

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0973

Affirmed
Ineligible

PROCEDURAL HISTORY: On July 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work during the weeks of June 12, 2016 through June 25, 2016 (decision # 83048). Claimant filed a timely request for hearing. On August 2, 2016, ALJ Wyatt conducted a hearing at which the Department did not appear, and on August 5, 2016 issued Hearing Decision 16-UI-65102, affirming the Department's decision. On August 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On approximately April 25, 2016, claimant enrolled as a student at Concorde Career College because she anticipated her employer was going to lay her off and she wanted to better her employment prospects. Sometime before June 13, 2016, claimant's employer laid her off.

(2) On approximately June 13, 2016, claimant filed a claim for unemployment insurance benefits. When she filed her claim, claimant spoke with a Department representative and told the representative that she was a student. The representative did not tell claimant that she was eligible to apply for benefits through the Training Unemployment Insurance (TUI) program in which she would be relieved of the obligation to be available for all suitable work if she was attending an appropriate school.

(3) Claimant claimed benefits for the weeks of June 5 through June 25, 2016 (weeks 23-16 through 25-16). Week 23-16 was claimant's waiting week and she was not paid benefits for that week. Claimant also claimed but was not paid benefits for the weeks of June 12, 2016 through June 25, 2016 (weeks 24-16 and 25-16), the weeks at issue.

(4) During the weeks at issue, claimant sought work as a customer service representative, among other types of work. Claimant's labor market was Portland, Oregon. In that labor market, the days and hours customary for work as a customer representative were all days, all hours.

(5) During the weeks at issue, claimant attended on-campus classes at Concorde on Mondays through Fridays from 5:30 p.m. to 9:50 p.m. Claimant was not willing to work at a job if its hours conflicted with her class schedule.

(6) After June 25, 2016, claimant made several phone calls to the Department to inquire about why she was not being paid benefits. None of the representative with whom claimant spoke told her about the TUI program. Sometime after June 25, 2016, claimant visited a WorkSource Oregon office to register for work. During that visit, a representative told claimant about the TUI program. Claimant applied for the TUI program and was approved, effective approximately July 23, 2016.

CONCLUSIONS AND REASONS: Claimant was not available for work during the weeks of June 12, 2016 through June 25, 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). An individual must meet certain minimum requirements to be considered “available for work” for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all suitable full time, part time and temporary work opportunities throughout the labor market during all of the usual hours and days customary for that work, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.*

From the intensity with which claimant testified at hearing about her commitment to her schooling and her great upset that she was not more promptly informed of the TUI program, we infer that during the weeks at issue that she would not have looked for or accepted a work opportunity that conflicted with her scheduled classes or required her withdrawal from school. Audio at ~16:10, ~21:40, ~23:26. Because claimant ruled out any customer service jobs with hours between 5:30 and 9:30 p.m. on Mondays through Fridays, she was not willing to work during all of the usual days and hours customary for the work she was seeking. Based on the plain language of OAR 471-030-0036(3), claimant was not available for work and therefore not eligible to receive benefits during the weeks at issue.

At hearing, claimant principally took issue with the fact that she was denied benefits because of her school attendance when, if she had been earlier informed about the TUI program, she contended she would have applied for it, been approved and would have received benefits regardless of her school attendance. Audio at ~16:10, ~21:40, ~23:26. However, claimant was not in the TUI program during the weeks at issue and was not subject to its availability standards, but the general availability standards of the regular benefits program. Neither the statutes nor the regulations governing the regular benefits program or the TUI program permit a retroactive determination that claimant was available for certain weeks based on her subsequent acceptance into the TUI program. *See* ORS 657.155 (regular program); ORS 657.335-657.360 (TUI program); OAR 471-030-0038(3) (regular program); OAR 471-030-0080 (September 16, 2008) (TUI). The availability standard for the regular benefits program does not allow any exceptions to its requirements, even for good cause (such as school attendance to better future prospects) or reasonable necessity. *See* OAR 471-030-0038(3). There is no authority in the statutes or regulations that allows us to exempt claimant from the condition that she must be available for all suitable while receiving benefits through the regular benefits program.

Claimant also made the point at hearing that once Department representative learned that she was a student they should have informed her of the TUI program rather than merely denying benefits. Audio at ~16:10, ~21:48, ~22:38, ~26:46, ~30:00, ~33:49. Under very limited circumstances, the doctrine of equitable estoppel may be invoked to prevent the Department from applying its standards, including its availability standards, to a particular claimant. 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 SOS 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)). In this case, it does not appear that any false representations were made to claimant by any Department representatives, and it does not appear that any representatives intended or were reasonably aware that claimant would take or not take any particular actions as a result of their failure to inform her of the TUI program. On this record, there is no basis to estop the Department from applying the regular benefits availability standard to claimant during the weeks at issue.

Finally, claimant testified that in addition to not being paid benefits for weeks 24-16 and 25-16, she was not paid benefits for weeks 23-16 and 26-16 through 29-16. Audio at ~12:00, ~25:00, ~28:10, ~29:01, ~33:17, ~35:46. However, the Department’s records that are accessible to us show that claimant was not paid benefits for week 23-16 because it was her waiting week in which no claimant is eligible to receive benefits¹. See ORS 657.155(1)(d). The Department’s records also indicate that claimant was paid benefits for weeks 26-16 through 36-16². If the Department’s records are incorrect and claimant was not paid benefits for any weeks other than weeks 23-16 through 25-16, we urge her to contact the Department about this matter and, if appropriate, to request a hearing on any Department determination.

In sum, claimant was not available for work during the weeks of June 12, 2016 through June 25, 2016 (weeks 24-16 and 25-16). Claimant is not eligible to receive benefits for those weeks.

DECISION: Hearing Decision 16-UI-65102 is affirmed.

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

DATE of Service: September 20, 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,

¹ We take notice of this fact, which is contained in Employment Department records. Any party who objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, 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 at EAB.

² See fn. 1.

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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