

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1331

Affirmed
Ineligible
Overpayment Assessed

PROCEDURAL HISTORY: On September 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of August 13 through August 26, 2017 and assessing a \$183 overpayment (decision # 93629). Claimant filed a timely request for hearing. On October 25, 2017, ALJ Seideman conducted a hearing, and on October 27, 2017 issued Hearing Decision 17-UI-95558, concluding claimant did not actively seek work during the weeks of August 13 through August 26, 2017, but modifying the amount of the overpayment to \$177. On November 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Around September 2016, a dentist hired claimant to work as a dental assistant. Sometime around May 2017, the dentist's work slowed down and his patient flow became erratic. Claimant was called in to work only as needed.

(2) On May 25, 2017, claimant filed an initial claim for unemployment insurance benefits. Claimant's claim was determined valid with weekly benefit amount of \$183. When she filed this claim, claimant represented that she was on a temporary layoff from employment with the dentist. However, claimant did not stop working for the dentist after May 25, 2017. The dentist never provided claimant any anticipated date when she would return to full-time work. Claimant did not know when, if ever, she would begin working full-time.

(3) Claimant claimed benefits for the weeks of August 13 through August 26, 2017 (weeks 33-17 and 34-17), the weeks at issue. For week 33-17, claimant reported 4 hours of work and \$77 in earnings from the dentist and was paid \$177 in benefits. For week 34-17, claimant reported \$88 in earnings from the dentist and was not paid benefits.¹ For weeks 33-17 and 34-17, claimant did not report any work seeking activities to the Department.

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing

CONCLUSIONS: Claimant did not actively seek work during weeks 33-17 and 34-17. Claimant received \$177 in benefits to which she was not entitled and is liable to repay this amount or to have it deducted from any future benefits otherwise payable to her.

Actively Seeking Work. 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).

Claimant did not report performing five work seeking activities during each week she claimed benefits since she thought the temporary layoff exception to the general work seeking requirements was applicable to her “layoff,” or the reduction in work she experienced during the weeks at issue. However, a layoff is generally understood to mean a complete cessation of all work activity, and a temporary layoff would also connote a temporary period of complete cessation of all work. <https://www.merriam-webster.com/dictionary/layoff>. Since claimant continued to work for the employer during the weeks at issue, albeit at reduced hours, the temporary layoff exception would not apply to her situation. *See* Unemployment Benefits Manual, Ch. 300 §360 (rev 02/28/2016) (“Claimants who continue to work part time are not considered temporarily laid off. These individuals must . . . begin immediately seeking work with other employers [than the regular employer to be eligible for benefits.]”) In addition, the temporary layoff exception can apply by its terms only if a claimant was given a *date* on which he or she would return to *full time work*. Here, claimant was not given any such date. Without a “date,” the exception to the general work seeking requirements is inapplicable, and claimant was required to conduct five work seeking activities each week, of which two needed to be direct employer contacts, as a condition of being eligible to receive benefits. Claimant did not seek work during the weeks at issue beyond performing part time work for the dentist. Although each day claimant worked from the dentist would be considered a direct employer contact, since she worked only four hours for the dentist in week 33-17 and appeared to work only 4.5 hours in week 34-17², we infer that she did not work 5 days for the dentist during either week at issue. Therefore, claimant’s part time work during the weeks at issue did not likely total five work seeking activities for purposes of determining her eligibility for benefits. *See*

this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

² Based on claimant’s testimony that she worked four hours for the employer in week 33-17, and the Department’s records showing that she reported earnings of \$77 in that week, claimant’s hourly wage would appear to have been \$19.25. Since the Department’s records show that claimant reported earning \$88 for week 34-17, she would appear to have worked a little over 4.5 hours in that week. Since it does not appear likely that the employer would have had claimant work less than an hour on any day during the weeks at issue, it also seems highly unlikely that her work for the dentist would have occurred on five days and amounted to five work seeking activities.

OAR 471-030-0036(5)(e). As such, claimant did not satisfy the Department's work seeking requirements during the weeks at issue and is ineligible to receive benefits during those weeks.

Overpayment. ORS 657.310 provides that an individual who receives any benefits to which the individual is not entitled because the individual, regardless of the individual's knowledge or intent, made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, is liable to repay the amount of the benefits or to have the benefits deducted from any future benefits otherwise payable to the individual.

It is undisputed that claimant would not have been paid \$177 in benefits for week 33-17 absent having certified that she was on a temporary layoff and therefore exempt from the requirement of performing five work seeking activities. As discussed above, claimant's certification that she fell within the temporary layoff exception was false. Accordingly, even if claimant's certification was an innocent error, she is still liable to repay the \$177 in benefits she was paid but not eligible to receive, or to have \$177 deducted from any future benefits otherwise payable to her.

DECISION: Hearing Decision 17-UI-95558 is affirmed.

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

DATE of Service: December 20, 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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