

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0398

Affirmed
Ineligible

PROCEDURAL HISTORY: On February 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work during the week of January 28 through February 3, 2018 (decision # 55822). Claimant filed a timely request for hearing. On March 30, 2018, ALJ Wymer conducted a hearing and issued Order No. 18-UI-106368, affirming the Department's decision. On April 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant claimed benefits for the week of January 28 through February 3, 2018 (week 05-18), the week at issue. The Department initially paid claimant benefits for that week.

(2) Claimant's regular employer was closed on weekends, and claimant therefore worked only on weekdays. During the week at issue, the only day claimant worked for his regular employer was Friday, February 2, 2018. On February 2nd, claimant was informed that he was being temporarily laid off starting Monday, February 5, 2018. As of February 5th, claimant had not been given a date to return to work.

(3) Claimant assumed he would return to work within four weeks. Thus, when filing an additional claim for benefits on February 5th, claimant reported to the Department that he was on temporary layoff with a return to work date of March 5, 2018.

(4) During the week at issue, claimant remained in contact with and was capable of accepting and reporting for any suitable work with his regular employer. He did not search for work with other employers.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during the week at issue, and therefore is not eligible for benefits for that week.

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 initially pays a claimant benefits, the Department has the burden to establish that claimant was not eligible for 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.* For an individual filing a continued claim for the first week of an additional claim 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)(d)(A).

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). The individual does not meet the requirements of this subsection if the individual has not, as of the layoff date, been given a date to return to work. OAR 471-030-0036(5)(b)(B).

In Order No. 18-UI-106368, the ALJ found that claimant was laid off from work on February 2, 2018 and, when filing his additional claim for benefits on February 5, 2018, informed the Department that he was on a temporary layoff and was scheduled to return to work on March 5, 2018.¹ The ALJ further found that during the week at issue, claimant remained on contact with his regular employer, but did not conduct any other work seeking activities.² Based on those findings the ALJ concluded that claimant's temporary layoff exceeded four weeks, and that, to be eligible for benefits for the week at issue, he was required to conduct at least five work seeking activities.³ The ALJ further concluded that because claimant did not conduct five working seeking activities, he did not actively seek work during the week at issue, and is not eligible for benefits for that week.⁴

We would agree with the ALJ's analysis if the record showed that claimant's temporary layoff started on February 2, 2018 and, as of that date, claimant had been given a date to return to work of March 5, 2018. However, although claimant assumed he would return to work work by March 5th and therefore informed the Department that he was scheduled to return to work on that date, he testified that he was not given a date to return to work. Audio Record at 27:45-28:30, 31:00-31:15. In addition, the record shows that although the employer informed claimant on Friday, February 2nd that he was being laid off from work, the layoff did not begin until the following Monday, February 5th. Audio Record at 24:15-24:45, 29:15-29:25. Claimant therefore was not yet on temporary layoff from with his regular employer during the week at issue, which ended on February 3rd. Thus, although we disagree with the ALJ's

¹ Order No. 18-UI-106368 at 2.

² *Id.*

³ *Id.* at 3.

⁴ *Id.*

analysis, we ultimately agree with his conclusion that, to be considered actively seeking work during the week at issue, claimant was required to conduct at least five work seeking activities.

During the week at issue, claimant conducted only two work seeking activities, remaining in contact with and being capable of accepting and reporting for any suitable work with his regular employer, and working one day for his regular employer. Because he did not conduct at least five work seeking activities, he did not actively seek work during the week at issue, and is not eligible for benefits for that week.

DECISION: Order No. 18-UI-106368 is affirmed.

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

DATE of Service: May 18, 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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