

IN RE: GERALDINE M. MOLONEY

Empl. Sec. Comm'r Dec.2d 986

August 24, 2012

Empl. Sec. Comm'r Dec.2d 986, 2012 WL 8441416 (WA)

Commissioner of the Employment Security Department.
State of Washington.

IN RE: GERALDINE M. MOLONEY

Case No. 986

Review No. 2012-3088

Docket No. 01-2012-14312

August 24, 2012

DECISION OF COMMISSIONER

On July 23, 2012, GERALDINE M. MOLONEY petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on June 22, 2012. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to [RCW 34.05.464\(4\)](#), we do not adopt the Office of Administrative Hearings' findings of fact or conclusions of law. We instead enter the following.

FINDINGS OF FACT

I

Claimant has been teaching at Lake Washington Institute of Technology, a community college, as a part-time faculty member for over ten years. Most recently, she taught for this employer during the winter quarter of the 2011-2012 school year. The winter quarter ended on March 22, 2012.

II

Claimant was offered a teaching contract for the spring quarter, which was to begin on April 2, 2012. The contract specifically stated: "The above class(es), program, or activity may be cancelled and this contract terminated at the discretion of the administration for such reasons as, but not limited to, insufficient enrollment, lack of facilities, or lack of funding" See page 18 in case file.

III

As a result of low enrollment, one of the classes offered to claimant for the spring quarter was cancelled, and several others were "clustered."

IV

Claimant applied for unemployment benefits for the week ending March 31, 2012. Both the Department and the Office of Administrative Hearings denied her benefits on the basis that she had "reasonable assurance" to return to teach in the same capacity after the spring break pursuant to [RCW 50.44.050](#).

V

During the week ending March 31, 2012, claimant was ready, able, and willing to immediately accept any offer of suitable work, and was actively seeking work as directed by the Department.

ISSUES PRESENTED

I

Has the employer, a community college, overcome the presumption that community college instructors do not have reasonable assurance when an offer of employment is conditioned on enrollment, funding, or program changes pursuant to [RCW 50.44.053\(3\)](#)?

II

Is claimant eligible for benefits pursuant to [RCW 50.20.010\(1\)\(c\)](#) for the week ending March 31, 2012?

CONCLUSIONS OF LAW

I

[RCW 50.44.050\(3\)](#) provides in pertinent part that an employee of any and all educational institutions is not eligible for benefits based on school wages for any week of unemployment which commences during an established and customary vacation or holiday recess if: (1) such individual performs such services for any educational institution in the period immediately before such vacation period or holiday recess; and (2) there is a reasonable assurance that such individual will perform such services for any educational institution in the period immediately following such vacation period or holiday recess.

II

The term "reasonable assurance," as used in [RCW 50.44.050](#), means a written, verbal, or implied agreement that the employee will perform services in the same capacity during the ensuing academic year or term as in the first academic year or term. A person shall not be deemed to be performing services "in the same capacity" unless those services are rendered under the same terms or conditions of employment in the ensuing year as in the first academic year or term. See [RCW 50.44.053\(1\)](#). [WAC 192-210-015](#) further clarifies "reasonable assurance" as follows:

Reasonable assurance is a bona fide offer from an educational institution to assign an individual future work at that institution under the same terms and conditions as the individual's previous employment. It is less than a contract or written agreement, but more than a mere possibility of future employment. The department must find that continued employment for that individual is likely or probable.

III

Since 2001, [RCW 50.44.053\(3\)](#) has contained a presumption that community college instructors do not have reasonable assurance when an offer of employment is conditioned on enrollment, funding, or program changes. The legislature enacted the following statement of finding and intent in [RCW 50.44.055](#):

The legislature finds the interests of the state and its citizens are best served by a strong community and technical college system. As described by their establishing legislation, these two-year institutions are an independent, unique, and vital section of our state's higher education system, separate from both the common school system and other institutions of higher education. Paramount to that system's success is the attraction and retention of qualified instructors. In order to attract and retain instructors, those who are subject to uncertainties of employment must be provided assurance their economic needs are addressed. Over time, a change in hiring patterns has occurred, and for the last decade a substantial portion of community and technical college faculty are hired on a contingent, as needed, basis. That contingent nature distinguishes them from the more stable, majority employment found in the common school system and in the other institutions of higher education. Contingent assurances of future employment are often speculative and do not rise to the level of other forms of assurance. As such, assurances conditioned on forecast enrollment, funding, or program decisions are typically not reasonable assurances of employment.

IV

The legislature emphasized that "[p]rimary weight must be given to the contingent nature of employment based on enrollment, funding, and program changes." [RCW 50.44.053\(3\)](#). We must give effect to these forceful and repeated statements by **requiring the employer to provide compelling and exceptional evidence of reasonable assurance in order to overcome the presumption.** If the standard evidence of reasonable assurance were sufficient, then the legislature would not have enacted [RCW 50.44.053\(3\)](#) and [RCW 50.44.055](#).

V

[WAC 192-210-020](#) is also applicable and provides that:

- (1) A person who performs services in an instructional, research, or principal administrative capacity at a community or technical college is presumed not to have reasonable assurance when an offer is conditioned on enrollment, funding, or program changes.
- (2) A conditional or contingent offer of employment is any offer other than an agreement that is binding on the college to provide work and on the individual to perform services.
- (3) The assertion by the college that an individual has reasonable assurance of continued employment is insufficient to overcome the presumption that a conditional or contingent offer of employment does not constitute reasonable assurance unless supported by documentation explaining why reasonable assurance exists. The college bears the burden of providing the department with this documentation. Primary weight will be given to the contingent nature of the offer of employment.
- (4) Whether an individual has reasonable assurance from the college will be determined on a case by case basis by the total weight of evidence, rather than the existence of any single factor.
- (5) Examples of the types of evidence the department will consider in deciding whether the college has overcome the presumption that a conditional or contingent offer is not reasonable assurance include, but are not limited to, the following: (a) The terms of the offer of employment between the individual and the college with consideration given to any provisions related to length, contingencies, or reasons for cancellation; (b) The number of comparable positions at the college; (c) Any hiring priorities used by the college; (d) The college's past practices, including the individual's previous experience with similar offers of employment from that college, and whether any classes have been canceled due to lack of enrollment, lack of funding, or program changes.

VI

In this case, there is some evidence of a reasonable assurance of continued employment under the same terms and conditions. Specifically, claimant has worked for the interested employer in the same capacity for over ten years. [WAC 192-210-020\(5\)\(d\)](#) specifically instructs us to consider the college's past practices when deciding whether the college has overcome the presumption that a conditional offer is not reasonable assurance. However, this is not the sole criterion listed in [WAC 192-210-020\(5\)](#). There are additional factors in this case that raise significant questions about the contingent nature of claimant's employment based on other criteria listed in [WAC 192-210-020\(5\)](#). For example, the classes offered to claimant may be cancelled based on enrollment or funding. See page 18 in case file. As a matter of fact, one of the classes offered to claimant for the spring quarter was cancelled due to low enrollment, and several others were "clustered." This provides evidence of the contingent nature of claimant's employment.

VII

In sum, there is evidence that indicates claimant has reasonable assurance of continued employment, but there is other evidence that indicates that she does not have reasonable assurance because her employment is contingent. In a standard case involving an employee of an educational institution, this might be sufficient to prove ineligibility. However, this is not a standard case because [RCW 50.44.053\(3\)](#) requires us to give "primary weight" to the contingent nature of employment based on enrollment, funding, and program changes. In other words, when there is approximately equal amount of evidence of both reasonable assurance and contingent employment, the evidence of contingent employment must be considered more persuasive. Under the circumstances of this case, the employer has not provided *compelling and exceptional evidence to overcome the presumption* in [RCW 50.44.053\(3\)](#). While there is some evidence of reasonable assurance in this case, it does not rise to the level required for contingent community college instructors.

VIII

Because claimant was able to, available for, and actively seeking work during the week ending March 31, 2012, she is not ineligible for benefits pursuant to [RCW 50.20.010\(1\)\(c\)](#).

Now, therefore,

IT IS HEREBY ORDERED that the Initial Order issued by the Office of Administrative Hearings on June 22, 2012, is REVERSED on the issue of availability. Claimant is not ineligible for benefits pursuant to [RCW 50.20.010\(1\)\(c\)](#) for the week ending March 31, 2012. The Initial Order is REVERSED on the issue of eligibility. Claimant is not ineligible pursuant to [RCW 50.44.050\(3\)](#) and [RCW 50.44.053\(3\)](#) for the week ending March 31, 2012. There is no overpayment.

DATED at Olympia, Washington, August 24, 2012.

S. Alexander Liu
Review Judge Commissioner's Review Office

Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to [RCW 34.05.470](#) and [WAC 192-04-190](#) you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant [WAC 192-04-170](#). Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to [RCW 34.05.510](#) through [RCW 34.05.598](#), which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See [RCW 34.05.514](#). (The Department does not furnish judicial appeal forms.) AND
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See [RCW 34.05.542\(4\)](#) and [WAC 192-04-210](#). The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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