

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1339

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed to accept an offer of suitable work without good cause (decision # 104752). Claimant filed a timely request for hearing. On August 14, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for August 25, 2017, at which time claimant failed to appear. On August 25, 2017, ALJ S. Lee issued Hearing Decision 17-UI-91256, dismissing claimant's request for hearing for failure to appear. On September 14, 2017, claimant filed a request to reopen the August 25th hearing. On October 5, 2017, OAH mailed notice of a hearing scheduled for October 19, 2017. On October 19, 2017, ALJ S. Lee conducted a hearing, and on October 27, 2017 issued Hearing Decision 17-UI-95648, allowing claimant's request to reopen and affirming decision # 104752. On November 16, 2017, claimant filed an application for review of Hearing Decision 17-UI-95648 with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the employer as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

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

FINDINGS OF FACT: (1) The West Linn - Wilsonville School District employed claimant as a substitute teacher during the 2016-2017 school year. Claimant sought work as a substitute teacher by registering with an "absence management" online call system (OLMIS). Transcript at 17. The system called available substitute teachers when it had available substitute teaching assignments. The system only called teachers who listed within the system that they were available for a particular assignment type, e.g., grade, topic, location. To accept or deny an assignment, the teacher was required to answer the phone call, enter their identification number and then follow instructions to accept or deny the assignment.

(2) During the week including January 29 through February 4, 2017 (week 05-17), claimant's labor market was the Lake Oswego, Tualatin, Wilsonville, Tigard, Beaverton, and Oregon City area. The customary days and hours for work as a substitute teacher in claimant's labor market were Monday through Friday, from 7:00 a.m. to 5:00 p.m. Based on jobs in the OLMIS system, the average earnings for substitute teachers in claimant's labor market was \$170.92 per day, or \$21.36 per hour.

(3) On February 1, 2017, at 7:17 a.m., the system called claimant and offered her a full day assignment as a second grade teacher at Boeckman Creek Primary School, a school within her labor market. The assignment began at 7:05 a.m. and was scheduled to end at 3:05 p.m. The West Linn - Wilsonville School District paid its substitute teachers \$175.44 for each full day or \$21.72 per hour. Claimant rejected the assignment because she was responsible for getting her five-year-old granddaughter, who lived in her household, to school that day and could not do so and also immediately report for the offered work assignment which had already begun by the time she received the call. She had no other options for getting her granddaughter to school on such short notice.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant had good cause for refusing to accept the work offered by the employer.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. OAR 471-030-0038(6)(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." Factors to consider when determining whether work is "suitable" include, in pertinent part, "the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual." ORS 657.190.

In a job refusal case, the burden of proof is on claimant to establish that a valid offer of work was not suitable, or that she had good cause to refuse the offer.¹ The employer, however, has the burden to prove that claimant is not entitled to benefits.² In other words, the employer must first establish that it made claimant a valid offer of suitable work and that claimant refused it, thus making a *prima facie* showing that claimant was not entitled to benefits. If, and only if, the employer meets that burden does it then shift to claimant to show the offer of work was not valid, or show she had good cause for refusing it.

In Hearing Decision 17-UI-95648, after concluding the offered work assignment was suitable, the ALJ further concluded that claimant failed without good cause to accept it because she failed to make prior arrangements for getting her granddaughter to school in the event the employer offered her a substitute

¹ See *accord Marella v. Employment Dept.*, 223 Or. App. 121, 194 P.3d 849 (2008) (so stating).

² *Alaska Tanker Co. v. Employment Dept.*, 185 Or. App. 687, 61 P.3d 276 (2003) (The Court held, in a vacation pay case, that because the "employer is the party arguing that claimant's benefits should be reduced, employer bears the burden of proof on that issue."); *citing Johnson v. Employment Dept.*, 177 Or. App. 464, 34 P.3d 716 (2001) (The employer has the burden to show misconduct in a discharge case under ORS 657.176(2)).

teaching assignment during customary days and hours for work as a substitute teacher, which were 7:00 a.m. to 5:00 p.m. The ALJ reasoned,

When claimant applied to West Linn-Wilsonville School District, she need to have stated that she was available for primary school, which includes primary school hours. While it is understandable that claimant was responsible for getting her grandchild to school, she had no provisions in place to allow her to accept the work at issue . . . I am not persuaded that a reasonable and prudent person of normal sensitivity would have declined the work here. I am persuaded that an ordinary person would have made arrangements to get her grandchild to school while claimant accepted and reported for work.

Hearing Decision 17-UI-95648 at 5-6. We disagree.

Although the ALJ was probably correct that claimant should have made prior arrangements for getting her granddaughter to school in the event she was offered an early work assignment, there was no dispute that she had not made such arrangements and under the circumstances was left with no reasonable alternative but to reject the job offer in question. Accepting the job offer, for which she was already late, would have required her to leave immediately without any care alternative for a five-year-old child. We conclude that under those circumstances, no reasonable and prudent person, exercising ordinary common sense, would have done so. Viewed objectively, claimant had good cause to reject the employer's offer of work, and is not disqualified from the receipt of benefits for doing so.³

DECISION: Hearing Decision 17-UI-95648 is set aside, as outlined above.⁴

J. S. Cromwell and D. P. Hettle.

DATE of Service: December 15, 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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³ Although EAB has concluded that claimant is not disqualified from receiving benefits based on the job refusal in question, upon review, the Department could still conclude that claimant was not eligible for benefits during the week in question, and perhaps other weeks, based on claimant's apparent failure to be willing and capable of reporting to all full time, part time and temporary suitable work opportunities throughout her labor market, given the fact that the customary hours of her work was 7:00 a.m. to 5:00 p.m. and claimant testified that she often was not available for work until after 8:00 a.m. Transcript at 25.

⁴ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

