

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0110

Affirmed
Ineligible ~ Overpayment Assessed

PROCEDURAL HISTORY: On October 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of July 10, 2016 through August 6, 2016 (decision # 144155). On November 9, 2016, decision # 144155 became final without claimant having filed a request for hearing. On December 6, 2016, the Department served notice of an administrative decision assessing an overpayment of \$286 based on decision # 144155 (decision # 152632). On December 12, 2016 claimant filed requests for hearing on both administrative decisions, the request on decision # 144155 being untimely and the request on decision # 152632 being timely. On January 5, 2017 ALJ Murdock conducted two hearings, and on January 10, 2017 issued two hearing decisions, Hearing Decision 17-UI-74352, which allowed claimant's late request for hearing and affirmed decision # 144155, and Hearing Decision 17-UI-74404, which affirmed administrative # 152632. On January 24, 2017, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-74352 and 17-UI-74404. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0109 and 2017-EAB-0110).

Because no adversely affected party sought review of the part of Hearing Decision 17-UI-74352 that allowed claimant's late request for hearing, we have confined our review of that decision to whether claimant actively sought work.

FINDINGS OF FACT: (1) Before July 7, 2016, claimant worked for Express Employment Professionals, an employee leasing agency. Claimant's work assignment was as an asset specialist with the employer's client, Betaseed. On July 7, 2016, claimant's work assignment ended. Around that time, Betaseed told claimant that another assignment in its commercial department was available and would start on August 6, 2016. Claimant accepted the new assignment.

(2) On July 8, 2016, claimant filed a claim for unemployment benefits. Claimant had filed five previous claims for benefits. Claimant reported to the representative handling the call that she worked for an

employee leasing agency, that the last day she worked on an assignment July 7, 2016 and that she was laid off. The representative who took claimant's report made a record of the call and noted "No TLO [temporary layoff] reported. No return to work date." Audio of 2:30 p.m. Hearing (Audio 1) at ~27:13. During the call, the representative asked claimant if she wanted information about what she needed to do to remain eligible to receive benefits read to her over the phone or if she wanted it sent to her in written form. Claimant wanted that information emailed to her. On July 8, 2016, the representative emailed to claimant, among other things, an advisory about the Department's requirement that claimants must actively seek work during the weeks for which they claim benefits, and which specified that, each week, a claimant must perform five work seeking activities, of which at least two must be direct employer contacts..

(3) Claimant claimed benefits for the weeks of July 10, 2016 through August 6, 2016 (weeks 28-16 through 31-16), the weeks at issue. The Department paid claimant benefits only for week 29-16, in the amount of \$286. When claimant filed her weekly claim reports for these weeks, she reported no work search activities and stated that she was on temporary layoff. Later, in response to an inquiry by the Department, claimant indicated that she had performed two work search activities during week 28-16 and four work search activities during each of weeks of 29-16 through 31-16.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during weeks 28-16 through 31-16. The Department paid claimant \$286 in benefits for week 29-16 to which she was not entitled and she is liable to repay those benefits to the Department or have that amount deducted from any future benefits otherwise payable to her.

Actively Seeking Work. 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 limited 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.* However, an individual who is on a temporary layoff for four weeks or less with the individual's regular employer and had, as of the layoff date, been given a date to return to work, is considered to have actively sought 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 layoff occurred. OAR 471-030-0036(5)(b)(A).

It is undisputed that claimant did not perform at least five work seeking activities during the weeks at issue, even if account is taken of the report she submitted to the Department after she had filed her weekly claim reports. At hearing, claimant contended that she had been advised by both the Department and a manager at Betaseed that she was allowed to take advantage of the exception from the general work seeking requirements set out at OAR 471-030-0036(5)(b) for individuals on temporary layoffs and so should be exempted from those requirements. Audio at ~19:06, ~23:33, ~31:35, ~40:03. However, at the outset, claimant was not laid off by her employer or by the employer's client, Betaseed, on July 7, 2016 and for that reason alone was not subject to the exemption of OAR 471-030-0036(5)(b). OAR 471-030-0038(1)(a) states that for individuals working for temporary agencies or employees leasing companies, the employment relationship is deemed severed at the time the work assignment ends. On July 7, 2016, claimant's work assignment at Betaseed was finished. Since at that time, the regulation

specifies that a work separation occurred, for purposes of unemployment benefit determinations it was logically impossible for the employer to have temporarily laid claimant off on that same day due to the completion of the same work assignment. While Betaseed might have told claimant it would have new assignment available for her on August 6, 2016, this was an offer of new employment to claimant and not the resumption of the prior employment. On the undisputed facts surrounding the hiatus from employment that began for claimant on July 7, 2016, establish that it was not a temporary layoff, and did not exempt claimant from the general work seeking requirements.

While claimant contended that she was told by a Betaseed manager and Department representative she did not need to look for work after July 7, 2016 because she was “within the 30 days,” it is not likely that either did so and highly unlikely that both did. Audio of 2:30 p.m. Hearing (Audio 1) at ~ 19:06, ~24:28, ~31:35, ~40:03. First, nowhere in the statutes or regulations governing claimants’ work searches, or exceptions due to temporary layoffs, is the language “30 days” used; rather, the relevant time period stated is “four weeks.” It is implausible that a Department representative and a Betaseed manager would make precisely the same mistake about the maximum length for a qualifying temporary layoff. Second, it is also implausible that a Department representative would tell claimant she qualified for the temporary layoff exception, and contemporaneously record in her notes that claimant did not qualify for the exception. As well, while initially creating the impression that she was an inexperienced claimant, claimant then conceded in response to the rebuttable of the Department’s witness that the claim at issue was her sixth claim for unemployment benefits and qualified her previous testimony by stating that she intended only to point out this claim was the claim she had filed while employed by the employer. Viewed in sum, claimant’s testimony appeared unreliable and it is not likely that either a Department representative or a Betaseed manager told her she qualified for the exception to the work seeking requirements for those on temporary layoffs, or that she relied on any such representations in failing to perform at least five work seeking activities during the weeks at issue. Because claimant was not on a temporary layoff, and no other exceptions appear applicable to claimant’s circumstances, that claimant did not perform at least five work seeking activities during each of the weeks at issue establishes that she did not actively seek work during the weeks at issue. Claimant was not eligible to receive benefits during those weeks.

Overpayment. ORS 657.310(1) provides that an individual who receives benefits to which the individual was not entitled because the individual, *regardless of the individual’s knowledge or intent*, made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, is liable to repay the amount of the benefits that were overpaid or to have the amount of the benefits deducted from any future benefits otherwise payable to the individual.

Claimant agreed she received \$289 in benefits for week 29-16. Audio of 3:30 p.m. Hearing (Audio 1) at ~7:45. As discussed above, claimant did not actively seek work during week 29-16. The Department would not have paid claimant benefits for week 29-16 unless she had made the false representation that she was on a temporary layoff and thereby exempt from the general work seeking requirements of OAR 471-030-0036(5)(a). Even if claimant thought she was entitled to take advantage of the exemption available for those on temporary layoffs when she made her claim report for week 29-16, claimant is still required to pay back the \$289 she received to which she was not entitled or to have that \$289 deducted from any future benefits otherwise payable to her.

DECISION: Hearing Decisions 17-UI-74352 and 17-UI-74404 are affirmed.

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

DATE of Service: February 17, 2017

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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