

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0239

Affirmed
Ineligible
Overpayment Assessed

PROCEDURAL HISTORY: On September 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 12, 2016 to July 9, 2016 (decision # 135244). On September 28, 2016, decision # 135244 became final without claimant having filed a timely request for hearing. On October 13, 2016, the Department served notice of another administrative decision assessing a \$1,701 overpayment that claimant was required to repay (decision # 133619). On November 2, 2016, decision # 133619 became final without claimant having filed a timely request for hearing. On December 20, 2016, claimant filed late requests for hearing on decisions # 133619 and 135244. On December 27, 2016, ALJ Kangas issued Hearing Decision 16-UI-73664, dismissing claimant's late request for hearing on decision # 135244, and Hearing Decision 16-UI-73645, dismissing claimant's late request for hearing on decision # 133619, both of which were subject to his right to renew the requests by responding to appellant questionnaires by January 10, 2017. On January 3, 2017, claimant responded to the appellant questionnaires. On February 10, 2017, ALJ Holmes-Swanson conducted two hearings, and on February 16, 2017 issued Hearing Decisions 17-UI-77102 and 17-UI-77108, which allowed claimant's late requests for hearing affirmed decisions # 135244 and 133619, respectively. On February 23, 2017, claimant filed timely applications for review of Hearing Decisions 17-UI-77102 and 17-UI-77108 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-77102 and 17-UI-77108. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0238 and 2017-EAB-0239).

No adversely affected party requested that EAB review the ALJ's decision in Hearing Decisions 17-UI-77102 and 17-UI-77108 to allow claimant's late requests for hearing. We therefore focus our analysis on the remaining issues.

FINDINGS OF FACT: (1) On June 10, 2016, claimant's regular employer laid claimant off work. The employer told claimant that it would return him to work when a shipment of steel arrived, which

“shouldn’t take much more than a month.” Audio recording, Hearing Decision 17-UI-77102, at ~ 36:37. The employer did not schedule a date upon which it expected claimant to return to work.

(2) On June 13, 2016, claimant filed an initial claim for unemployment insurance benefits. He claimed the weeks of June 12, 2016 through July 9, 2016, the weeks at issue, and was paid benefits in the amount of \$567 per week, for a total of \$1,701 for the weeks of June 19, 2016 through July 9, 2016.

(3) Claimant reported his layoff to the Department when he filed his initial claim. The Department employee assisting claimant asked him whether the employer had given him a specific date to return to work. Claimant responded it had not; the employee then notified claimant about his work search requirements. The Department subsequently mailed claimant several different written notices instructing him what his work search requirements were.

(4) Thereafter, claimant discussed how to claim benefits with a different Department employee. The employee told claimant to report on his weekly claim that he had sought work. The claim form included three spaces in which individuals who actively sought work were required to write the names of the employers with which they had direct contact during the week being claimed. The employee said claimant could write down the name of his regular employer in all three spaces.

(5) During the weeks at issue, claimant did not conduct any work search activities other than maintaining contact with his regular employer. Each week when he made a weekly claim for benefits, claimant reported to the Department that he had actively sought work during the weeks claimed, wrote his regular employer’s name on the weekly claim form and certified that the information was correct.

(6) Because claimant reported to the Department that he had actively sought work, the Department paid claimant benefits for the weeks of June 19, 2016 through July 9, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant did not actively seek work and was therefore ineligible for benefits from June 12, 2016 to July 9, 2016, and that claimant was overpaid \$1,701; however, we conclude that he is liable to repay the Department under ORS 657.310.

Actively Seeking Work. ORS 657.155(1)(c) requires that individuals actively seek work as a condition of being eligible to receive unemployment insurance benefits. OAR 471-030-0036(5)(a) provides that an individual is considered to be actively seeking work “when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity,” which includes “conduct[ing] 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.” Some individuals laid off by their regular employers are exempt from seeking work; that exception only applies to individuals who are “on temporary layoff of four weeks or less” who have “been given a date to return to” work. OAR 471-030-0036(5)(b).

As a preliminary matter, claimant does not qualify for the exception to the actively seeking work requirement. Although his regular employer did lay him off work and planned for his layoff to be temporary, the employer laid him off for a period of not “much more than a month.” Anything “more than a month” exceeds the “four weeks or less” period covered by the exception. Additionally, claimant’s testimony illustrated that he was given an approximate time period about when the employer might return him to work, and was not actually “given a date to return to” work. For those reasons,

claimant does not qualify for the exception to work search requirement and was, during all the weeks at issue, required to actively seek work by performing at least five work seeking activities. Claimant conceded during the hearing that he did not do any work seeking activities beyond maintaining contact with his regular employer. Because claimant did not actively seek work during the weeks at issue, he is ineligible to receive benefits during those weeks.

Overpayment. Claimant conceded at the hearing that he erred in filing his weekly claims for benefits, and did not dispute that he received \$1,701 in benefits for weeks the Department has concluded, and we have agreed, he was not eligible for benefits. Claimant asserted, though, that he was not at fault for the overpayment. Claimant argued that he was instructed by a Department employee to report that he actively sought work each week, even though he had not, write his regular employer's name on all three lines provided for him to list his direct contact work search activities, and certify that the information was true.

Under the doctrine of equitable estoppel, the Department would be barred from collecting claimant's overpayment on the theory that doing so would amount to penalizing claimant for reasonably relying upon bad advice from a Department employee. We disagree that estoppel applies here, 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 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)).

Estoppel does not apply in this case for at least two reasons. First, we find it more likely than not that any representation by a Department employee in this case was not "made with the knowledge of the facts." Claimant described the circumstances of his layoff to a Department employee at the time of his initial claim for benefits and was told he needed to seek work. Given that claimant's description of his layoff to a different employee yielded different advice, it is unlikely that the employee in question had "knowledge of the facts" when the employee told claimant how to file his weekly claims. Second, we also find it more likely than not that claimant's reliance on the information he was told by the second employee was not reasonable. It is not reasonable to rely on information provided by one employee that contradicted information he received from another employee without taking some sort of action to resolve the conflict, rather than choosing to rely on the set of information most beneficial to his interests. Had claimant resorted to, for example, online resources such as the claimant handbook, a guide the Department publishes online and to which it refers claimants for information on their rights and responsibilities when claiming benefits, claimant would have been instructed, in pertinent part:

You must seek work immediately. You must * * * actively seeking work during each week that you claim. This includes * * * actively seeking full-time, part-time, permanent and temporary work.

If you are temporarily laid-off and have a definite date to return to full-time work for your regular employer within four weeks from the last day of work, you are actively seeking work

if you stay in touch with your employer. If your return to full-time work date is delayed, you must advise the UI Center immediately and you must begin seeking other work.¹

In the alternative, it appears that claimant's argument is that he should not have to repay the overpayment because he was not at fault for causing it. The Department decided the issue of claimant's overpayment under ORS 657.310, and concluded that claimant "must repay" the amount of the overpayment to the Department. Decision # 133619. Although the ALJ stated in his "Order" that claimant "must repay" the overpayment to the Department, the ALJ also stated that the repayment was to occur under ORS 657.315. Hearing Decision 17-UI-77108 at 4.

ORS 657.310 and ORS 657.315 both require that individuals overpaid by the Department return the money to the Department. The distinction between them is that ORS 657.310(1) applies to claimants who caused the overpayment to occur, whether on purpose or accidentally, and requires that claimant reimburse the Department out-of-pocket *or* have the benefits "deducted from any future benefits otherwise payable to the individual under ORS chapter 657"; ORS 657.315(1), on the other hand, applies to claimants who were overpaid due to someone else's error, and requires only that claimant reimburse the Department for the overpaid benefits by being "liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within 52 weeks following the week in which the decision establishing the erroneous payment became final."

Given the evidence in this case, we conclude it is appropriate to apply ORS 657.310 to this case. The Department paid benefits to claimant for the weeks at issue because claimant erroneously reported to the Department that he had actively sought work during each of those weeks. Although claimant appears to have sincerely believed he had actually actively sought work when he made those reports to the Department, he was mistaken, and it was his mistake that directly caused the Department to overpay him. Regardless that claimant made a mistake in claiming, and does not appear to have intended to claim benefits to which he was not entitled, because he caused the overpayment he is liable to repay the Department for the amount of the overpayment, \$1,701. Under ORS 657.310 the Department may collect the overpayment by deducting the overpayment from future benefits otherwise payable to him, or by requiring claimant to reimburse the Department out-of-pocket.

DECISION: Hearing Decision 17-UI-77102 is affirmed. Hearing Decision 17-UI-77108 is modified, as outlined above.

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

DATE of Service: March 16, 2017

¹ See http://www.oregon.gov/EMPLOY/Unemployment/Claimant_Handbook/Pages/Section-3-Maintaining-Eligibility.aspx. (Emphasis added). We take notice of this generally cognizable fact. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, 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.

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.

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.