

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0139

Affirmed
Ineligible

PROCEDURAL HISTORY: On October 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work during the weeks of October 8, 2017 through October 21, 2017 (decision # 90301). On December 7, 2017 filed an untimely request for hearing. On December 11, 2017, ALJ Kangas issued Hearing Decision 17-UI-98767, dismissing claimant's request for hearing as untimely subject to her right to renew the request by filing with the Office of Administrative Hearings (OAH) a completed copy of the Appellant Questionnaire included with the hearing decision within 14 days of the date the decision was mailed. On December 18, 2017, claimant filed the completed Appellant Questionnaire with OAH. On December 19, 2017, OAH issued a letter order cancelling Hearing Decision 17-UI-98767 and returning this matter to the docket for scheduling a hearing on the timeliness of claimant's request for hearing and, if appropriate, on the merits of decision # 90301. On January 23, 2018, ALJ Seideman conducted a hearing, and on January 29, 2018 issued Hearing Decision 18-UI-101900, allowing claimant's untimely request for hearing and affirming decision # 90301. On February 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings, analysis and conclusion with respect to allowing claimant's untimely request for hearing are **adopted**.

FINDINGS OF FACT: (1) On June 5, 2017, claimant filed an initial claim for benefits. Claimant's claim was valid with a weekly benefit amount of \$590.

(2) On September 28, 2017, claimant's regular employer laid him off. In addition to being an employee, claimant was also an owner of his employer. Claimant expected to return to full-time work when an architect had finished a contract. As of September 28, 2017, claimant thought he would return to work within three or four weeks, but the employer had not provided a specific date for that return to work.

(3) Sometime during the week of October 1, 2017, claimant learned that he probably would be able to return to work for his regular employer on October 23, 2017 since it was anticipated that the architect would complete the contract by that time.

(4) Also sometime approximately during the week of October 1, 2017, claimant restarted his unemployment insurance claim. When he restarted his claim, claimant represented to the Department that he had been temporarily laid off by this regular employer. When, as part of restarting his claim, claimant was asked to provide the date on which he would return to full-time employment, he did not supply a date.

(5) Claimant claimed benefits for the weeks of October 8, 2017 through October 21, 2017 (weeks 41-17 and 42-17). When claimant made his weekly claim reports, he did not list any work search activities since he thought he was on a temporary layoff.

(6) On October 23, 2017, claimant reported to the workplace. At that time, claimant was told that he was not going to return to full-time work until October 30, 2017.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the weeks of October 8, 2017 through October 21, 2017 and is not eligible to receive 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). An individual does not meet the requirements for being considered exempt from the usual work search activities under OAR 471-030-0036(5)(b)(A) if the individual was not given, as of the layoff date, a date when he would return to full time work or work for which the remuneration paid or payable equals or exceeds the individual’s weekly benefit amount. OAR 471-030-0036(5)(b)(B).

Claimant candidly testified that as of the date of his layoff, his regular employer “did not give me exactly a date” when he would return to work, and he thought at that time that he would probably would return to work within three or four weeks of the layoff, which appeared to be the time by which he expected the architect to have finished the contract. Audio at ~23:16, ~26:32. In common language usage, to be given a “date” means to be given “a numbered date in a month, often given with a combination of the name of the day, month, and of the year.” <https://dictionary.cambridge.org/dictionary/english/date>; *see also* <https://en.oxforddictionaries.com/definition/date> (date means the day of the month or year as specified by a number). Based on this definition, while claimant might have expected to return to full-time work within three or four weeks of the date of his layoff, the employer did not give him a *date when he would return to full time work*, i.e., the day of the month when he would

resume working. As such, claimant did not meet the conditions of being exempt from the requirement of performing five work seeking activities during any week for which he claimed benefits due to his layoff. OAR 471-030-0036(5) does not give the ALJ, EAB or any other adjudicator the discretion to conclude that an individual who was not, at the time of the layoff, given a date when he or she would return to work, has substantially complied with OAR 471-030-0036(5)(b)(A) and thereby was exempted from the requirement of performing five work seeking activities each week.

Because claimant did not perform five work seeking activities during weeks 41-17 and 42-17 and no exemption from the requirements of OAR 471-030-0036(5)(a) is applicable to his circumstances, claimant did not actively seek work during the weeks at issue and is not eligible to receive benefits for them.

DECISION: Hearing Decision 18-UI-101900 is affirmed.

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

DATE of Service: March 12, 2018

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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