

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1012

Reversed
Eligible

PROCEDURAL HISTORY: On April 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively work from December 25, 2016 through January 28, 2017 (decision # 143756). Claimant filed a timely request for hearing. On August 1, 2017, ALJ Shoemake conducted a hearing, and on August 14, 2017 issued Hearing Decision 17-UI-90292, affirming the Department's decision. On August 22, 2017, claimant filed a timely application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On December 27, 2016, claimant filed an initial claim for benefits. Claimant claimed benefits for the weeks from December 25, 2016 through January 28, 2017 (weeks 52-16 through 04-17), the weeks at issue. The Department paid claimant benefits for those weeks.

(2) On Friday December 23, 2016, claimant's regular employer notified him that he was being temporarily laid off, effective Monday, December 26, 2016, and that he would return to full time work on Monday, January 23, 2017.

(3) During weeks 52-16 through 03-17, claimant remained in contact with and was capable of accepting and reporting for any suitable work with his regular employer.

(4) On January 23, 2017, claimant's regular employer notified claimant that his temporary layoff was being extended indefinitely.

(5) During week 04-17, claimant remained in contact with and was capable of accepting and reporting for any suitable work with his regular employer. He also applied for work with two other employers, reviewed job postings in a newspaper, and reviewed job postings on at least one job placement web site.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant actively sought work during the weeks at issue, and therefore is 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). Where, as here, the Department has paid a claimant benefits, 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).

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 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, for an individual who is on a temporary layoff for four weeks or less with the individual's regular employer, if the individual 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, such individual is actively seeking 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 temporary layoff occurred. OAR 471-030-0036(5)(b)(A). The individual no longer meets the requirements of this subsection if four calendar weeks have passed following the week in which the temporary layoff occurred, and the individual therefore must seek work consistent with OAR 471-030-0036(5)(a) in addition to the individual's regular employer. *Id.* 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).

In Hearing Decision 17-UI-90292, the ALJ found that, as of claimant's December 26, 2016 layoff date, his regular employer had told him that he would "be off work for a month," and "did not give claimant a specific date to return."¹ The ALJ further found that during weeks 52-16 through 03-17, claimant conducted no work seeking activities other than remaining in contact with and being capable of accepting and reporting for any suitable work with his regular employer.² Finally, the ALJ found that during week 04-17, claimant remained in contact with and was capable of accepting and reporting for any suitable work with his regular employer, applied for work with one other employer, reviewed job openings posted in a newspaper, and reviewed job openings on job placement web sites.³

¹ Hearing Decision 17-UI-90292 at 1.

² *Id.*

³ *Id.* at 1-2.

Based on those findings, the ALJ concluded that because claimant was not given a date to return to work from his temporary layoff, he was required to conduct at least five work seeking activities per week to be eligible for benefits, and not merely remain in contact with and be capable of accepting and reporting for any suitable work with his regular employer.⁴ The ALJ further concluded that claimant did not conduct five work seeking activities during any of the weeks at issue.⁵ The ALJ therefore ultimately concluded that claimant did not actively seek work during any of the weeks at issue, and is not eligible for benefits for those weeks.⁶

We first disagree with the ALJ's finding that, as of claimant's December 26, 2016 layoff date, his regular employer had told him that he would "be off work for a month," and "did not give claimant a specific date to return." At hearing, claimant testified that his regular employer had told him he would return to full time work on January 23, 2017. Audio Record at 22:00-23:05. His testimony was consistent with that of the Department representative, who testified claimant provided the same information when he filed his initial claim for benefits on December 27, 2016, and again on February 13, 2017. Audio Record at 10:50-11:00, 15:45-16:55. The record therefore shows that as of claimant's December 26, 2016 layoff date, he was given a return to work date of January 23, 2017, and therefore was on a temporary layoff of exactly four weeks. Thus, to be considered actively seeking work during weeks 52-16 through 03-17, claimant only was required to remain in contact with and be capable of accepting and reporting for any suitable work with his regular employer. It is undisputed that claimant did so. We therefore disagree with the ALJ and conclude that claimant actively sought work during weeks 52-16 through 03-17, and is eligible for benefits for those weeks.

On January 23, 2017, claimant's regular employer notified him that his temporary layoff was being extended indefinitely. Thus, as of week 04-17, claimant was no longer on a temporary layoff of four weeks or less, and did not have a date to return to work. We therefore agree with the ALJ that to be considered actively seeking work during week 04-17, claimant was 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. We also agree with the ALJ that during week 04-17, claimant remained in contact with and was capable of accepting and reporting for any suitable work with his regular employer, reviewed job openings posted in a newspaper, and reviewed job openings on at least one job placement web site, which amounted to three work seeking activities.

However, we disagree with the ALJ's finding that claimant applied for work with only one employer other than his regular employer. At hearing, claimant testified that he applied for work with two other employers during week 04-17, which is consistent with what he reported to the Department when claiming benefits for that week. Audio Record at 25:15-22:45. The Department did not assert, and the record does not show, that claimant's applications for work did not constitute two direct contacts with an employer who might have hired claimant, as required under OAR 471-030-0036(5)(a) and defined under OAR 471-030-0036(5)(a)(B). The Department therefore failed to establish that claimant did not conduct five work seeking activities during week 04-17, with at least two of those being direct contact with an

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.*

employer who might have hired him. We therefore disagree with the ALJ and conclude that claimant actively sought work during week 04-17, and is eligible for benefits for that week.

In sum, we disagree with the ALJ and conclude that claimant actively sought work during all the weeks at issue, and therefore is eligible for benefits for those weeks.

DECISION: Hearing Decision 17-UI-90292 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 14, 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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