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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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<p>EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0596</p>
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Hearing Decision 17-UI-82541 – Affirmed, Ineligible Weeks 48-16 and 51-16 to 3-17
Oregon Employment Department Decision 2017-UI-00587 – Application for Review Dismissed

PROCEDURAL HISTORY: On January 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was ineligible for benefits from November 27, 2016 to January 21, 2017 because she did not actively seek work (decision # 113911). On January 26, 2017, claimant filed a timely request for hearing on decision # 113911. On February 7, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing on decision # 113911 scheduled for February 21, 2017, at which claimant failed to appear. On February 22, 2017, ALJ Monroe issued Hearing Decision 17-UI-77416, dismissing claimant's request for hearing on decision # 113911 for failure to appear. On March 6 or March 8, 2017, claimant filed a timely request to reopen the February 21, 2017 hearing.

On March 30, 2017, the Department mailed notice of another administrative decision, based on decision # 113911, concluding that claimant was liable to repay a \$1,806 overpayment to the Department (decision # 101819). On April 7, 2017, claimant filed a timely request for hearing on decision # 101819. On April 19, 2017, OAH mailed two notices of two hearings scheduled for May 3, 2017, one on decision # 101819, and the second on the actively seeking work and reopening matters.

On April 27, 2017, the Department served notice of an amended decision which stated that it canceled or superseded decision # 113911 and concluded claimant was ineligible for benefits from November 27, 2016 to December 3, 2016 and December 18, 2016 to January 21, 2017 because she did not actively seek work (decision # 85823). On May 2, 2017, claimant filed a timely request for hearing on decision # 85823. Also on May 2, 2017, a Department Compliance Specialist, R. Mitchell, served notice of Employment Department Decision 2017-UI-00587, dismissing claimant's request for hearing on decision # 101819 on the basis that the decision that created the overpayment – decision # 113911 – had been canceled or superseded.

On May 3, 2017, ALJ M. Davis conducted a hearing based on claimant's timely request for hearing on decision # 85823. On May 4, 2017, the ALJ issued Hearing Decision 17-UI-82541, concluding that because the Department had canceled decision # 113911 and issued decision # 85823 the reopen issue

was moot, and affirming decision # 85823. On May 11, 2017, claimant filed timely applications for review of Hearing Decision 17-UI-82541 and Employment Department Decision 2017-UI-00587 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decision 17-UI-82541 and Employment Department Decision 2017-UI-00587. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0594 and 2017-EAB-0596).

Employment Department Decision 2017-UI-00587:

To any extent claimant's May 11, 2017 application for review was intended to apply to the Department's decision 2017-UI-00587, claimant's application for review must be dismissed for three reasons. First, EAB has no jurisdiction to directly review decisions issued by the Oregon Employment Department; our review is confined to review of Unemployment Insurance Benefits hearing decisions issued by Administrative Law Judges. *See e.g.* ORS 657.270(6); ORS 657.275; OAR 471-041-0060(1). Second, because the Department dismissed claimant's request for hearing no hearing was held and no hearing record developed, so there is no hearing record for EAB to review. *See* ORS 657.275(2) (EAB performs *de novo* review of hearing records). Third, the decision underlying Employment Department Decision 2017-UI-00587 was decision # 113911. Because the Department issued amended decision # 85823, decision # 113911 was canceled or superseded, and neither a hearing decision nor EAB decision has yet become final. In the absence of a final decision establishing whether or not claimant actively sought work during the weeks at issue, there is, as yet, no basis to decide whether or not claimant was overpaid benefits. The Department will, in all likelihood, issue a new overpayment decision when our actively seeking work decision becomes final; in the event the Department does so, claimant will have the right to request a hearing on the new overpayment decision, and the new overpayment decision will include instructions for requesting a hearing. For each of those reasons, claimant's application for review of Employment Department Decision 2017-UI-00587 must be dismissed.

Hearing Decision 17-UI-82541:

FINDINGS OF FACT: (1) On November 20, 2016, claimant last worked for her regular employer, East Cascade Retirement Center. The employer laid claimant off work. Although the employer informed claimant it would return her to work at some point in the future and told her to maintain contact, the employer did not provide claimant with a return to work date at that time.

(2) Effective November 27, 2016, claimant filed an initial claim for unemployment insurance benefits. The claim form claimant completed instructed her that she was required to perform five work seeking activities each week unless she was temporarily laid off work. The form included the following description of a temporary layoff and advised her, "If you meet this requirement you do not need to complete the work search activities":

I am on a temporary layoff with my regular employer. I am returning to full-time work within four weeks of when I was originally laid off. I remained in contact with my employer last week.

Transcript at 5-6.

(3) Claimant filed weekly claims for benefits for weeks including November 27, 2016 to December 3, 2016 (week 48-16) and December 18, 2016 to January 21, 2017 (weeks 51-16 to 3-17), the weeks at issue. The Department allocated waiting week credit to claimant for week 48-16, paid claimant for weeks 51-16 to 2-17, and did not pay claimant for week 3-17.

(4) During each of the weeks at issue, claimant checked a box on the weekly claim form to report to the Department that she was temporarily laid off work. Claimant did not report to the Department that she performed five work seeking activities in any of the weeks at issue. During week 48-16, claimant contacted one prospective employer, did internet work searches, and repeatedly contacted her regular employer. During weeks 51-16 and 52-16, claimant contacted two prospective employers, did internet work searches, and repeatedly contacted her regular employer. During weeks 1-17 to 3-17, claimant repeatedly contacted her regular employer and did internet work searches.

(5) On December 22, 2016, claimant met with a Department employee. The employee went through the work search requirements with claimant and instructed her that she was required to complete five work seeking activities each week, and that her work searches needed to include direct contacts and other activities. The employee also instructed claimant she was not supposed to list her regular employer as a direct contact, but was permitted to list her regular employer as a work seeking activity.

(6) On December 30, 2016, claimant's regular employer notified claimant that she was going to be returned to work on February 1, 2017. On January 1, 2017, claimant filled out an online weekly claim form and included a notation that she was going to return to work on February 1, 2017. On January 2, 2017, claimant replied to a letter from the Department about her work searches; in her reply she noted that she had, on December 30, 2016, been given a return to work date.

(7) On January 3, 2017, claimant spoke with a Department employee by telephone. During that call, claimant and the employee discussed the letter claimant had faxed to the Department and her benefit payment for the previous week.

(8) On January 23, 2017, claimant met with a Department employee. The employee instructed claimant that she was required to actively seek work notwithstanding her return to work date. On January 26, 2017, claimant spoke with a Department employee on the phone, during which she was again instructed that she was required to actively seek work.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant did not actively seek work from November 27, 2016 to December 3, 2016 (week 48-16) and December 18, 2016 to January 21, 2017 (weeks 51-16 to 3-17), and she is therefore ineligible for benefits during each of those weeks.

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). 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.* 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).

In any week in which the Department paid claimant benefits, the Department has the burden to prove claimant should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). By extension of that principal, in any week in which the Department deemed claimant ineligible for benefits and did not pay her, claimant has the burden to prove that benefits should have been paid. In this case, that means the Department has the burden to prove that claimant was ineligible for benefits, and should not have been paid, during week 48-16, in which the Department allocated waiting week credit to claimant, and weeks 51-16 to 2-17, in which the Department paid her. Claimant has the burden to prove that she was eligible, and the Department should have paid her, for week 3-17.

Claimant argued in her request to reopen and at the hearing that she was “diligently filling out the work search forms each week” until she was misinformed by a Department employee during a January 2, 2017 phone call that “if you’re going back within the 4 weeks you no longer need to fill out the work search.” *See* Claimant’s request to reopen letter; Transcript at 15. Claimant claimed that after receiving that advice she stopped reporting her work search activities and that the Department should be estopped from denying her benefits because the only reason she was ineligible for them is that she relied upon misinformation from a Department employee.

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)).

Claimant did not prove that she received a false representation. She asserted that an employee gave her false information about her work search requirement in a phone call she made to the Department on January 2, 2017. The Department was closed on January 2, 2017, however, making it impossible for claimant to have spoken with anyone on that date. Claimant did speak with an employee on the phone on January 3, 2017; by that time, however, claimant had already completed a weekly claim form upon which she had reported an inadequate work search and written that she had been given a return to work date, meaning that the week in which she was to have actively sought work had passed prior to the date she spoke with a Department employee, and the defect in her report about those activities could not have been based upon erroneous advice she alleged she later received from a Department employee.

Claimant did not prove that she was induced to act upon a false representation. Claimant claimed that she only stopped reporting a sufficient amount of work search activities because of what she was told during the alleged January 2, 2017 call; however, the record shows that with the exception of only two weeks that are not at issue here, claimant had incorrectly reported that she was on a temporary layoff with a return to work date during all of the weeks at issue, not just the weeks that followed the alleged

January 2, 2017 call, making it unlikely that she would have been induced to act by any erroneous advice she received during such a call.

Lastly, claimant did not prove that she was ignorant that any representation given to her was false, or that she reasonably relied upon a misrepresentation. Even if claimant had made a call on January 2nd, and received some misinformation at that time, or during the January 3rd call, any erroneous advice about her work seeking obligations would have been anomalous in the context of the other information the Department had frequently communicated to her in the course of the weeks at issue, making claimant's reliance on any such advice unreasonable. Specifically, the information the Department had already provided to her at the time of her initial claim, in her weekly claims, on letters, and during an in-person interview about her work searches less than two weeks earlier all stated that the only reason she would not need to complete the work search activities and report them to the employer is if she was "returning to full-time work within four weeks *of when I was originally laid off.*" (Emphasis added.) The fact that the employer gave her a return to work date on December 30th did not change the fact that claimant was not given a return to work date when she was originally laid off, and therefore did not change her obligation to actively seek work as a condition of receiving unemployment insurance benefits based on the accurate information the Department had already repeatedly given to her. It is also notable that claimant was given her February 1st return to work date on December 30th, which was over four weeks prior to the return to work date; nothing in claimant's assertions about the erroneous advice the Department employee gave her suggests claimant had reason to believe that she did not have to seek work if the return to work date she was given was over four weeks away at the time she was given that return to work date. It was, therefore, not reasonable for claimant to have relied on alleged advice suggesting that she qualified for an exception to the work search requirement that applied only to individuals whose temporary layoff periods were four weeks or less. For each of the reasons explained, the Department may not be estopped from denying claimant benefits based on the alleged misleading advice given to claimant.

As previously explained, the circumstances of claimant's layoff did not qualify her for the temporary layoff exception to the actively seeking work requirement because she was not given a date to return to work at the time of her layoff that was within four weeks of the layoff date. As such, as a condition of being eligible for benefits claimant was required to have conducted five work seeking activities during each of the weeks at issue, including two direct contacts with employers who might hire her and three other activities, which, in accordance with the Department's advice to her, could include maintaining weekly contact with her regular employer. Claimant argued at the hearing, "I work searched every single day, whether I wrote it down or not" and spent two to three hours each day on the computer looking for a job. Transcript at 15. However, claimant admitted that she did not write them down or keep records of her work search, and, at the time of the hearing, was unable to supplement the specific work searches she reported to the Department at the time of her weekly claims. The record therefore establishes only that claimant did the work searches she reported to the Department, plus internet work searches.

During week 48-16, claimant contacted one prospective employer, and therefore had one direct contact. She made repeated contact with her regular employer, which constituted one work seeking activity, and did internet work searches, which constituted a second work seeking activity. Claimant therefore conducted a total of three work seeking activities during week 48-16. During weeks 51-16 and 52-16, claimant contacted two prospective employers each week, for a total of two direct contacts each week.

She also did internet searches and repeatedly contacted her regular employer, which constituted two additional work seeking activities each week. Claimant therefore conducted a total of four work seeking activities each week during weeks 51-16 and 52-16. During weeks 1-17, 2-17 and 3-17, claimant's work seeking activities included internet work searches and repeated contacts with her regular employer, which constitute only two work seeking activities and no direct contacts. In sum, claimant did no more than four work seeking activities during any of the weeks at issue, falling short of the Department's requirement that she perform five activities each week. Claimant therefore failed to actively seek work as required, and she must be found ineligible to receive benefits during the weeks at issue.

DECISION: Hearing Decision 17-UI-82541 is affirmed. Claimant's application for review of Oregon Employment Department Decision 2017-UI-00587 is dismissed.

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

DATE of Service: June 8, 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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