

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1263**

*Affirmed*  
*Ineligible Weeks 26-16 to 34-16*

**PROCEDURAL HISTORY:** On September 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 26, 2016 to August 27, 2016 (weeks 26-16 to 34-16) (decision # 140458). Claimant filed a timely request for hearing. On October 24, 2016, ALJ Murdock conducted a hearing, and on October 26, 2016 issued Hearing Decision 16-UI-69957, affirming the Department's decision. On November 9, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant filed weekly claims for benefits for the weeks including June 26, 2016 to August 27, 2016 (weeks 26-16 to 34-16). The Department paid claimant for each of those weeks.

(2) At all relevant times, claimant was attached to a regular employer. Claimant had worked for the same employer for 19 years and been temporarily laid off for eight to ten weeks during each summer.

(3) On June 1, 2016, claimant's regular employer notified claimant that he would be subject to a limited duration summer layoff effective June 20, 2016. Claimant knew he would be returned to work at some point, but his regular employer did not give him a date to return to work at that time. Claimant last worked for his regular employer on June 17, 2016.

(4) During each of the nine weeks at issue, claimant reviewed a "Wednesday Wire" email from his employer that included a list of job openings with the county but did not apply for any of the jobs because he was not qualified for them. Claimant also received other emails from his regular employer and regularly checked the email account his regular employer provided for him.

(5) During each week at issue claimant also visited various websites. During week 26-16, claimant looked at the Oregonian website job ads and reviewed the Beaverton and Hillsboro School District websites. During week 27-16, claimant again reviewed the Oregonian website and Beaverton School

District website, and also visited the Tigard-Tualatin School District website. During week 28-16, claimant performed job seeking activities with the Department, looked at the Oregonian, and reviewed the Portland Public Schools website. During week 29-16, claimant reviewed the State of Oregon website and again contacted the Hillsboro and Portland Public Schools websites. During week 30-16, claimant again looked at the Hillsboro and Beaverton School District and Portland Public Schools websites.

(6) On July 26, 2016, claimant's regular employer sent claimant a letter notifying him that his return to work date was going to be August 25, 2016. Claimant received that letter sometime during the week of July 31, 2016 to August 6, 2016 (week 31-16).

(7) During week 31-16, claimant re-checked the Beaverton and Hillsboro School District websites. During week 32-16, claimant reviewed his emails regarding his return to work, and re-checked the Beaverton and Hillsboro School District websites. During week 33-16, claimant reviewed his email again, and re-checked the Portland Public School and Beaverton School District websites. During week 34-16, claimant re-checked the Beaverton and Hillsboro School District websites. That same week, claimant's temporary layoff ended and he returned to work with his regular employer.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant was not eligible for benefits between June 26, 2016 and August 27, 2016 (weeks 26-16 to 34-16).

To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). OAR 471-030-0036(5) defines "actively seeking work," in pertinent part, as follows:

(a) 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. Unless otherwise directed by the director or an authorized representative of the employment department, an individual who is not on temporary layoff as described in subsection (b) \* \* \* shall be 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.

(A) Work seeking activities include but are not limited to registering for job placement services with the Employment Department, attending job placement meetings sponsored by the Employment Department, participating in a job club or networking group dedicated to job placement, updating a resume, reviewing the newspaper or job placement web sites without responding to a posted job opening, and making direct contact with an employer.

(B) Direct contact with an employer means making contact with an employer in person, by phone, mail, or electronically to inquire about a job opening or applying for job openings in the manner required by the hiring employer.

(b) For an individual on temporary layoff of four weeks or less with the individual's regular employer:

(A) If the individual had, as of the layoff date, been given a date to return to full-time work \* \* \* such individual is actively seeking work by remaining in contact with \* \* \* that employer for a period of up to four calendar weeks following the end of the week in which the temporary layoff occurred. \* \* \*

(B) The individual does not meet the requirements of this subsection if the individual had not, as of the layoff date, been given a date to return to full-time work or work for which remuneration is paid or payable that equals or exceeds the individual's weekly benefit amount.

(c) For an individual on temporary layoff of more than four weeks with the individual's regular employer: such individual must immediately seek work consistent with the requirements of subsection (a) of this section.

\* \* \*

As a preliminary matter, claimant was not excused from actively seeking work because of his temporary layoff status. There is no dispute that claimant was on a temporary layoff from his regular employer. To qualify for the exemption, however, the layoff must, in total, be four weeks or less, and claimant's regular employer must have given him a date to return to work at the time he was laid off. In this case, claimant expected his layoff to last eight to ten weeks, thereby exceeding the four-week limit, and his regular employer did not notify him of his return to work date until mid-July, well over a month after his layoff commenced. Claimant was, therefore, required to immediately seek work with other employers in order to maintain his eligibility to receive unemployment insurance benefits.

During the weeks at issue, claimant's "direct contact" work search activities consisted of maintaining contact with his regular employer and reviewing emailed job listings from his regular employer. He did not specify when or how frequently he maintained contact, however, knew his layoff would last between eight and ten weeks and he was not likely to be returned to work earlier than that. And with respect to the purported "direct contacts" with claimant's regular employer, claimant testified that his primary activity was checking emails and receiving a weekly mass-mailed email from the employer that listed job announcements. It does not appear from this record that claimant initiated any specific activity designed to seek out new employment with his regular employer, he testified that he was not qualified to perform any of the jobs listed in the mass-email, and, notably, claimant did not apply for or further inquire about any of the jobs based on the emails he received. Claimant's passive receipt of a mass-mailed email from his regular employer did not constitute "direct contact" as defined in the administrative rule.

Also notable with respect to the "direct contacts" and claimant's other work seeking activities, claimant repeatedly contacted the same few potential employers throughout the weeks at issue. During the nine weeks at issue, claimant contacted his regular employer 18 times and his other activities were largely comprised of repeatedly re-checking the same four school district websites that he had checked during his first two weeks of unemployment. Although claimant is correct that the Department never specifically advised him not to repeatedly contact the same employer(s) each week, the applicable administrative rule does require that claimants do "what an ordinary and reasonable person would do to

return to work at the earliest opportunity.” As a matter of common sense, repeatedly and unsuccessfully initiating contact with the same employers every week is not an activity likely to return an individual to work “at the earliest opportunity.”<sup>1</sup> Repeatedly contacting a regular employer that has already notified an individual that (s)he is laid off and will be contacted with his or her return to work date, while certainly advisable under many circumstances, is not an activity that is likely to return the individual to work “at the earliest opportunity.” Likewise, repeatedly checking the same four school district websites each week during a period in which the school districts are in recess and appear not to have been actively recruiting employees is not an activity likely to return an individual to work “at the earliest opportunity.”<sup>2</sup> For those reasons, we conclude that claimant’s work search activities during weeks 26-16 to 34-16 did not amount to an “active” work search, and, consequently, that he was not eligible for benefits during those weeks.

In reaching this decision, we note that we have considered and disregarded claimant’s supplemental list of work search activities.<sup>3</sup> The ALJ also disregarded the information, finding that the supplemental work search information was inconsistent with his earlier statements to the Department, that claimant had “clear confusion and disagreement that he expressed concerning the Department’s work search requirements in light of his particular long-term work situation that included a two-month layoff in the summer every year,” and had “inconsistent” explanations for having failed to report the work search efforts to the Department.<sup>4</sup> Consequently, the ALJ concluded that the new work search list was “disingenuous and merely self-serving,” and was “insincere and unreliable.”<sup>5</sup> Claimant argued that the ALJ’s findings were groundless, based on “her prejudicial assumptions and assertions.” We disagree, and conclude that the ALJ’s assessment of the evidentiary value of the supplemental list is supported by the record. The factors the ALJ cited in the hearing decision undermine the reliability of the supplemental work search list and related testimony. In addition, although it is not implausible that an unemployed person might perform more work search activities than would fit within a weekly report to the Department, as a matter of common sense it is implausible that claimant would report to the Department only his work search activities with employers that were *not* actively recruiting new employees while simultaneously maintaining a list of jobs he had applied for with employers that *were* actively hiring new employees. There is also an inherent inconsistency in claimant’s claim that he

---

<sup>1</sup> We do not mean to suggest that repeated contacts with the same employer can never be part of an active work search. There might be other circumstances under which repeatedly contacting the same employer(s) each week could be considered an activity likely to return an individual to work “at the earliest opportunity,” for instance, if the evidence showed the labor market is constricted, the employer was a temporary or employee leasing agency that required regular check-ins, or if a particular employer instructed the individual to check back repeatedly or on a weekly basis to inquire about job openings.

<sup>2</sup> We infer that the districts were not actively hiring during the period in which claimant viewed them based on claimant’s testimony that he had not seen or applied for job openings based upon his review of those websites.

<sup>3</sup> Claimant alleged he sent resumes in response to job announcements as follows: Week 26-16, to a school district and mental health provider; Week 27-16, to a school district and mental health provider; Week 28-16, to two school districts and a mental health provider; Week 29-16, to two school districts and a mental health provider; Week 30-16, to a school district and a mental health provider, and checked a county’s website; Week 31-16, to a school district and a family services organization, and checked a mental health website; Week 32-16, to two counties and a school district; and Week 33-16, to a county and a mental health organization. *See* Exhibit 3.

<sup>4</sup> Hearing Decision 16-UI-69957 at 3.

<sup>5</sup> *Id.*

essentially exceeded the Department's work search requirements when compared with his testimony at various times that he felt he did not need to seek work because he was returning to work as he had done after every layoff during his 19 years of employment in his specialized area of work.<sup>6</sup> Claimant was not able to satisfactorily resolve that inconsistency.<sup>7</sup> For example, claimant repeatedly testified with respect to what appeared to be a reduced amount of work search activities during week 34-16 that he did not seek work as much that week "[b]ecause I was returning to work," but he also claimed, in essence, that his return to work did not affect his work search.<sup>8</sup> Claimant knew throughout the layoff period that the employer would return him to work, however, and by mid-July 2016 knew the date upon which he would return to work. When the ALJ asked claimant whether or how that knowledge affected his work search activities in weeks other than week 34-16, claimant again repeated that he was returning to work.<sup>9</sup> Claimant's oft-repeated statement that his knowledge that he was returning to work affected his work search activities undermined his claim that he sought more work than he reported to the Department, and support the ALJ's determination that claimant's supplemental work search list was not reliable evidence of claimant's work search activities during the weeks at issue.

For the reasons explained, we conclude that claimant did not actively seek work during weeks 26-16 through 34-16. He is, therefore, ineligible to receive benefits for those weeks.

**DECISION:** Hearing Decision 16-UI-69957 is affirmed.

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

**DATE of Service:** November 29, 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](http://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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

---

<sup>6</sup> Audio recording at ~ 27:15.

<sup>7</sup> The Department initially paid claimant benefits and had the burden of persuasion in this matter. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). As such, claimant did not have the burden to establish that he actively sought work; however, the onus to resolve any inconsistencies within his own testimony or evidence was on claimant.

<sup>8</sup> Audio recording at ~ 33:30, 34:50.

<sup>9</sup> *See e.g.* Audio recording at ~ 35:30.