiting for her. Audio at ~16:17, ~16:40, ~17:06. In essence, claimant is attempting to invoke the doctrine of estoppel, and taking the position that the Department is precluded from applying its general work seeking requirements to her based on the WorkSource representative’s alleged statement. The doctrine of equitable estoppel “requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.” *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, *rev den*, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)). However, the evidence in this record is insufficient to establish that a WorkSource representative made the statement that claimant alleged and, therefore, that claimant could take advantage of the doctrine of estoppel.

At the outset, claimant was unable to recall even approximately when the WorkSource representative told her she did not need to look for work. Audio at ~19:21. In her testimony, claimant never explained why she spoke to the WorkSource representative about work seeking requirements, or why the representative might have brought up work seeking requirements to her. Audio at ~21:27. According to claimant, she expected to be off from her regular job for two months to allow her broken hand to heal, and the WorkSource representative coincidentally told her she was allowed for eight weeks (or two months) to satisfy the Department’s work seeking requirements by only keeping in touch with her regular employer. Audio at ~16:17, ~17:06. However, four weeks is the time period during which a claimant on a temporary layoff may satisfy the work seeking requirements by only maintaining contact with his or her employer and there is no exception that lasts for eight weeks or two months. *See* OAR 471-030-0036(5)(b). It is unlikely that a WorkSource representative who was confused or lacked knowledge about exceptions to the work seeking requirements would have come up with an exception that unrelated to an existing exception but aligned so closely with the length of claimant’s two month leave from her regular employment. As well, it makes no sense that, if a WorkSource representative had actually told claimant she did not need to look for work beyond contacting her regular employer that she would have sought work from Skylark during week 21-16.

Further aspects of claimant's testimony lead us to doubt that claimant was acting in compliance with the advice given to her by a WorkSource representative. At times during her testimony about what the WorkSource representative told her, claimant seemed to be asserting that she herself had concluded she did not need to look for work during the two months she was on leave from her regular employment. Claimant testified that she did not see any reason to look for work with other employers when she would leave that work within two months to return to work with her regular employer. Audio at ~17:06, ~22:00. This aspect of claimant's testimony suggests she relied on her own views about work seeking activities rather than what a WorkSource representative told her. Finally, although WorkSource representatives are required to document all advice they give to claimants, there is no record of any advice given to claimant about work seeking requirements, or telling her she was exempt from the general work seeking requirements. Audio at ~23:07, ~23:46. Viewing this record as a whole, it does not appear likely that claimant was advised that she did need not look for work beyond maintaining contact with her regular employer. If a WorkSource representative did not make the misrepresentation to her that she contended, claimant has no basis to invoke estoppel against the Department's application to her of the general work seeking requirements of OAR 471-030-0038(5)(a).

It was undisputed that claimant did not comply with the work seeking requirements of OAR 471-030-0036(5)(a) during the weeks at issue, and it was also undisputed that claimant's temporary leave of absence from her regular employment did not cause her to fall within any exception to the work seeking mandates of OAR 471-030-0036(5)(a). Since there is no basis to exempt claimant from those work seeking requirements due to estoppel, claimant did not actively seek work during the weeks at issue. Accordingly, claimant was not eligible to receive benefits during the weeks at issue.

DECISION: Hearing Decision 16-UI-64637 is affirmed.

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

DATE of Service: September 15, 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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