

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0250

Affirmed
Disqualified ~ Ineligible

PROCEDURAL HISTORY: On December 19, 2016, the Oregon Employment Department (the Department) served fifteen notices of fifteen administrative decisions, fourteen concluding that claimant was disqualified from benefits because she refused fourteen offers of suitable work without good cause (decisions # 72440, 73431, 74513, 75435, 80132, 81652, 82054, 82542, 82913, 83248, 83633, 84057, 84403, and 84808), and one concluding that claimant was ineligible for benefits from October 23, 2016 to November 5, 2016 because she was not available for work (decision # 74037). On February 22, 2017, claimant filed a timely request for hearing on all fifteen decisions. On February 1, 2017, ALJ Seideman conducted a consolidated hearing, and on February 2, 2017 issued fifteen Hearing Decisions: 17-UI-75996, affirming decision # 84808, 17-UI-75997, affirming decision # 84403, 17-UI-75999, affirming decision # 84057, 17-UI-76000, affirming decision # 83633, 17-UI-76001, affirming decision # 74037, 17-UI-76002, affirming decision # 83248, 17-UI-76003, affirming decision # 82913, 17-UI-76004, affirming decision # 82542, 17-UI-76005, affirming decision # 73431, 17-UI-76006, affirming decision # 82054, 17-UI-76007, affirming decision # 80132, 17-UI-76008, affirming decision # 81652, 17-UI-76009, affirming decision # 74513, 17-UI-76010, affirming decision # 75435, and 17-UI-76011 affirming decision # 72440. On February 22, 2017, claimant filed an application for review of all fifteen hearing decisions with the Employment Appeals Board (EAB).

On March 3, 2017, ALJ Seideman issued Amended Hearing Decision 17-UI-78130, purporting to modify Hearing Decision 17-UI-76002. However, that the “finality” date of Hearing Decision 17-UI-76002 was on February 22, 2017. Because ALJs do not have continuous jurisdiction to revisit or amend their decisions, the ALJ’s purported amendment was issued without statutory authority. In addition, claimant filed a timely application for review of Hearing Decision 17-UI-76002 on February 22, 2017, thus transferring jurisdiction over review of the case to the Employment Appeals Board and relieving the ALJ of jurisdiction. For both of those reasons, considered together or independently, Amended Hearing Decision 17-UI-78130 was issued without authority and had no effect on the parties’ rights or interests. We note that even if the ALJ had had the authority to issue the amended decision in this case we would still review the amended decision based upon claimant’s February 22, 2017 application for review because the amended decision did not substantively alter or resolve the matter with respect to

claimant's disqualification from receiving benefits, and did not end or abate claimant's expression of a present intent to appeal the outcome of that matter to EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-75996, 17-UI-75997, 17-UI-75999, 17-UI-76000, 17-UI-76001, 17-UI-76002, 17-UI-76003, 17-UI-76004, 17-UI-76005, 17-UI-76006, 17-UI-76007, 17-UI-76008, 17-UI-76009, 17-UI-76010, and 17-UI-76011. For case-tracking purposes, this decision is being issued in decaquintuplicate (EAB Decisions 2017-EAB-0245, 2017-EAB-0246, 2017-EAB-0247, 2017-EAB-0248, 2017-EAB-0249, 2017-EAB-0250, 2017-EAB-0251, 2017-EAB-0252, 2017-EAB-0253, 2017-EAB-0254, 2017-EAB-0255, 2017-EAB-0256, 2017-EAB-0257, 2017-EAB-0258, and 2017-EAB-0259).

Claimant's argument contained information that was not part of the hearing record. In order for EAB to be able to consider that information, claimant must first prove that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). Claimant did not show any reason she was prevented from presenting the information, only that she had not gathered it and did not present it. We therefore considered only information received into evidence at the hearing when reaching this decision. Even if we had considered claimant's new information, the outcome of this decision would remain the same for the reasons explained herein.

FINDINGS OF FACT: (1) On August 16, 2016, claimant filed an initial claim for unemployment insurance benefits. Her labor market area included Beaverton, Hillsboro, Forest Grove and West Portland. She sought work as a substitute teacher, work that was performed weekdays between approximately 7:30 a.m. and 4:00 p.m.

(2) At all relevant times, claimant worked for EMS Subdesk, LLC, an agency that staffed schools in claimant's labor market with substitute workers. Claimant had the appropriate licensure to work in all of the assignments the employer offered to her. All of the assignments the employer offered to claimant paid at least \$21.93 per hour, the median rate for similar work in claimant's labor market, except a 30-minute assignment would have paid at a rate of \$175.45 per hour.

(3) On September 25, 2016, the employer offered claimant two half-day assignments as a substitute at Miller Education Center. The main reason claimant declined the assignment was that it was only for a half-day assignment and claimant wanted to wait and see if she could get a full-day assignment instead. Claimant was also unfamiliar with the school. She did not want to work at middle schools or in special education class assignments because she was in her third trimester of pregnancy. She thought special education students could sometimes be aggressive, and she "got nervous" when she "was walking through the hallway" with middle school students. Transcript at 67.

(4) On September 27, 2016, the employer offered claimant a half-day assignment on September 29, 2016 at Liberty High School in a life skills class. Claimant declined the assignment because she wanted to wait and see if she could get a full-day assignment and because life skills classes were for special education students, which she wanted to avoid while pregnant.

(5) On September 28, 2016, the employer offered claimant a half-day assignment on September 28, 2016 at Pointer Middle School in a life skills class. Claimant declined the assignment because she

wanted to wait and see if she could get a full-day assignment, and because she did not want to work in a middle school or with special education students while pregnant.

(6) On September 28, 2016, the employer offered claimant a half-day assignment on September 29, 2016 at Hillsboro High School teaching Spanish. Claimant declined the offer because she wanted to wait and see if she could get a full-day assignment.

(7) On September 28, 2016, the employer offered claimant a half-day assignment at Pointer Middle School on September 29, 2016. Claimant declined the offer because she wanted to wait and see if she could get a full-day assignment.

(8) On September 29, 2016, the employer offered claimant a half-day assignment at Liberty High School in a life skills class on September 29, 2016. Claimant declined the offer because it was a half-day class and she did not want to work with special education students while pregnant.

(9) On September 29, 2016, the employer offered claimant a half-day assignment at Evergreen Middle School in the resource center on September 29, 2017. Claimant declined the offer because it was a half-day class and she did not want to work with special education students while pregnant.

(10) On September 30, 2016, the employer offered claimant a half-day assignment at Century High School in the resource center on September 30, 2016. Claimant declined the offer because it was a half-day class and she did not want to work with special education students while pregnant.

(11) On October 5, 2016, the employer offered claimant a half-day assignment at Hillsboro High School teaching math on October 6, 2016. Claimant declined it, likely because it was only a half-day assignment. The employer subsequently offered claimant another half-day assignment on October 6, 2016 at Hillsboro High School in the life skills classroom. Claimant declined it because it was a half-day class and she did not want to work with special education students while pregnant. The employer then called claimant with a third offer of a full-day assignment at Liberty High School, and claimant accepted it.

(12) On October 10, 2016, the employer offered claimant a half-day assignment at Century High School in the resource room on October 10, 2016. Claimant declined the offer because it was a half-day class and she did not want to work with special education students while pregnant. Also on October 10, 2016, the employer offered claimant a full-day assignment at Liberty High School in a math class on October 10, 2016. Claimant declined the assignment for reasons unknown to her at the time of the hearing. Fourteen minutes later, claimant received an offer of a different full-day assignment and accepted it.

(13) On October 11, 2016, the employer offered claimant a full-day assignment at Liberty High School in a social studies class on October 11, 2016. Claimant refused the assignment for reasons unknown to her at the time of the hearing. Also on October 11, 2016, the employer offered claimant a 30-minute assignment at Century High School in a math classroom on October 11, 2016. Claimant declined it on the assumption that the 30-minute assignment was not legitimate; she thought if she accepted the offer someone would then call her to cancel the assignment.

(14) Claimant filed weekly claims for benefits for the weeks of October 23, 2016 to November 5, 2016 (weeks 43-16 and 44-16). On October 27, 2016, claimant notified the employer that she would not be available to accept substitute assignments that day. Claimant's daughter's preschool was having a classroom party that claimant wanted to attend. On October 31, 2016, claimant again notified the employer that she would not be available to accept substitute assignments that day. Claimant might have wanted that day off because it was Halloween and she was taking her child trick-or-treating, or because her mother was not available to babysit for her, or because she wanted to take the day off.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant refused fourteen offers of suitable work without good cause, and was not available for work from October 23, 2016 to November 5, 2016.

Job refusals. ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if claimant failed without good cause to accept suitable work when offered. Generally speaking, work is considered "suitable" if it is consistent with an individual's physical fitness, prior training, experience and prior earnings, does not pose too significant a risk to the individual's health, safety or morals, and in consideration of the length of the individual's unemployment, prospects for securing local work in his or her customary occupation, and the distance of the available work from the individual's residence. ORS 657.195. OAR 471-030-0038(3)(a) (August 3, 2011) defines good cause as "such that a reasonable and prudent person, exercising ordinary common sense, would refuse to . . . accept suitable work when offered by the employer", with consideration given to whether the work was "suitable."

There is no factual dispute that the employer extended fourteen offers of work to claimant, and that claimant refused each of them. Therefore, unless the offers were for unsuitable work or claimant had good cause for declining the offers, claimant must be disqualified from benefits under ORS 657.176(2)(e) until she has earned four times her weekly benefit amount from work in subject employment.

One reason claimant gave for declining offers of work was that the jobs were at middle schools or involved working with special education students. Claimant was in her third trimester of pregnancy, felt that special education students had a tendency toward aggression and felt "nervous" in hallways with middle school aged students, and did not want to work in those environments. During the hearing, though, claimant did not provide any specific health concerns or identify with any specificity why those work environments posed such a degree of risk to her health or safety that it made working in them unsuitable. Nor did she assert or imply at any point during the hearing proceedings that she lacked the physical fitness to perform that sort of work or that she would have suffered ill health from doing so. Claimant's concerns about working with middle school and special education children did not make the work unsuitable, nor did they amount to good cause to refuse the employer's offers of work.

Another reason that claimant provided for declining offers of work was that the jobs the employer offered were only for a half-day, and she thought if she rejected those offers she might be offered full-day assignments instead. Claimant did not have good cause to refuse the offers of work for that reason. Although accepting an offer of a half-day of work might foreclose the possibility that she could receive an offer of a full-day of work if a full-day offer was forthcoming, it was also distinctly possible that no full-day offer of work would occur, and possible that claimant might receive multiple offers of half-day work that would allow her to work the equivalent of a full-day shift. A reasonable and prudent person,

exercising ordinary common sense, would not refuse to accept an otherwise suitable half-day of work in order to preserve the possibility of receiving another offer of work.

Claimant refused two offers of work for reasons that were unknown to her at the time of the hearing. With respect to the October 10th offer for an assignment at Liberty High School, claimant rejected one offer at 5:40 a.m. but accepted a second at 5:54 a.m. When asked why, claimant replied, “I – I’m – like I said I can’t remember. * * * But I don’t know why – I don’t know why I declined that one. * * * I – I’m not a morning person. So it’s possible I picked up my phone and I don’t know. I really don’t know. I – * * * I mean knowing me I probably like picked it up and was like half asleep. And then I was awake and then 15 minutes later got another call. And then was like, oh, I need the job. I mean, that’s – I’m – I’m just guessing though that’s probably what I did.” Transcript at 48-49. To the extent that claimant refused an offer of work because she was too groggy to respond appropriately when offered it, she did not have good cause for the refusal. With respect to the October 11th offer for an assignment at Liberty High School, claimant testified, “I really don’t remember why I declined that job. It could have been that I didn’t – I’m trying to think. So I was talking with my Mom and she doesn’t – she doesn’t remember. But it might have been that she couldn’t watch the girls that day. I’m really not sure.” Transcript at 55-56. Claimant has the burden to prove good cause for refusing a job. *See accord Marella v. Employment Dept.*, 223 Or. App. 121, 194 P.3d 849 (2008) (so stating). Absent a recollection as to why she refused those job offers, she has not shown that it is more likely than not she refused them for a reason that amounted to good cause.

Finally, claimant refused one offer of work because the offer was for a 30-minute assignment. Claimant assumed that the offer must have been made by mistake and, if she accepted, that the employer would call her later to cancel it. Claimant did not show good cause to refuse the offer for that reason. We conclude that a reasonable and prudent person in that position who was available for work assignments and willing to work would have accepted the offer and verified with the employer that the offer was legitimate rather than just refusing it out of hand.

In claimant’s written argument she averred that she has the right to reject the employer’s job offers if she does not want them or feels she lacks the qualification to perform them, and we do not disagree. However, while claimant has the right to do as she pleases with respect to offers from the employer, individuals who reject suitable offers of work may be disqualified from receiving unemployment insurance benefits for doing so. For purposes of avoiding disqualification from receiving unemployment insurance benefits, claimant may only refuse an offer of work if the work would be “unsuitable” under Employment Department law, or if she has “good cause” for doing so under Employment Department law; for reasons already stated, claimant has not shown that any of the offers were for unsuitable work or that she had good cause for refusing them.

Claimant also argued that she should not be disqualified from receiving unemployment insurance benefits because, during most of the weeks at issue, she earned too much in wages from her employment to receive unemployment insurance benefits anyway. Claimant is confusing weekly eligibility for benefits with disqualification from receiving benefits. To explain, each week an individual claims benefits, he or she must affirmatively claim to have been eligible for benefits by being able to work, available for work and actively seeking work. The Department examines that information on a week-by-week basis to determine whether the individual claiming benefits has maintained his or her eligibility in that single week, and, if the Department finds that a person did not meet the eligibility requirements in

any single week, the Department will not pay benefits to the individual for that specific week. In other words, if an individual is not available for work in one week, the Department will deny her benefits only for that particular week, and benefit payment may resume the following week.

The Department separately analyzes each claim to determine whether the individual has done something to disqualify herself from receiving benefits, for example, by quitting a job without good cause, being discharged from a job for misconduct, or, as occurred in claimant's case, refusing offers of work without good cause. An individual who is disqualified from receiving benefits cannot receive benefits even if she is otherwise eligible, unless she first requalifies for benefits by earning four times her weekly benefit amount in remuneration from subject employment subsequent to the week that the disqualification occurred. In other words, if an individual refuses an offer of work without good cause, it does not just create an eligibility issue that affects the week in which the job refusal occurred. She is, rather, disqualified from receiving unemployment insurance benefits until she requalifies by earning a sufficient amount of money from work in subject employment. It also does not matter whether the job refusal itself occurred in a week in which claimant was or was not going to receive a benefit payment; the disqualification occurred in proximity to her claim(s) for benefits, and, once the disqualification was in place, it continued until such time as claimant ended it by requalifying for benefits through her earnings from other work. Therefore, it is immaterial to these cases that claimant would likely not have received a benefit payment during any of the weeks in which her job refusals occurred.

Availability. ORS 657.155(1)(c) requires that individuals be "available for work" during each week claimed as a condition of being eligible for benefits. OAR 471-030-0036(3) (February 23, 2014) defines "available for work" to include, among other things, that claimant be willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, be capable of reporting to work, and refrain from imposing conditions that would substantially reduce her opportunities to return to work at the earliest possible time.

During week 43-16, claimant told her employer she was not willing to accept any work assignment offers on October 27th. During week 44-16, claimant told her employer that she was not willing to accept any work assignment offers on October 31st. Claimant's request to the employer not to assign her to work demonstrated her unwillingness to accept work "during *all* of the usual hours and days of the week customary" for the type of work she sought, and, given that it appears the employer's offers of work were her primary source of work during the weeks at issue, her request also substantially reduced her opportunities to return to work for the employer. For those reasons, claimant was not available for work during weeks 43-16 and 44-16.

In her written argument, claimant argued that denying her benefits is tantamount to "discriminat[ing] against" her for being pregnant or for needing to take "one hour in the middle of the day" to attend to personal business. Claimant argued that people in the workforce regularly take time off their regular jobs and are not penalized for doing so. That may be so, but there are unique laws and rules applicable to unemployed individuals claiming unemployment insurance benefits that require an individual to be available for work all days and hours customary for the work they seek, and prohibits claimants from placing significant limitations upon their availability. For example, a regularly employed person might be able to take a day off work because she is feeling sick. Under OAR 471-030-0036(3)(f), however, an individual claiming benefits is not available, and not eligible for benefits, if she misses even one work opportunity in a week due to illness or injury. A regularly employed person might take some time off to

go out of town. Under OAR 471-030-0036(3)(d), however, an individual claiming benefits must be physically present in her labor market as a condition of receiving benefits. Claimant, regardless of her pregnancy or other issues, is not being discriminated against in these cases, but, rather, is being held to the same standards applicable to every unemployment insurance claimant.

For the foregoing reasons, we conclude that claimant refused fourteen offers of suitable work without good cause, and must be disqualified from benefits until she requalifies for them. We also conclude that claimant was not available for work during weeks 43-16 and 44-16 and is not eligible to receive unemployment insurance benefits for either week.

DECISION: Hearing Decisions 17-UI-75996, 17-UI-75997, 17-UI-75999, 17-UI-76000, 17-UI-76001, 17-UI-76002, 17-UI-76003, 17-UI-76004, 17-UI-76005, 17-UI-76006, 17-UI-76007, 17-UI-76008, 17-UI-76009, 17-UI-76010, and 17-UI-76011 are affirmed.

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

DATE of Service: March 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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