

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1947

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not fail without good cause to accept suitable work when offered (decision # 12155). The employer filed a timely request for hearing. On December 18, 2014 and December 19, 2014, ALJ Triana conducted a hearing, and on December 19, 2014 issued Hearing Decision 14-UI-30736, modifying the Department's decision. On December 24, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lane Education Service District employed claimant as a program associate in the Title VII Indian Education Program until her position was eliminated on June 26, 2014.

(2) On April 23, 2014, the employer's assistant superintendent delivered a written notice to claimant stating that she was laid off as a program associate effective June 26, 2014 due to a loss of funding for the Indian Education Program and a concomitant reduction in force. This notice included a copy of the employer's lay off policy, which stated the rights of all laid off employees. The notice also stated that the employer would place claimant in a vacant instructional assistant position in the special education life skills program during school year 2014-2015. The notice further set out the expected minimum hours for the instructional assistant position, the expected rate of pay and stated that claimant's starting date as an instructional assistant would be August 24, 2014 or August 25, 2014, depending on the school that the employer selected for claimant's assignment.

(3) After April 26, 2014, claimant developed concerns about the instructional assistant position and whether she wanted it during school year 2014-2015. Sometime after April 26, 2014, claimant contacted the assistant superintendent to determine if she thought the employer would have any other positions available for school year 2014-2015. The assistant superintendent told claimant that the only position available for her was as an instructional assistant in the life skills program. Transcript at 56, 57. Claimant never told the assistant superintendent that she declined to work as an instructional assistant.

(4) In approximately July 2014, claimant had ovarian surgery. In late July 2014, claimant left Oregon to convalesce from that surgery with her family in Rhode Island. Claimant intended to return to Oregon in late August 2014, in time to start the job as an instructional assistant in school year 2014-2015.

(5) On August 7, 2014, the employer's special education director sent claimant a "back to school" letter through the regular mail notifying her that, as a member of the special education program staff, she was expected to attend a training session on August 18, 2014. Transcript at 14. The letter also informed claimant that the beginning date for her job as an instructional assistant was August 25, 2014. Claimant did not receive the letter and did not attend the training.

(6) On August 18, 2014 and August 19, 2014, the assistant superintendent tried to reach claimant by phone to determine why she had not attended the August 18, 2014 training session. On August 20, 2014, the assistant superintendent sent an email to claimant asking her why she had not attended the training and stating that her failure to do so could be considered "job abandonment." Transcript 54. Claimant promptly sent an email to the assistant superintendent's email stating that she had not received the August 7, 2014 letter, had not known about the scheduled training and that she was going to return to Oregon from Rhode Island on August 27, 2014. In that email, apparently in reference to the assistant superintendent's comment about abandoning her job, claimant stated that she intended to return to work for school year 2014-2015. Transcript at 15, 28. Claimant also asked the assistant superintendent to send her a job description and more specific information about the instructional assistant job. The assistant superintendent responded as requested and informed claimant that she was expected to attend an all-staff in-service training on August 28, 2014. Transcript at 15, 28.

(7) On August 28, 2014, claimant attended the in-service training. The employer paid claimant for the hours she spent at the training. After the training, claimant spoke to one of the employer's human resources representatives about the instructional assistant job. The representative gave claimant more specific information about her placement, including the school that the employer had selected for claimant's assignment. Claimant became concerned about the physical requirements of the instructional assistant position because of her recent surgery and the fact she was assigned to a high school, where the physical size of the students might be beyond her capacity to provide direct, hands-on physical assistance and care. Transcript at 30, 32. However, claimant did not tell the human resources representative that she declined the position as an instructional assistant for any reason, including its physical requirements. The representative also told claimant that she needed to take an essential functions test (EFT) to confirm that she had the physical strength to perform the duties of an instructional assistant in the life skills program. That day, the representative scheduled claimant's EFT for September 3, 2014.

(8) On September 3, 2014, claimant took the EFT that the employer had arranged. Claimant passed the EFT. The employer paid claimant for the hours that she spent taking the EFT.

(9) Between September 3, 2014 and September 23, 2014, claimant consulted with her union representative about the position as an instructional assistant. On September 23, 2014, the union representative informed the employer that claimant was unwilling to work as an instructional assistant.

CONCLUSIONS AND REASONS: Claimant did not without good cause fail to accept suitable work when offered.

ORS 657.176(1) states that an authorized representative of the Department shall promptly exam each claim to determine whether or not an individual is subject to a disqualification from benefits. ORS 657.176(2)(e) states that one of the grounds on which an individual is disqualified from benefits is failing without good cause to accept suitable work when offered. The Department's administrative decision focused exclusively on this single ground in determining that claimant was not disqualified from benefits. Record Document, November 4, 2014 Administrative Decision # 12155. The notices of hearing that the Department issued framed the single hearing issue as whether "claimant failed without good cause to accept an offer of suitable work when offered." Record Documents, December 1, 2014 and December 18, 2014 Notices of Hearing at 1. Although the ALJ might have expanded the scope of the issues at hearing to include grounds for claimant's disqualification in addition to that identified in the administrative decision and the notices of hearing, she did not, and no party requested that she do so. See OAR 471-040-0025(8) (August 1, 2004). Hearing Decision 14-UI-30736 at 3 n. 1. Absent the ALJ's direct consideration of other grounds for claimant's disqualification from benefits, EAB will limit its review to the merits of the ALJ's decision. See ORS 657.275.

Although we agree with the ALJ's conclusion that claimant is not disqualified from benefits, we disagree with the reasoning underlying that determination. The ALJ determined that claimant could not have refused the employer's job offer as a special education instructional assistant because claimant and the employer were in a work relationship at the time the alleged offer was made. Hearing Decision 14-UI-30736 at 3. However, the plain language of the "lay-off" notification letter, its enclosed materials and the repeated hearing references of both claimant and the employer's witness to claimant's "lay-off," "termination" or the "elimination" of claimant's existing position due to lack of funding as of June 26, 2014, show that the employer involuntarily discharged her when the program associate position ended. Transcript at 13, 14, 15, 17, 23, 46, 59. Because the work relationship as a program associate was, or was going to be, severed when the employer presented to claimant the possibility of working as an instructional assistant, it is properly considered an offer of new work.

From the testimony of both claimant and the employer's witness, it is apparent that, while claimant might never have clearly stated that she intended to accept the work as an instructional assistant, both parties behaved between August 20, 2014 and September 22, 2014 in a manner that is consistent only with a reestablished work relationship. For example, although she expressed some reservations about the new position, claimant never told the employer that she was declining the new position. The August 7, 2014 letter from the special education director to claimant about special education staff training was based on the assumption that claimant had accepted the position as an instructional assistant and, by doing so, was already a member of the special education staff. On August 20, 2014, the employer's assistant superintendent accused claimant of "job abandonment" when she did not attend the August 18, 2014 training, which plainly suggested that she assumed claimant had agreed to accept the new work, and claimant's response to the assistant superintendent, that she wanted to return to work, also suggested that, by that time, claimant considered herself re-hired by the employer. On August 20, 2014, the assistant superintendent also informed claimant of the requirement that she along with all other special education staff attend the August 28, 2014 in-service training, which further suggested that, at least from the employer's perspective, claimant was at that time a member of the special education staff as an instructional assistant. Claimant attended the August 28, 2014 in-service training as well as taking the

EFT on September 3, 2014, both of which objectively manifest that, from claimant's perspective, she assumed that she was working as an instructional assistant and was required to perform the first assigned duties of that job. The employer paid claimant for her participation in both and claimant apparently accepted that compensation, behaviors that are most consistent with an understanding that claimant was performing work for the employer as an instructional assistant when she attended those events. *See* OAR 471-030-0038(6). The undisputed and unbroken behaviors of both claimant and the employer's staff objectively manifest that claimant unequivocally accepted the employer's April 23, 2014 offer of new work as an instructional assistant sometime on or before September 3, 2014, the date that claimant participated in the EFT. Because the preponderance of the evidence shows that claimant accepted the employer's offer of new work, claimant did not fail without good cause to accept suitable work when offered.

It is not disputed that, through her union representative, claimant communicated to the employer on September 23, 2014 that she was unwilling to continue working as an instructional assistant. At that time, it appears that the work relationship was severed. *See* OAR 471-030-0038(2) (August 3, 2011). Whether that separation disqualifies claimant from benefits is an issue that we do not reach because it goes beyond reviewing the merits of Hearing Decision 14-UI-30736.

Claimant did not fail without good cause to accept an offer of suitable work. On that limited ground, only, claimant is not disqualified from benefits.

DECISION: Hearing Decision 14-UI-30736 is affirmed.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: February 17, 2015

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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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