

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0781

Affirmed
Ineligible Weeks 52-16 through 03-17

PROCEDURAL HISTORY: On February 24, 2017, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding claimant did not actively seek work during the week including December 25 through December 31, 2016 (week 52-16) (decision # 61452) and a second concluding claimant did not actively seek work during the weeks including January 1 through January 21, 2017 (weeks 01-17 through 03-17) (decision # 62142). Claimant filed timely requests for hearing on both decisions.

On June 1, 2017, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on both decisions scheduled for June 21, 2017. On June 21, 2017, ALJ Frank conducted a consolidated hearing, and on June 22, 2017, issued Hearing Decision 17-UI-86373, affirming decision # 62142, and Hearing Decision 17-UI-86381, affirming decision # 61452. On June 28, 2017, claimant filed applications for review of Hearing Decisions 17-UI-86373 and 17-UI-86381 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-86373 and 17-UI-86381. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0780 and 2017-EAB-0781, respectively). EAB considered the entire hearing record in reaching these decisions.

FINDINGS OF FACT: (1) Allied Photo (Allied) and Dermac Manufacturing, Inc. (Dermac) each employed claimant part-time immediately prior to the period at issue in these consolidated proceedings.

(2) On January 11, 2016, claimant filed an initial claim for unemployment insurance benefits (BYE 52-16). When restarting her claim on December 30, 2016 for week 52-16, claimant reported to the Department that she had last worked for Allied on December 13, 2016 and had last worked for Dermac on December 19, 2016. She reported that she was returning to work for each on January 23, 2017. Finally, claimant checked a box certifying that she was on temporary layoff with her employers and was returning to work within 28 days of her layoff date. She did not report that any work searches during 52-16. Based on claimant's representations, the Department paid claimant benefits for week 52-16.

(3) On January 3, 2017, claimant filed a second initial claim for unemployment insurance benefits (BYE 52-17). When filing that initial claim, claimant reported to the Department that she last worked for Allied part-time on December 13, 2016 and last worked for Dermac on December 19, 2016. Claimant also that she expected to return to work for each part-time employer on January 23, 2017. When filing each of her weekly claims for weeks 01-17 through 03-17, claimant checked a box certifying that she was on temporary layoff with her employers and was returning to work within 28 days of her layoff date. She did not report that any work searches during any of those weeks. Based on claimant's representations, the Department gave claimant waiting week credit for week 01-17 and paid claimant benefits for weeks 02-17 and 03-17.

(4) On February 15, 2017, the Department sent claimant a letter requesting additional information about whether the employer gave her a return to work date for any of the periods at issue and any work searches she may have engaged in during any week at issue. On February 21, 2017, claimant responded in writing that each time she was laid off, the employer told her that she would return to work on January 23, 2017. Exhibit 1. Claimant did not describe any work search activities that she had engaged in other than maintaining contact with her employers and participating in the Department's welcome process on January 19, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant did not actively seek work during weeks including December 25 through December 31, 2016 and January 1 through January 21, 2017 (weeks 52-16 and 01-17 through 03-17) and 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.* 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)(February 23, 2014).

The Department retroactively denied benefits for the weeks at issue after concluding claimant did not actively seek work during the weeks at issue. Where, as here, the Department initially gives waiting week credit or pays a claimant benefits for weeks claimed, the Department has the burden to establish by a preponderance of evidence that the claimant is not entitled to those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). The Department met its burden.

It is undisputed that when claimant filed each of her weekly claims, she certified to the Department that she was on "temporary layoff" and had been given a date to return to full-time work within 28 days of her layoff dates. However, in her response to the Department on February 21, 2017 and at hearing, claimant clarified that her return to work date for both employer's was January 23, 2017. Audio Record ~ 17:45 to 19:00. For purposes of determining whether or not a claimant was required to seek work during her layoffs, claimant's reported return to work date was not within 28 days of either layoff date.

Therefore, claimant did not qualify for the modified work search requirements permitted for an individual on a temporary layoff under OAR 471-030-0036(5)(b)(A). Accordingly, to be eligible for benefits, she was required to seek work by performing at least five work-seeking activities per week, with at least two of those work seeking activities being direct contact with an employer which might hire her, during each of the weeks at issue in these cases. Claimant did not dispute that she did not engage in more than two work seeking activities during any week at issue.

Because, on this record, claimant failed to engage in the required number and nature of work search activities during the weeks at issue, the Department established that claimant did not actively seek work in accordance with OAR 471-030-0036(5)(a) and, therefore, is ineligible for benefits for the weeks including December 25 through December 31, 2016 and January 1 through January 21, 2017 (weeks 52-16 and 01-17 through 03-17).

DECISION: Hearing Decisions 17-UI-86373 and 17-UI-86381 are affirmed.

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

DATE of Service: July 31, 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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