

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0710

Reversed
Eligible

PROCEDURAL HISTORY: On April 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of January 22, 2017 through February 18, 2017 (decision # 92732). Claimant filed a timely request for hearing. On May 22, 2017, ALJ Sgroi conducted a hearing at which the Department filed to appear, and on May 24, 2017 issued Hearing Decision 17-UI-84093, affirming the Department's decision. On June 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) As of January 2017, McKeown's Restaurant employed claimant as a bartender in its Irish Pub. Sometime around January 23, 2017, claimant learned the employer planned to close its business in April 2017. Claimant arranged for work at the Seaside Golf course, which was to start after he was laid off.

(2) On January 25, 2017, the son of the employer's owner informed claimant that the employer would be closing on Sunday, January 29, 2017. The son told claimant the employer would reopen in "about a month." Audio at ~17:25. The son did not provide a return to work date to claimant.

(3) Sometime after January 25, 2017, claimant filed a claim for unemployment insurance benefits. Claimant's claim was determined valid. Claimant claimed and was paid benefits for the weeks of January 22, 2017 through February 18, 2017 (weeks 04-17 through 07-17), the weeks at issue. During the weeks at issue, claimant sought work as a bartender and in the field of construction.

(4) During the weeks at issue, claimant reported to the Department that some of his work search activities included meditating, hiking, reviewing recipes for alcoholic drinks, quizzing himself on drinks and cooking for his wife and simulating bartending and server work by serving her meals and drinks that he prepared. In addition during the weeks at issue, claimant looked for available work online, updated his resume, completed a tutorial in the Department's job search program, iMatch, and did "all kinds of [other] stuff." Audio at ~30:48, ~35:33. As well, to the best of his recollection, claimant inquired about work in person at the Seaside Golf course and Sam's Seaside Café during week 04-17, at Big Foot

Restaurant and Twisted Fish during week 05-17, with two construction contractors and one plumbing contractor during week 06-17 and at Finn's Fish House and Ballou's Beach Club during week 07-17. Further, claimant went to the nearby towns of Astoria, Warrenton and Cannon Beach to inquire about work in person during the weeks at issue. Claimant made at least two direct contacts with potential employers during each of the weeks at issue and, in total, engaged in at least five work seeking activities during each of the weeks at issue.

CONCLUSIONS AND REASONS: Claimant actively sought work during the weeks at issue and is eligible to receive benefits during 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 few exceptions, none of which apply here, 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.* "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). Because the Department paid benefits to claimant during the weeks at issue, the burden of persuasion is on the Department to demonstrate that claimant was ineligible for benefits, or that he did not actively seek work, during the weeks at issue. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In Hearing Decision 17-UI-84093, the ALJ concluded that claimant did not actively seek work during the weeks at issue. The ALJ reasoned that, although the evidence showed that claimant made two or three direct job contacts during each of the weeks at issue, it did not show that he engaged in at least a total of "five satisfactory work seeking activities" during each of the weeks at issue since many of the activities that claimant reported to the Department, such as meditating, hiking and "self-quizzing," were not activities that reasonably would facilitate his return to work at the earliest possible time. Hearing Decision 17-UI-84903 at 3. While we agree with the ALJ that meditating and cooking meals for his spouse are not work seeking activities, we disagree with the ALJ's conclusion that claimant's actual work seeking activities were insufficient to satisfy the requirement that he actively seek work.

Despite claimant's stated belief, we do not consider that activities such as hiking, meditation and cooking for and serving his spouse are appropriately considered work seeking activities since it is not likely they would enhance his ability to locate suitable work or augment his skills in a way that would make him more hireable. When reaching this decision, we have not considered those activities to be valid work seeking activities, although we leave open whether his actions in researching drink recipes and self-quizzing might properly be considered valid since they could plausibly enhance his marketable skills. As well, for purposes of this decision, claimant was not on a temporary layoff within the meaning of OAR 471-030-0036(5)(b), which would have exempted him from requirement of engaging in five work-seeking activities each week, because returning to work in "about a month" does not meet the requirement that, to qualify for this exemption, a claimant must have a definite return to work date and that date must be within four weeks or less of the date of his layoff. *See* OAR 471-030-0036(5)(b). In this decision, we have assessed claimant's eligibility using the work seeking standard of OAR 471-030-

0036(5)(a), which means engaging five work seeking activities each week, of which two must have been direct employer contacts.

There was no evidence contradicting claimant's testimony that he made at least two direct employer contacts during each of the weeks at issue, and the specific detail he provided about the identities of the potential employers he contacted gave credence to his testimony. Furthermore, claimant described many other work seeking activities he undertook during the weeks at issue, including contacting former employers and his upcoming employer, updating his resume, the iMatch tutorial, self-study to augment his job skills and making in-person contacts with employers in nearby towns. While claimant might not have assigned any of these work seeking activities to particular of the weeks at issue, there was no reason to doubt that he undertook them during the weeks at issue or to question his testimony that he performed at least five work seeking activities during each of the weeks at issue. Audio at ~31:42. Because claimant did not have the burden of persuasion to demonstrate that he actively sought work during the weeks at issue, and there is insufficient evidence in the record suggesting he did not seek work as he claimed, claimant is not ineligible to receive benefits during the weeks at issue.

DECISION: Hearing Decision 17-UI-84093 is set aside, as outlined above.¹

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

DATE of Service: July 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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¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.