

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0861

Order No. 19-UI-135889 Affirmed – Disqualification
Order Nos. 19-UI-135890 and 19-UI-135891 Affirmed – Ineligible

PROCEDURAL HISTORY: On August 7, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause and was disqualified from benefits effective June 16, 2019 (decision # 80500). On August 7, 2019, the Department also served notice of an administrative decision concluding claimant was ineligible for benefits for the weeks from July 7, 2019 through August 3, 2019 because she was not available for work during those weeks (decision # 74139). On August 7, 2019, the Department also served notice of an administrative decision concluding claimant was ineligible for benefits for the weeks from July 7, 2019 through August 3, 2019 because she did not actively seek work during those weeks (decision # 75418). Claimant filed a timely request for hearing on all three administrative decisions.

On August 28, 2019, ALJ Scott conducted a hearing on decision # 80500, and on August 30, 2019, issued Order No. 19-UI-135889, affirming the Department's decision. On August 28, 2019, ALJ Scott conducted a separate hearing on decisions # 74139 and # 75418. On August 30, 2019, ALJ Scott issued Order No. 19-UI-135891 modifying decision # 74139 by concluding claimant was available for work during the week of July 7, 2019 through July 13, 2019 (week 28-19), but was not available for work during the weeks from July 14, 2019 through August 24, 2019 (weeks 29-19 through 34-19). On August 30, 2019, ALJ Scott also issued Order No. 19-UI-135890, modifying decision # 75418 by concluding claimant did not actively seek work during the weeks from July 7 through July 27, 2019 (weeks 28-19 through 30-19), but did actively seek work during the weeks from August 4 through August 24, 2019 (weeks 32-19 through 34-19).¹ On September 4, 2019, claimant filed a timely application for review of each order with the Employment Appeals Board (EAB).

With each application for review, claimant filed a written argument. However, claimant's written arguments contained information that was not part of the hearing record, and did not show that factors or

¹ Order Nos. 19-UI-135890 and 19-UI-135891 also found, based on the Department's admission, that the week including July 28, 2019 through August 3, 2019 (week 31-19), was not at issue because claimant had been denied benefits for that week due to excess earnings. Order Nos. 19-UI-135890 and 19-UI-135891 at 1; Transcript, Case Nos. 2019-UI-98875 and 2019-UI-98877 at 5.

circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing, and claimant's written arguments only to the extent they were based thereon, when reaching these decisions.

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-135889, 19-UI-135891 and 19-UI-135890. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2019-EAB-0859, 2019-EAB-0861 and 2019-EAB-0860, respectively).

EAB reviewed the entire hearing record regarding each of these proceedings. On *de novo* review and pursuant to ORS 657.275(2), Order Nos. 19-UI-135889 and 19-UI-135891 are **adopted**. The remainder of this decision concerns claimant's work search and Order No. 19-UI-135890.

FINDINGS OF FACT: (1) PeaceHealth employed claimant as a part-time, on-call medical assistant from June 21, 2019 through the weeks at issue (ending on August 24, 2019).

(2) On July 8, 2019, claimant contacted the Department by telephone without identifying herself and inquired of an unidentified employee about claimant's right to apply for unemployment insurance benefits if she was a part-time employee with PeaceHealth. Claimant understood from her conversation with the Department employee that she spoke with that she had the right to apply, and that if she worked less than 20 hours in a week, her only work search requirement to be eligible to receive benefits was to remain in contact with her employer. Later on July 8, 2019, claimant filed an initial claim for unemployment insurance benefits online.

(3) Claimant claimed, but was not given, waiting week credit or paid benefits for each of the weeks from July 7 through July 27, and August 4 through August 24, 2019 (weeks 28-19 through 30-19, and 32-19 through 34-19), the weeks at issue.

(4) When claimant claimed benefits online for each of the weeks from 28-19 through 30-19, she indicated that she was on a "temporary layoff" from her employer, and that her only work-seeking activity was that she had remained in contact with her employer to determine the availability of work with that employer. Transcript, Case Nos. 2019-UI-98875 and 2019-UI-98877, at 6-7. She also reported part-time hours and earnings that were less than her weekly benefit amount during each of those weeks.

(5) On July 31, 2019 (during week 31-19), an adjudicator contacted claimant about her claim. Claimant reported to the adjudicator that she thought she was in a closed union and had only to seek work with her employer to be eligible for benefits. The adjudicator clarified to claimant that her union was not a closed union and that to be eligible for benefits she was required to perform at least five work-seeking activities each week with at least two of those being direct contacts with employers to seek work.

(6) When claimant claimed benefits online for each of the week including 32-19 through 34-19, she conducted five work-seeking activities each week, including at least two direct employer contacts.

CONCLUSIONS AND REASONS: Claimant did not actively seek work during weeks 28-19 through 30-19. Claimant did actively seek work during weeks 32-19 through 34-19.

To be eligible to receive benefits, unemployed individuals must 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)(April 1, 2018). 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 temporarily unemployed is considered to be actively seeking work by remaining in contact with and capable of accepting and reporting for suitable work with their regular employer if: (1) there is a reasonable expectation that they will be returning to full time work, or work that equals or exceeds their weekly benefit amount, for their regular employer; (2) the individual is temporarily unemployed due to a lack of work; and (3) the individual is temporarily unemployed for no greater than four weeks between the date the individual last performed services for the employer and the week the individual returns to work. OAR 471-030-0036(5)(b). Where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principal, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The first issue is whether, during weeks 28-19 through 30-19, claimant was exempt from the work search requirements because she was "temporarily unemployed." Since claimant worked for the employer, on a part-time, on-call basis from the start of her employment through all the weeks at issue, her situation was not temporary, and the exemption from the work search requirements does apply to her circumstances.² Therefore, she 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 her to be eligible for unemployment insurance benefits.

Claimant's only work-seeking activities during weeks 28-19 through 30-19 were contacts with her regular employer. She did not conduct five work-seeking activities, did not "actively seek work," and is not eligible to receive unemployment insurance benefits for any of those weeks. Conversely, claimant did conduct at least five work-seeking activities per week, with at least two of those being direct contact with an employer who might hire her during each of weeks 32-19 through 34-19. Consequently, claimant actively sought work during weeks 32-19 through 34-19.

At hearing, claimant asserted that she did not conduct the required number of work-seeking activities during weeks 28-19 through 30-19 because a Department employee lead her to believe that given her part-time employment with PeaceHealth, she only needed to remain in contact with her regular employer to be eligible for benefits. Transcript, Case Nos. 2019-UI-98875 and 2019-UI-98877, at 18-19. Essentially, claimant asserted that for that reason, the Department should be estopped from denying her benefits for any of those weeks she did not conduct an adequate search for work.

The doctrine of equitable estoppel "requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." *Keppinger v. Hanson*

² See *accord* 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.")

Crushing, Inc., 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, *rev den*, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

Estoppel does not apply in this case for at least two reasons. First, it is more likely than not that any representation by a Department employee in this case was not “made with the knowledge of the facts.” Claimant anonymously described some of the circumstances of her employment to a Department employee on July 8, 2019, just prior to filing her initial claim for benefits online. Given that claimant’s complete and accurate description of her circumstances to a different employee on July 31, 2019 yielded different advice, it is unlikely that the first employee in question had “knowledge of the facts” when the employee reportedly told claimant that she only needed to maintain contact with her employer in seeking work. Second, it is also more likely than not that claimant’s reliance on the information from the first employee was not reasonable. It is not reasonable to rely on information provided by an employee in response to questions asked anonymously, “off the cuff,” without providing specific information concerning the employee’s circumstances. Transcript, Case Nos. 2019-UI-98875 and 2019-UI-98877, at 30. Accordingly, the Department is not estopped from denying claimant benefits for any of the weeks she did not conduct an adequate search for work.

Claimant did not actively seek work during weeks 28-19 through 30-19 and is ineligible for benefits for those weeks. Claimant did actively seek work during weeks 32-19 through 34-19 and is eligible for benefits for those weeks if otherwise qualified.

DECISION: Order Nos. 19-UI-135889, 19-UI-135891 and 19-UI-135890 are affirmed.

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

DATE of Service: October 11, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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