

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0655

Affirmed
Ineligible

PROCEDURAL HISTORY: On February 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from December 4 through 24, 2016 (decision # 104412). Claimant filed a timely request for hearing. On May 11, 2017, ALJ M. Davis conducted a hearing, and on May 12, 2017 issued Hearing Decision 17-UI-83207, affirming the Department's decision. On May 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

On June 14, 2017, claimant submitted a timely written argument. However, claimant's argument contained new information regarding the remuneration paid or payable to her for the week of December 25 through 31, 2016 that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering that information during the hearing. Nor, for the reasons discussed below, is claimant's new information material to EAB's determination of whether she actively sought work during the weeks at issue. EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from December 4 through 24, 2016 (weeks 49-16 through 51-16), the weeks at issue. The Department initially paid claimant benefits for those weeks.

(2) On December 3, 2016, claimant's regular employer notified her that she would be working reduced hours until December 26, 2016 when her hours would increase for the remainder of that week (week 52-16), after which her hours again would be reduced.

(3) During the weeks at issue, claimant worked reduced hours for her regular employer. She did not conduct five working seeking activities, or make contact with two employers to inquire about a job opening or apply for job openings, during any of those weeks.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the weeks at issue, and therefore is not eligible for benefits for those weeks.

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.* 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 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. OAR 471-030-0036(5)(a)(B).

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 full time work or work for which remuneration is paid or payable that equals or exceeds the individual's benefit amount, 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). Where, as here, the Department initially pays a claimant benefits, the Department has the burden to establish by a preponderance of evidence that the claimant is not eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The first issue in this case is whether, during the weeks at issue, claimant was, under OAR 471-030-0036(5)(b)(A), exempt from the work search requirements set forth in OAR 471-030-0036(5)(a). At hearing, the Department's representative testified the fact that claimant's regular employer notified her she would be working reduced hours during the weeks at issue, and that claimant worked reduced hours for her regular employer during the weeks at issue, were not material to whether claimant was on a temporary layoff during those weeks. Audio Record at 8:30. In Hearing Decision 17-UI-83207, the ALJ did not address that issue, and instead concluded that claimant was not exempt from the work search requirements set forth in OAR 471-030-0036(5)(a) because, while claimant may have "believed she was on temporary layoff, the employer did not have her returning to full-time work or work for which remuneration is paid or payable that equaled or exceeded her weekly benefit amount"¹

At hearing, claimant argued that her regular employer did give her a date to return to work for which remuneration, including wages and tips, was paid or payable that equaled or exceeded her weekly benefit amount. Audio Record at 26:30-27:35. During her cross examination of claimant, the Department's representative implied that claimant's tips should not be included because they were not "guaranteed," but did not testify on that issue. Audio Record at 27:00-27:15. OAR 471-030-0017(1)(c) (July 1, 2016) states that "remuneration" means compensation resulting from the employer-employee

¹ Hearing Decision 17-UI-83207 at 3.

relationship, and includes wages and tips. In Hearing Decision 17-UI-83207, the ALJ did not address the issue, but included only claimant's wages, and not tips, when determining whether her regular employer gave her a date for which remuneration was paid or payable that equaled or exceeded her weekly benefit amount.²

In written argument, claimant asserted that the ALJ erred in failing to include tips when determining whether her regular employer gave her a date to return to work for which remuneration was paid or payable that equaled or exceeded her weekly benefit amount. However, we find it unnecessary to address that issue because we disagree with the Department representative's testimony that the fact that claimant's regular employer notified her she would be working reduced hours during the weeks at issue, and that claimant worked reduced hours for her regular employer during the weeks at issue, were not material to whether claimant was on a temporary layoff during those weeks.

A "temporary layoff" is a period of time in which there is a temporary cessation of all work. An individual who continues to work on-call or reduced hours for her regular employer is not considered, under the Department's policies, to be on a "temporary layoff" within the meaning of OAR 471-030-0036(5)(b) and is not exempt from the general work seeking requirements of OAR 471-030-0036(5)(a). See UI Pub 195 (01-14) (if full-time hours reduced but currently working at least some part-time hours, an individual is not considered to be on temporary layoff, is not exempt from the general work seeking requirements and must comply with the work seeking requirements of OAR 471-030-0056(5)(a)); February 5, 2014 Memorandum from George Berriman, Manager UI Programs and Methods to All Staff Re: Active Work Search Requirements (claimants who continue to work some part-time hours after a supposed layoff are not considered to be on a temporary layoff and must perform the minimum of five work seeking activities each week to receive benefits for that week); UI Pub 195 (03-15) (the temporary layoff exception does not apply if the claimant works part-time on a continual basis with the claimant's regular employer); see also *Employment Appeals Board Decision*, 2016-EAB-0488 (May 4, 2016) adopting Hearing Decision 16-UI-57855 (claimant who worked between 1 and 3 hours each week not considered to be on temporary layoff because she "continued to work part-time for the employer" and was therefore required to perform five work seeking activities to receive benefits); *Employment Appeals Board Decision*, 2017-EAB-0369 (April 14, 2017) (claimant who worked between 5 and 13 hours during each of the weeks at issue not considered to be on a temporary layoff because all work with her regular employer had not ceased and claimant was therefore required to perform five work seeking activities to receive benefits in any week); *Employment Appeals Board Decision* 2017-EAB-0570 (June 13, 2017) (claimant who expected to, and did, work some hours for her regular employer during all weeks at issue not considered to be on temporary layoff).

We therefore find that claimant was not on temporary layoff from work with her regular employer during the weeks at issue, and conclude that she was not exempt, under OAR 471-030-0036(5)(b)(A), from the work search requirements set forth in OAR 471-030-0036(5)(a). As stated above, it therefore is unnecessary for us to whether claimant's regular employer gave her a date to return to work for which remuneration was paid or payable that equaled or exceeded her weekly benefit amount. Claimant's new information regarding the remuneration paid or payable to her for week 52-16 therefore is not material to our determination of whether claimant actively sought work during the weeks at issue. The remaining issue is whether claimant met the work search requirements set forth in OAR 471-030-0036(5)(a).

² *Id.* at 1, 3.

In Hearing Decision 17-UI-83207, the ALJ concluded that although claimant testified that she “asked some people if they were hiring” during the weeks at issue, “the evidence was not persuasive to establish” that claimant met the work search requirements set forth in OAR 471-030-0036(5)(a).³ The ALJ therefore ultimately concluded that claimant did not actively seek work during the weeks at issue, and is ineligible for benefits for those weeks. Although we note that the Department had the burden to prove claimant did not actively seek work during the weeks at issue, claimant’s testimony shows that she likely did not conduct five work search activities during the weeks at issue, and very likely did not make contact with two employers to inquire about a job opening or apply for job openings, during any of those weeks. The Department therefore established that claimant did not meet the work search requirements set forth in OAR 471-030-0036(5)(a). We therefore agree with the ALJ’s ultimate conclusion that claimant did not actively seek work during the weeks at issue, and is ineligible for benefits for those weeks.

DECISION: Hearing Decision 17-UI-83207 is affirmed.

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

DATE of Service: June 16, 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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³ *Id.* at 3-4.