

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0767

Affirmed
Ineligible

PROCEDURAL HISTORY: On March 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from November 27 through December 31, 2016 (decision # 105635). Claimant filed a timely request for hearing. On June 1, 2017, ALJ J. Janzen conducted a hearing, and on June 5, 2017 issued Hearing Decision 17-UI-84853, affirming the Department's decision. On June 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from November 27 through December 31, 2016 (weeks 48-16 through 52-16), the weeks at issue.

(2) During week 48-16 (November 27 through December 3, 2016), claimant worked two days for his regular employer, which informed him on December 2, 2016, that he was being laid off, effective, December 5, 2016, and that he would return to full time work some time during week 52-16 (December 25 through 31, 2016).

(3) During the weeks at issue, claimant remained in contact with and was capable of accepting and reporting for any suitable work with his regular employer, and worked part-time during weeks 49-16, 50-16 and 51-16. During week 52-16, claimant worked 24 hours in 3 days. Claimant worked full time during week 01-17 (January 1 through 7, 2017).

(4) Claimant did not seek work with other employers during the weeks at issue.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant did not actively seek work during the weeks at issue, and therefore is ineligible 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.* For an individual who is filing a continued claim for the first week of an additional claim, if the individual worked less than full time and remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount, each day the individual worked for the employer shall be considered a direct employer contact. OAR 471-030-0036(5)(e).

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 weekly 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). The individual does not meet the requirements of this subsection if the individual had not, 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 weekly benefit amount. OAR 471-030-0036(5)(b)(B). Where, as here, the Department initially pays a claimant benefits, the Department has the burden to establish that the claimant is not entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In written argument, claimant complained that although the Department's administrative decision # 105635 concluded that he did not actively seek work during the weeks at issue, the ALJ concluded that he was not eligible for benefits for those weeks because, as of his layoff date, he had not been given a "specific" date to return to full time work, and "nothing about work searches what the hearing was for." In order to determine whether claimant actively sought work during the weeks at issue, however, it first was necessary to determine whether he was required to conduct five work seeking activities per week, as required under OAR 471-030-0036(5)(a), or merely remain in contact with and be capable of accepting and reporting for any suitable work opportunities with his regular employer, as required under OAR 471-030-0036(5)(b)(A). The ALJ therefore did not err in first addressing that preliminary issue.

Claimant next argued that the ALJ erred in determining that claimant was required to conduct five work seeking activities per week during the weeks at issue unless he was given a "specific" date to return to work,¹ and that because he was told that he would return to work by December 31, 2016, which was within four weeks of the effective date of his layoff, he only should be required to have remained in contact with and been capable of accepting and reporting for any suitable work opportunities with his regular employer. With respect to week 48-16, however, claimant's layoff did not begin until the following week, and because he was not on temporary layoff during week 48-16, he was required to conduct five work seeking activities as required under OAR 471-030-0036(5)(a). And with respect to weeks 49-16 through 52-16, although we agree that OAR 471-030-0036(5)(b)(A) does not state that, as of the layoff date, the individual must have been given a "specific" date to return to work, it does state that the individual must have been given "a date" to return to work. Here, claimant was not given "a date" to return to work, but a seven day time period during which he would return to work. Claimant

¹ See Hearing Decision 17-UI-84853 at 3.

therefore did not meet all the requirements OAR 471-030-0036(5)(b)(A), and therefore was required to conduct five work seeking activities per week as required under OAR 471-030-0036(5)(a) .

During week 48-16, claimant worked two days for his regular employer, which, under OAR 471-030-0036(5)(e), is considered two direct employer contacts, and therefore two work seeking activities. However, his only other work seeking activity that week was to remain in contact with and be capable of accepting and reporting for any suitable work opportunities with his regular employer. Claimant therefore conducted only three work seeking activities that week, and not five work seeking activities as required under OAR 471-030-0036(5)(a). He therefore did not actively seek work during week 48-16, and is ineligible for benefits for that week.

During weeks 49-16 through 52-16, claimant' only work seeking activity was to remain in contact with and be capable of accepting and reporting for any suitable work opportunities with his regular employer. Claimant therefore conducted only one work seeking activity per week during weeks 49-16 through 52-16, and not five work seeking activities per week as required under OAR 471-030-0036(5)(a). He therefore did not actively seek work during weeks 49-16 through 52-16, and is ineligible for benefits for those weeks.

Finally, claimant argued that, at worst, he made an "honest mistake" when claiming benefits for the weeks at issue, and that he wasn't trying to "cheat the system." However, claimant did not actively seek work during the weeks at issue, and therefore is ineligible for benefits for those weeks, regardless of his knowledge or intent when claiming benefits.

DECISION: Hearing Decision 17-UI-84853 is affirmed.

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

DATE of Service: July 19, 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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