

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1276

Affirmed
Ineligible Weeks 20-16 & 22-16
Overpayment Assessed for Weeks 22-16 & 24-16

PROCEDURAL HISTORY: On July 6, 2016, the Oregon Employment Department (the Department) served notice of two administrative decisions, decision # 100314 concluding that claimant did not actively seek work from May 15 through 21, 2016 (week 20-16), and decision # 100500 concluding that claimant did not actively seek work from May 29 through June 4, 2016 (week 22-16). On July 26, 2016, decisions # 100314 and # 100500 became final without claimant having filed requests for hearing. On August 11, 2016, the Department served notice of two administrative decisions based on decisions # 100314 and # 100500, decision # 114230 concluding that claimant was overpaid \$500 in benefits for week 22-16, and decision # 132043 concluding that claimant was overpaid \$504 in benefits for the week of June 12 through 18, 2016 (week 24-16). On August 30, 2016, claimant filed late requests for hearing on decisions # 100314 and # 100500, and timely requests for hearing on decisions # 114230 and # 132043. On September 2, 2016, ALJ Kangas issued Hearing Decisions 16-UI-66853 and 16-UI-66855, dismissing claimant's late requests for hearing on decisions # 100314 and # 100500 subject to his right to renew the requests by responding to an appellant questionnaire by September 16, 2016. On September 4, 2016, claimant responded to the appellant questionnaire. The Office of Administrative Hearings (OAH) considered claimant's response, and on October 3, 2016 canceled Hearing Decisions 16-UI-66853 and 16-UI-66855, and scheduled hearings on decisions # 100314, # 100500, # 114230 and # 132043 for October 18, 2016. On October 18, 2016, ALJ Wyatt conducted hearings, and on October 26, 2016 issued Hearing Decisions 16-UI-66903 and 16-UI-69918, allowing claimant's late requests for hearing on decisions # 100314 and # 100500 and affirming those decisions, and Hearing Decisions 16-UI-69917 and 16-UI-69958, affirming decisions # 114230 and # 132043. On November 15, 2016, claimant filed timely applications for review of Hearing Decisions 16-UI-66903, 16-UI-69917, 16-UI-69918 and 16-UI-69958 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-66903, 16-UI-69917, 16-UI-69918 and 16-UI-69958. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2016-EAB-1276, 2016-EAB-1277, 2016-EAB-1278 and 2016-EAB-1279). No party applied for review of those portions of Hearing Decisions 16-UI-66903 and 16-UI-69918 allowing claimant's late requests for hearing on decisions # 100314 and # 100500. EAB

therefore limited its review of those decisions to whether claimant actively sought work during weeks 20-16 and 22-16.

ELIGIBILITY

FINDINGS OF FACT: (1) Claimant claimed benefits for weeks 20-16 and 22-16, the weeks at issue.

(2) On or about May 12, 2016, claimant's regular employer notified him that it was beginning 1 to 2 week layoffs of individual employees, and that claimant was being laid off, effective May 13, 2016. Claimant was not given a date to return to work.

(3) On May 18, 2016, claimant filed an initial claim for benefits. On May 19, 2016, the Department mailed claimant UI Pub 195, which explained that normal work search requirements applied to each week that claimant would claim benefits unless he had a date to return to full time work with his regular employer. Claimant did not search for work with other employers during week 20-16.

(4) Claimant returned to full time work with his regular employer on May 23, 2016. On or about May 30, 2016, his regular employer notified him that he was being laid off for 1 to 2 weeks again, effective May 31, 2016. Claimant was not given a date to return to work. Claimant did not search for work with other employers during week 22-16.

(5) At some point after receiving and reading UI Pub 195, claimant informed his regular employer's general manager that to be eligible for benefits, he was required to search for other work while on temporary layoff. At some point after that, the general manager and claimant's supervisor "began calling Human Resources and calling the Unemployment Department and said they had worked that out. That I did not need to be out looking for a new job." Transcript at 21. On June 7, 2016 (week 23-16), claimant spoke to a Department employee who, based on the information claimant provided regarding his temporary layoff, told claimant that he was not required to search for work with other employers.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant did not actively seek work during weeks 20-16 and 22-16.

To be eligible to receive benefits, unemployed individuals must 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). Individuals typically 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.* Work seeking activities include but are not limited to registering for job placement services with the Department, attending job placement meetings sponsored by the 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. OAR 471-030-0036(5)(a)(A). "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).

For an individual on temporary layoff of four weeks or less with the individual's regular employer, if the individual had, 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, such individual is actively seeking work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the temporary layoff occurred. OAR 471-030-0036(5)(b)(A). The individual does not meet the requirements of OAR 471-030-0036(5)(b)(A) 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. OAR 471-030-0036(5)(b)(B).

In the present case, it is undisputed that, as of claimant's layoff dates, he had not been given dates to return to work. Claimant therefore did not meet the requirements of OAR 471-030-0036(5)(b)(A) during weeks 20-16 or 22-16. It also is undisputed that claimant did not conduct at least five work seeking activities during those weeks as required under OAR 471-030-0036(5)(a). Claimant therefore did not actively seek work during weeks 20-16 or 22-16.

The remaining issue is whether the employer should be prevented from denying claimant benefits for weeks 20-16 or 22-16 under the doctrine of equitable estoppel, given that claimant's general manager and supervisor told him after calling the Department that they had "worked that out," and claimant did not need to be "out looking for a new job," and that a Department employee told claimant on June 7, 2016 that he was not required to search for work with other employers. However, 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)).

Here, the record fails to show when the employer contacted the Department, whether the employer informed the Department that as of claimant's layoff date he had not been given a date to return to work, what the employer meant by they had "worked it out," or why claimant relied on the employer's assertion that claimant did not need to search for other work over contrary information contained in the Department's UI Pub 195, which claimant had received, read and apparently understood. Absent such showings, we cannot find that the Department made a false representation to the employer with knowledge of the facts and the intention that claimant would act on it, that claimant relied and acted on it during weeks 20-16 or 22-16, or that his reliance was reasonable. Nor could claimant have relied, during weeks 20-16 or 22-16, on a representation made to him by a Department employee during week 23-16. The Department therefore should not be prevented from denying claimant benefits for weeks 20-16 and 22-16 under the doctrine of equitable estoppel. Claimant is ineligible for benefits for those weeks.

OVERPAYMENTS

EAB reviewed the entire hearing record on decisions # 114230 and # 132043, which concluded that claimant was overpaid \$500 in benefits for week 22-16 and \$504 in benefits for week 24-16. On *de novo* review and pursuant to ORS 657.275(2), Hearing Decisions 16-UI-69917 and 16-UI-69958 are **adopted**. Claimant was overpaid \$1,004 in benefits that he is liable to repay or have deducted from any future benefits otherwise payable to him under ORS 657.

DECISION: Hearing Decisions 16-UI-66903, 16-UI-69917, 16-UI-69918 and 16-UI-69958 are affirmed.

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

DATE of Service: December 2, 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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